

COMPARATIVE CONSTITUTIONAL REASONING: THE LAW AND STRATEGY OF SELECTING THE RIGHT ARGUMENTS

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I. INTRODUCTION

The relevance of comparative law in constitutional adjudication has repeatedly been at the center of heated debates. During the 2001–2002 term, the Supreme Court continued to struggle with this issue. In *Atkins v. Virginia*,¹ where the Court invalidated the death penalty for the developmentally disabled, this conflict was at its apogee. Chief Justice Rehnquist argued forcefully:

I write separately . . . to call attention to the defects in the Court’s decision to place weight on foreign laws. . . . In reaching its conclusion today, the Court . . . adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination. . . . [W]e have . . . explicitly rejected the idea that the sentencing practices of other countries could serve to establish the first Eighth Amendment prerequisite, that a practice is accepted among our people. . . . For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.²

Justice Scalia seconded this:

[T]he prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a

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1. 536 U.S. 304 (2002).

2. *Id.* at 322–25 (Rehnquist, C.J., dissenting) (citations and internal quotation marks omitted).

footnote) to the views of assorted professional and religious organizations, members of the so-called “world community,” and respondents to opinion polls. . . . [T]he practices of the “world community,” whose notions of justice are (thankfully) not always those of our people[,] [are irrelevant].³

This stinging criticism was indeed caused by a single sentence in a single footnote.⁴ In addressing the criticism of the dissents, Justice Stevens added that although comparative arguments “are by no means dispositive,” they still lend “further support to our conclusion that there is a consensus among those who have addressed the issue [of capital punishment for the developmentally disabled].”⁵

A second major case of the term, *Zelman v. Simmons-Harris*,⁶ which involved school vouchers, also contained arguments relying on comparative experience. In this case, however, the comparative arguments were outlined by the dissenters. Justice Stevens stressed the influence of comparative experience in the Balkans, Northern Ireland, and the Middle East in evaluating religious funding of primary education.⁷ Justice Breyer, arguing that the funding of religious schools might contribute to “religious strife,” referred to the British and French experience:

I recognize that other nations, for example Great Britain and France, have in the past reconciled religious school funding and religious freedom without creating serious strife. Yet British and French societies are religiously more homogeneous—and it bears noting that recent waves of immigration have begun to create problems of social division there as well.⁸

These two cases from the U.S. Supreme Court demonstrate that debate over the use of comparative reasoning in constitutional interpretation⁹ is far from concluded. Two issues in particular are left

3. *Id.* at 347–48 (Scalia, J., dissenting).

4. “Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Id.* at 316–17 (Stevens, J.).

5. *Id.*

6. 536 U.S. 639 (2002).

7. “Admittedly, in reaching that conclusion I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.” *Id.* at 685–86 (Stevens, J., dissenting).

8. *Id.* at 725 (Breyer, J., dissenting).

9. The Supreme Court’s use of comparative experience is not limited to cases involving constitutional law. For example, one argument put forward in support of the holding that elec-

open in these decisions. The first issue is openly and vehemently brought out by the dissenters in *Atkins v. Virginia*—namely, whether the use of comparative constitutional law in domestic adjudication is appropriate at all. When courts choose to accept comparative constitutional arguments they must then address a second issue—the weight of comparative arguments relative to other methods of analysis.

This article tries to provide answers to these two questions. It will make a contribution to the growing literature on comparative constitutional law in three ways. First, this paper systematically distinguishes between different uses of comparative law. I will show how comparative experience could theoretically contribute to solving both normative and empirical questions. However, because normative and empirical reasoning are each based on different types of materials, these forms of reasoning each result in unique legitimacy and practical problems, and as a result. The weights of comparative arguments often vary.¹⁰ Moreover, different courts may not employ comparative reasoning consistently, or at the same rate as other courts.

Second, this article outlines scholarly treatment of comparative reasoning by social scientists, and especially by political scientists. Increasingly, critics of legal analysis specifically highlight the deficit of interdisciplinary approaches to legal questions,¹¹ and such approaches are particularly suited to comparative studies.

Finally, this paper distinguishes between strategic and legal purposes for utilizing foreign materials and comparative experience. I argue that there is a difference between what constitutes a good legal argument and what makes a decision useful in relation to the strategic goals the court or individual justice might pursue outside of legal analysis. If comparative experience has not been used as the basis for a court's holding, I term this use "strategic" or "soft." I will show that the courts may invoke comparative arguments, or may specifically avoid these arguments, because of strategic calculations, both based

tronic publishers infringed upon the copyrights of freelance writers by reproducing and distributing works in electronic databases was that "[c]ourts in other nations, applying their domestic copyright laws, have also concluded that Internet or CD-ROM reproduction and distribution of freelancers' works violate the copyrights of freelancers." *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 n.13 (2001) (Ginsburg, J.).

10. See Ulrich Drobnig, *The Use of Comparative Law by Courts*, in *THE USE OF COMPARATIVE LAW BY COURTS* 17–19 (Ulrich Drobnig & Sjeff van Erp eds., 1999) (showing that the courts use both foreign rules and the information about effects of the rules, but discussing the weight of comparative arguments based only on the rules).

11. See, e.g., Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 118 (2002) (arguing that the subfield of methodology of law should be developed by encouraging contact between several disciplines).

on institutional and individual concerns. The strategic or “soft” use enables a court to broaden acceptance of the decision in the eyes of the public or other political institutions, or may assist in achieving international goals. For example, strategic uses of comparative arguments may give a court’s legal analysis the appearance of being based on “legal” considerations when the decision itself is actually motivated more by political concerns. This distinction between legal and strategic uses of foreign experience provides an explanation for the differences in practice among various courts citing foreign experience.

This paper begins with a brief overview of the relevant literature. The second part of the paper outlines three uses of comparative law. The next three parts of the paper describe the practice, strengths, and weaknesses of each approach. In the sixth part, I describe strategic uses of comparative arguments and show that these strategic uses are useful in explaining the differences between courts in citing comparative experience. I conclude with a discussion of the possible ways in which research on the uses of comparative law can be developed.

II. FIVE AREAS OF COMPARATIVE CONSTITUTIONAL SCHOLARSHIP

Literature on comparative constitutional law¹² can be roughly divided into five strands.¹³ First, there is literature on foreign countries’ constitutional law from the perspective of an “outsider,” or country evaluations on a general level.¹⁴ Such works may, but usually do not,

12. For an earlier thorough overview, see generally James A. Thomson, *Comparative Constitutional Law: Entering the Quagmire*, 6 ARIZ. J. INT’L & COMP. L. 22 (1989).

13. Casebooks are exceptions, covering different fields of comparative constitutional law. See, e.g., MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1979); VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

14. See generally FRANCOIS VENTER, *CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES* (2000) (comparing the constitutional law of Germany, Japan, Canada and South Africa). On France, see generally JOHN S. BELL, *FRENCH CONSTITUTIONAL LAW* (1992) (providing an overview of French constitutional law doctrine); Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982) (arguing that several constitutional issues can be solved with the help of separation-of-powers analysis); Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21 (1997) (broadly comparing the approaches of France and the U.S. in constitutional interpretation). On Germany, see generally EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (2002) (analyzing the approaches of Germany and the U.S. related to restricting personal freedoms); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (2nd ed. 1997) (providing an overview of the most important cases of the German Constitutional Court); DAVID P. CURRIE, *THE CONSTITUTION*

involve “comparison” as such. Sometimes generalized conclusions may be offered.¹⁵ A second type of literature focuses on constitutional theory, rule of law, and judicial review.¹⁶ A third focuses on substantive constitutional law issues, and compares approaches by different countries, or otherwise reviews the solutions of one country from an “outsider” perspective or for an outside reader. Such issues are very diverse, and have ranged from free speech¹⁷ to affirmative action.¹⁸ Fourth, there are papers that advocate the adoption of a particular constitutional system¹⁹ or specific solutions to constitutional

OF THE FEDERAL REPUBLIC OF GERMANY (1994) (providing an overview of German constitutional law).

15. See, e.g., Bojan Bugarcic, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT’L L.J. 247 (2001) (arguing that the East European constitutional courts have been poor policy-makers when deciding complex social and economic issues related to transition); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000) (arguing that the Eastern European constitutional courts have been helpful in maintaining the democratic system).

16. See generally M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (2nd ed. 1998) (describing the history of the concept of separation of powers); Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415 (2000) (arguing the utility of learning from the experience of other countries in deciding constitutional issues); HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE (David M. Beatty ed., 1994) (providing descriptions of the various judicial review systems); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and its Discontents*, 17 NW. J. INT’L L. & BUS. 354 (1996–97) (analyzing the constitutionalization process of the European Union); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001) (providing an analysis of American and Commonwealth models of constitutionalism and judicial review).

17. For instance, on texts involving just U.S.–Canadian comparisons, see Ian Slotin, *Free Speech and the Visage Culturel: Canadian and American Perspectives on Pop Culture Discrimination*, 111 YALE L.J. 2289 (2002); Marie-France Major, *Comparative Analogies: Sullivan Visits the Commonwealth*, 10 IND. INT’L & COMP. L. REV. 17 (1999); Donald L. Beschle, *Clearly Canadian? Hill v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187 (2001); Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5 (1992).

18. E.g., Jan Lodewyk Pretorius, *Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview*, 61; ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 403 (2001); ANNE PETERS, *WOMEN, QUOTAS, AND CONSTITUTIONS: A COMPARATIVE STUDY OF AFFIRMATIVE ACTION FOR WOMEN UNDER AMERICAN, GERMAN, EUROPEAN COMMUNITY AND INTERNATIONAL LAW* (1999); SUNITA PARIKH, *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* (1997); Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329 (1999); THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* (1990); POLITICS OF POSITIVE DISCRIMINATION: A CROSS NATIONAL PERSPECTIVE (Subatra Kumar Mitra ed., 1990).

19. Consider the recent discussion over the vices and virtues of the presidential system of government. See generally Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor*

problems.²⁰ This trend has especially gained momentum after the break-up of the Communist Bloc.²¹ These papers tend to address the issue of legal drafting²² with less emphasis on legal interpretation, following the idea that the two questions are somehow distinct.²³

The fifth strand of literature deals with comparative constitutional law as a process or discipline and describes its value, goals, and methods. This article belongs to this strand of literature. More specifically, this strand explores how courts employ comparative constitutional analysis—drawing conclusions about the strategies courts rely on in selecting comparative constitutional arguments.

Ackerman Is Wrong to Prefer the German to the U.S. Constitution, 18 CONST. COMMENT. 51 (2001).

20. *E.g.*, Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225, 229 (András Sajó ed., 1996) (arguing that social rights should be guaranteed through legislation to “reserve the constitution for other matters”); Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution*, 10 AM. U. J. INT’L L. & POL’Y 1233 (1995) (arguing that a constitution should contain positive rights).

21. *E.g.*, Cass R. Sunstein, *American Advice and New Constitutions*, 1 CHI. J. INT’L L. 173 (2000) (providing a commentary on the Draft Ukrainian Constitution).

22. To stress the importance of comparative law when drafting statutes is actually misleading. The benefits of comparison are the greatest when one considers the policy underlying the statute, not the statute as such. Also, it is important to consider comparative experience not only when drafting statutes (creating new policy), but also when analyzing the performance of existing statutes (existing policies). Comparative policy analysis has performed this task for a long time, and its usefulness has not been doubted in the political science literature as much as in the legal circles. *See generally* JESSICA R. ADOLINO & CHARLES H. BLAKE, *COMPARING PUBLIC POLICIES: ISSUES AND CHOICES IN SIX INDUSTRIALIZED COUNTRIES* (2001); FRANCIS G. CASTLES, *COMPARATIVE PUBLIC POLICY: PATTERNS OF POST-WAR TRANSFORMATION* (1998); HUGH HECLIO ET AL., *COMPARATIVE PUBLIC POLICY: THE POLITICS OF SOCIAL CHOICE IN EUROPE AND AMERICA* (3rd. ed. 1990).

23. Such is the view expressed by Justice Scalia in *Printz v. U.S.*, 521 U.S. 898, 921 (1997) (“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.”). However, the arguments and methods put forward in this paper largely apply to legal drafting as well. When drafting constitutions or statutes, the same kinds of normative and empirical questions arise as when interpreting the law. *Cf.* Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 476 (1991) (“In constitutional debates, one invariably finds a large number of references to other constitutions, as models to be imitated, as disasters to be avoided, or simply as evidence for certain views about human nature.”); BERNARD H. SIEGAN, *DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM* (2d ed. 1994) (describing the influence of foreign constitutions in drafting the “new” constitutions); Rett R. Ludwikowski, *“Mixed” Constitutions—Product of an East-Central European Constitutional Melting Pot*, 16 B.U. INT’L L.J. 1 (1998) (arguing that the constitution-drafters borrowed from a variety of sources). Comparative law can be helpful, but also inappropriate, when dealing with legislative change.

Several authors have reviewed the use of comparative materials by appellate courts.²⁴ Some have undertaken statistical studies on citations to foreign law.²⁵ This approach has been combined by some with a more analytical approach to comparative constitutional law. Political scientists, relying on analytical approaches which focus on judges' motivations, have tried to explain the differences between various courts' citation practices.²⁶ However, other than these few rare positive analyses, the literature largely focuses on whether and how courts and other decision-makers should use comparative constitutional law.

In evaluating the use of comparative experience, three different types of issues are usually addressed: the systematization of the uses of comparative law, legitimacy problems of comparative reasoning, and practical difficulties of comparison. Attempts to categorize uses of comparative law by courts are numerous. Although most authors claim that there are three uses of comparative constitutional law, there is a general lack of coherency among these classifications. For example, Tushnet discusses functionalism, expressivism, and brico-

24. Similarly, the use of comparative law generally, not only in comparative constitutional law, has been thoroughly discussed. See generally THE USE OF COMPARATIVE LAW BY COURTS (Ulrich Drobnig & Sief van Erp eds., 1999) (providing a survey of twelve countries and the European Union); MARKKU KIIKERI, COMPARATIVE LEGAL REASONING AND EUROPEAN LAW 77-92 (2001) (based on interviews with the judges and functionaries of the courts in England, Sweden, Finland, Germany, Italy, and France). For the Netherlands, see T. Koopmans, *Comparative Law and the Courts*, 45 INT'L & COMP. L.Q. 545, 550-55 (1996).

25. In Australia, see generally Paul E. von Nessen, *The Use of American Precedents by the High Court of Australia, 1901-1987*, 14 ADEL. L. REV. 181 (1992). In Canada, see generally Peter McCormick, *The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview*, 8 SUP. CT. L. REV. (2d) 527 (1997); Christopher P. Manfredi, *The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms*, 23 CAN. J. OF POL. SCI. 499 (1990); C. L. Ostberg et al., *Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada*, 34 CAN. J. POL. SCI. 377 (2001). In the United States, the studies are usually combined with the studies on general citation practices. See generally Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267 (2002).

26. See e.g., C. L. Ostberg et al., *supra* note 25 (arguing that the citation of foreign precedents is a form of policy emulation explained by the individual attitudes of the justices from the litigation strategies of the interest groups and from general values to which the justices refer); Shannon Ishiyama Smithey, *A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa*, 34 COMP. POL. STUD. 1188 (2001) (arguing that judges rely on foreign precedent because of its utility in cutting information costs, decreasing uncertainty, and providing justification). See also Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 516-27 (2000) (describing possible explanations for the use of comparative experience).

lage.²⁷ Choudhry contends that there are three modes of comparative constitutional interpretation: universalist, dialogical, and genealogical. Universalist interpretation relies on the assumption that constitutional principles are based on similar universal norms. The dialogical approach focuses on assumptions underlying constitutional jurisprudence to justify or reject the use of foreign materials and experience. Finally, genealogical interpretation emphasizes the similar historical backgrounds of constitutions.²⁸ Another way of seeing the use of comparative law is to differentiate between defining and justifying relevant issues, and clarifying the reasoning behind comparative analysis in moral and policy balancing.²⁹ One can refer to “evaluative,” “intentionalist,” “textualist,” and “authority-based” comparisons.³⁰ One might also distinguish between “necessary” and “voluntary,”³¹ between “genealogical” and “ahistorical,” and between “positive” and “negative”³² recourse to comparative law. The court may use comparative experience by referring to it “in *dicta*,” to “create a workable principle of law” or to “prove a ‘constitutional fact.’”³³ The court may use comparative law in order to “find a solution” or “justify a solution,”³⁴ as well as for the purpose of “internal utility” or “external legitimacy.”³⁵ The comparison may be “vertical” or “horizontal.”³⁶ Alternatively, one might distinguish between the “general and indirect,” as opposed to “specific and direct,” influence of com-

27. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

28. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 825–26 (1999).

29. Louis J. Blum, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157, 160 (2002).

30. Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 519–22 (2002). “Evaluative” comparison refers to the use of foreign materials to evaluate the likely consequences of specific interpretation. “Intentionalist” comparison is used to ascertain the intent of the legislator, especially when “borrowed statute doctrine” applies. “Textualist comparisons” can ascertain the common meaning of the terms at the time a statute was adopted. “Authority-based” comparisons are made when the courts advance foreign statutes or decisions as arguments in favor of or against a particular interpretation.

31. Drobnig, *supra* note 10, at 6.

32. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 550–51 (2001).

33. *Id.* at 552–56.

34. Koopmans, *supra* note 24 at 550.

35. Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 254–63 (2001).

36. KIKERI, *supra* note 24, at 194, 298.

parative constitutional materials, as well as between explicit and non-explicit uses of comparative constitutional law.³⁷

The diversity that we see in these classifications of comparative analysis illustrate that a systematic approach to this topic has not been developed. Certainly, the analyses of different authors overlap. However, none of these classifications attempts to be exhaustive, nor are any of these classifications necessarily mutually exclusive. I will turn to this issue in the next section of the article.

III. LEGITIMACY AND PRACTICABILITY ISSUES IN COMPARATIVE ANALYSIS

While most authors focus on classifications of comparative law, few actually address its legitimacy. This is surprising, as there is a genuine dispute between U.S. Supreme Court justices on the issue, some of whom explicitly reject the legitimacy of comparative reasoning.³⁸

Perhaps the most common discussion of legitimacy focuses on the universal character of some constitutional norms, particularly human rights provisions. It has been argued that courts should look at foreign practices because such practices often reflect norms of a universal character. As an example, the universal character of human rights norms is argued to demand a universal application of these rights.³⁹ Drobni, who writes about both comparative constitutional law and the use of comparative law in general, distinguishes between different types of comparison, basing the legitimacy of comparative arguments mostly on the international character of the norms.⁴⁰

There are alternatives to this proposition. The question of legitimacy is the main issue in Dammann's analysis.⁴¹ Dammann contends that the legitimacy problem of "intentionalist," "textualist," and

37. McCrudden, *supra* note 26, at 510–11.

38. Consider the dissents in *Atkins v. Virginia*, 536 U.S. 304 (2002), or the majority opinion in *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (arguing that "it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant") (Scalia, J.).

39. For a discussion, see McCrudden, *supra* note 26, at 527–29; Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 120–22 (1994); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 24–25 (1998).

40. Drobni, *supra* note 10, at 19–21. He has no clear explanation for applying comparative law in "purely domestic" cases. He presents two functions that comparative arguments might have—to fill legal gaps or to overcome an outmoded rule. *Id.* at 21.

41. Dammann, *supra* note 30.

“authority-based comparisons,” is minimal, as these analytical methods are generally based on traditional interpretation techniques. In order to justify “authority-based comparisons,” Dammann refers to the general discourse theory developed by Habermas, who theorizes that the truthfulness of legal analysis is supported by the fact that legal decision-makers who follow similar basic procedural rules also reach similar conclusions.⁴² According to Dammann, comparative analysis is therefore legitimate because courts in different countries follow similar basic procedural rules.

Tushnet similarly distinguishes between uses of comparative constitutional law—he sees no considerable legitimacy problems for functionalist or expressivist uses of comparative constitutional law, as they do not form an authority for the court.⁴³ Tushnet justifies the use of bricolage, the practice of constructing a legal argument from arguments used by foreign courts, by the fact that foreign materials are often used unconsciously. Bricolage is thus nothing but a natural practice that warrants its own use.⁴⁴

A survey of the existing literature suggests that the practical problems of comparative constitutional law are often discussed. These include the difficulty of comprehending foreign law,⁴⁵ the tendency of decision-makers to take cases out of their wider social and cultural context,⁴⁶ the difficulty in determining the effects of laws abroad,⁴⁷ and the problems of transferring such experience into the domestic system.⁴⁸ The literature fares excellently in discussing practical problems in comparative analysis. However, there are limits to this literature. The literature does not distinguish clearly between the

42. *Id.* at 540–54. KIKERI bases his justification for comparative reasoning also on discourse theory. See *supra* note 24, at 307–14.

43. Tushnet, *supra* note 27, at 1234–37.

44. *Id.* at 1237–38.

45. Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 647 (1999) (“verbal similarities may be misleading”).

46. Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 236 (1996) (the comparativists often “forget about the historical, social, economic, political, cultural, and psychological context which has made that rule or proposition what it is”); Christopher Osakwe, *Introduction: The Problems of the Comparability of Notions in Constitutional Law*, 59 TUL. L. REV. 876 (1985) (“Public law reflects an inner relationship—a sort of spiritual and psychical relationship—with the people over whom it operates.”).

47. *E.g.*, Tushnet, *supra* note 27, at 1265 (arguing that any number of variables could have determined the observed outcomes, not just the law that is being discussed).

48. Fontana, *supra* note 32, at 556 (arguing that the courts could hire experts to solve such issues).

different uses of comparative constitutional law and the different types of practical problems that emerge with these uses. Also, the literature does not address issues that have been identified by scholars in other fields, as many of the practical problems arising from comparative constitutional analysis arise in *all* comparative studies, and arguably have little to do with the legitimacy problems that judges have to address in the constitutional realm. Discussion of comparative legal analysis would profit immensely from an interdisciplinary approach.

Finally, existing literature is often neither explicit nor consistent in defining what “comparative experience” means. Constitutional case law from foreign courts certainly is included. However, there is less certainty whether or not constitutions, statutes, and other kinds of information should be included in comparative analysis. What about the text of the constitution or statutes? What about other kinds of information from foreign systems?⁴⁹ I will discuss whether different materials are suitable for different types of reasoning and why these materials potentially give rise to various legitimacy and practical problems. In my own analysis, reference to comparative constitutional law (also termed comparative or foreign “experience”) will be quite broad, and will include the use of any kind of information from other jurisdictions. The “information” can be contained in the texts of constitutions, statutes, cases, government documents, but also all other kinds of economic or social data.⁵⁰

IV. THE THREE USES OF COMPARATIVE CONSTITUTIONAL LAW BY THE COURTS

For practical purposes, the use of comparative law in the constitutional context can be classified into three categories: soft use, comparative normative reasoning, and comparative empirical reasoning.

49. Some authors are rather consistent. Consider the approach in Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 517–21 (2002). His starting approach is broad, as his purpose is to develop “a general justification for comparative reasoning in the context of interpretation” and describing “comparative reasoning” as “any reasoning that somehow refers to foreign law”. *Id.* at 517, 519. However, when relying on discourse theory to develop the justification, he explicitly refers to “authority-based comparisons.” *Id.* at 521.

50. Existing scholarship tends to be quite superficial when discussing this issue. Some explicitly deal with case law. See Choudhry, *supra* note 28, at 824 (The goal is “to describe and explain the interpretive methodologies used, and the normative justifications offered, by courts for their use of comparative jurisprudence in constitutional interpretation.”). Some refer to social data and case law interchangeably. *E.g.*, Tushnet, *supra* note 27.

First, a differentiation needs to be made between “soft” and “hard” uses of comparative experience. The former describes the process of discussing foreign statutes, cases, or practices in the decision-making process or in the text of judicial opinions without relying on this experience in reaching the holding. In these instances, foreign experience is mentioned, but it has no precedential value. The “hard” use of comparative experience, however, contributes directly to the holding of the case, and possesses at least some degree of authority for the court. Of course, comparative experience need not be central to a holding. In these cases, foreign materials utilized in the opinion only add weight to the court’s argument. What is important is that these materials have legal significance in the opinion. Their inclusion is not just a matter of judicial rhetoric, for omission of these materials would reduce the persuasiveness of the argument.⁵¹

The “hard” use of comparative experience serves two purposes. First, one might acquire help in making normative judgments, either when balancing different constitutional values or when interpreting broad constitutional principles.⁵² Second, foreign materials may assist in making empirical observations and predictions about the consequences of a judicial determination. Essentially, comparative materials may be utilized in either normative or empirical judgments.

In making this sharp distinction between “hard” and “soft” uses, I argue that techniques of legal reasoning such as filling gaps in laws and creating legal tests for the analysis of legal concepts⁵³ are in reality not merely techniques that can simply be adopted with the help of comparative reasoning. For example, Jackson recommends that the U.S. Supreme Court should look at comparative constitutional law to discover “proportionality” analysis.⁵⁴ This analysis would require balancing restrictions to constitutional rights with the aims of such restrictions. At first sight, this might seem to be a rather technical ap-

51. *But see* Koopmans, *supra* note 24, at 550 (“A method consisting of relying on comparative materials in order to justify the solution is not always interesting from a legal point of view. Very often, the court might have used a different argument to arrive at exactly the same decision. . . . It is more or less a matter of judicial rhetoric.”).

52. I do not need to delve into the discussion of whether normative judgments by the courts relying on broad principles are in themselves acceptable or not. For purposes of this article, I will be satisfied with the observation that the courts simply rely on these principles.

53. This is where Drobniig sees great usefulness in comparative law. *See* Drobniig, *supra* note 10, at 21.

54. 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) (arguing that the U.S. courts could learn from the experience of foreign courts such as the Canadian Supreme Court and adopt proportionality analysis).

plication of a legal test. However, adopting proportionality analysis actually requires the adoption of a normative position carrying a certain empirical assumption. This adoption normatively assumes that it is “right” to balance different values in constitutional adjudication. Further, proportionality analysis carries an empirical assumption that courts are the suitable venue for balancing conflicting values, that is, that certain positive consequences result from the fact that courts engage in this balancing. One could, of course, test this empirical assumption by analyzing available comparative evidence. Proportionality analysis is not a technical process, and similarly other⁵⁵ “technical” issues that the courts face actually involve complex normative judgments and empirical predictions.

It is essential to distinguish between a court’s use of normative reasoning in contrast to empirical reasoning. Different rules govern the use of comparative materials in each situation. Additionally, the legitimacy and practical limits of comparative materials is different when assessing normative questions on one hand and empirical questions on the other. Analyzing the various uses of comparative law allows one to make recommendations regarding comparative analysis according to the specific type of court at issue. The next three sections of this article provide a description of each type of use of comparative reasoning and give examples from cases where foreign materials have been utilized. Thereafter, I will turn to the legitimacy and practicability problems for each use and discuss the weight of each type of comparative reasoning. I will conclude each part with a discussion of the context where such type of reasoning could be useful.

55. There is some support from comparative experience that courts adopting extensive proportionality analysis might shape the policy process, giving rise to the “judicialization of politics.” Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995) (using Canadian and French case studies and arguing that more-than-minimal judicial review causes policy distortion and poses difficult problems for democratic debilitation and operation of a stable and vigorous constitutional democracy). See also ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000) (arguing that the European constitutional courts have features of a “third chamber” of the parliament); C. Neal Tate & Torbjörn Vallinder, *Judicialization and the Future of Politics and Policy*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 515 (C. Neal Tate & Torbjörn Vallinder eds., 1995) (describing the increase in power of judicial institutions around the globe).

V. ‘SOFT’ USE OF COMPARATIVE EXPERIENCE

A. The Soft Use as a “Dialogue”

The “soft” use of comparative experience generally involves instances where a court references foreign materials but does not consider these material to have precedential weight. Choudhry describes this process as dialogical interpretation, under which the courts “identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions”⁵⁶ to “better understand their own constitutional systems and jurisprudence.”⁵⁷ Engaging in such a dialogue is a variation of transjudicial communication,⁵⁸ or the “international traffic in ideas,”⁵⁹ resulting in “cross-fertilization” of decisions.⁶⁰ In the soft version of comparative reasoning, courts evaluate foreign experience⁶¹ as a “source of inspiration.”⁶² One way to consider soft analysis is as a mechanism employing foreign decisions as “superstar amicus briefs.”⁶³ Further, the sources used in “soft comparison” are almost exclusively constitutional cases. In utilizing these materials, courts evaluate foreign case law to discover a variety of approaches to analyzing constitutional problems⁶⁴ and to reject “false necessities”—legal doctrines that seem indispensable, but really are not.⁶⁵ Tushnet sees the utility in foreign cases in even more general terms, arguing that “[w]e can learn from experience elsewhere by looking at the ex-

56. Choudhry, *supra* note 28, at 825.

57. *Id.* at 836.

58. Slaughter, *supra* note 39, at 99.

59. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 158 (1991).

60. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1116–19 (2000).

61. *E.g.*, Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331, 350–60 (1998) (arguing that the foreign sources constitute a “source for ideas and solutions”).

62. Koopmans, *supra* note 24, at 545 (arguing that there is more awareness of comparative materials and that they may be a source of inspiration for legal decisions).

63. Shirley S. Abrahamson & Michael J. Fischer, *All the World’s a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 287 (1997).

64. Dammann, *supra* note 30 (taking this approach further and arguing that discourse theory legitimizes the use of foreign precedents as an authority for the domestic court). “[T]here are two reasons why courts should resort to authority-based comparisons. The fact that another court has reached the same conclusion indicates that a particular interpretation is the result of a fairly rational discourse. In addition, a court can ‘artificially’ increase the number of participants in the legal discourse underlying its interpretation by considering the decisions of foreign courts.” *Id.* at 559.

65. Tushnet, *supra* note 27, at 1227.

perience in rather general terms, and then by seeing how those terms might help us think about the constitutional problems we confront.”⁶⁶ He calls this process the “expressivist” use of comparative experience, which helps “us see our own practices in a new light and might lead courts using non-comparative methods to results they would not have reached had they not consulted the comparative material.”⁶⁷

Courts may realize that the decision of a foreign court is persuasive and may adopt similar reasoning, not because the reasoning is contained in a judicial opinion, but because of the reasoning itself.⁶⁸ These uses do not mean that the foreign experience itself is a binding or persuasive authority for the court. The similarities between the two decisions may be merely coincidental. The mere fact that a court has reached a conclusion that is similar to a foreign court decision does not mean that a borrowing from the foreign court has taken place.⁶⁹

The “soft” use of comparative constitutional law deals mostly with foreign case law. This is rather logical, as foreign judgments are legal documents often addressing legal issues similar to those facing a domestic judge. Therefore, the “soft” use of comparative constitutional law is the type of comparative constitutional law that is most often referred to and probably most often used by different courts.

It is rather difficult to identify cases that limit the use of comparative constitutional law in “soft” ways. It is unusual for a court to discuss a foreign case, only to admit that the discussion was irrelevant for its holding. At the same time, courts do not refer to a foreign case as having precedential authority. Courts use terms such as “useful,”⁷⁰

66. *Id.* at 1308.

67. *Id.* at 1236.

68. R.Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT'L & COMP. L.Q. 1, 9 (1996) (“There are two ways of referring to a previous judgment: as with juridical opinion it can be used in order to quote a passage which seems to put something rather well; but this is quite different from citing the decision as something having those other qualities which make up a precedent.”).

69. Matthew D. Adler, *Can Constitutional Borrowing Be Justified? A Comment on Tushnet*, 1 U. PA. J. CONST. L. 350, 350–51 (1998).

70. *E.g.*, *Knight v. Florida*, 528 U.S. 990, 997–98 (1999) (Breyer, J., dissenting from denial of certiorari) (arguing that the views of foreign courts are “useful even though not binding”). This language has also been adopted by many commentators. See Lord Irvine of Lairg, *Activism and Restraint: Human Rights and the Interpretative Process*, in HUMAN RIGHTS FOR THE NEW MILLENNIUM 1, 5 (Frances Butler ed., 2000) (“[T]he jurisprudence of constitutional courts in other jurisdictions is a useful source of guidance. . .”).

“helpful,”⁷¹ or “instructive.”⁷² A court might state that it agrees with the reasoning of the foreign decision.⁷³ It may also mention foreign cases in passing and state that foreign courts have reached similar results, without giving explicit reasons why the reference was inserted into the opinion.⁷⁴ Courts may declare that a foreign precedent “supports” the court’s own conclusion or otherwise offers “guidance” in making its conclusion. Often, such a reference is made only in a footnote.⁷⁵ Sometimes the line between mere referral and acknowledging the persuasive weight of a foreign decision is especially difficult to draw, as when courts refer to a foreign decision and then explicitly adopt the decision’s reasoning.⁷⁶

Sometimes courts discuss “helpful” foreign cases, only to admit later that the decision of the foreign court was inapplicable due to different legal, social, or economic circumstances. Canada has often rejected the use of U.S. precedents.⁷⁷ For example, in *Regina v. Keegstra*, the Supreme Court of Canada explicitly stated that:

71. See *R. v. Keegstra*, [1990] S.C.R. 697, 740 (Can.) (In examining issues of constitutional protection of free expression under the Canadian Charter of Rights and Freedoms, the comparative experience of the United States should not be “overlooked.”).

72. E.g., *State v. Walters*, 2002 (7) BCLR 663 (SA), available at <http://www.concourt.gov.za> (arguing that *Tenn. v. Garner*, 471 U.S. 1 (1985), is “instructive” in determining the test of determining the permissibility of use of deadly force in making an arrest).

73. For example, in *Carmichele v. Minister of Safety and Sec. and Another*, 2001 (10) BCLR 995, ¶ 45 (SA), the South African Constitutional Court stated that it would “adopt [a] statement” from a case of the European Court of Human Rights, referring to the reasoning why the convention contains positive obligations on the state. In *Jordan v. State*, 2002 (11) BCLR 1117, ¶ 128 (SA), the court considered some of the “considerations” of the Canadian Supreme Court “as valid in South Africa as they are in Canada.”

74. *Carmichele*, 2001 (10) BCLR 995, ¶ 54 (SA), contains the following statement, together with the referral to the relevant German case: “Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system.”

75. This is where many of the recent citations to foreign cases by the U.S. Supreme Court have appeared. See also references by Justice Frankfurter in *Staub v. City of Baxley*, 355 U.S. 313, 325–326 n.1 (1958) (Frankfurter, J., dissenting) and in *Freeman v. Hewit*, 329 U.S. 249, 251 n.1 (1946).

76. In *State v. Dodo*, 2001 (3) SA 382, ¶ 39 (CC), the South African court stated that “the gross proportionality approach adopted by the US and Canadian Supreme Courts . . . can properly be employed and should be employed under our Constitution. For the reasons advanced in the Canadian cases, it would not be mere disproportionality between the sentence legislated and the sentence merited by the offence which would lead to a limitation of the section 12(1)(e) right, but only gross disproportionality.” The authority remains to be the constitution and its analysis; the foreign decisions are used quite as if they were briefs by the parties—not an authority for the court, but worthy of agreement.

77. David Beatty, *The Canadian Charter of Rights: Lessons and Laments*, 60 MOD. L. REV. 481, 482 (1997) (“Although US authorities are frequently referred to by the Court, it has, for the

Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.⁷⁸

The South African Constitutional Court in *S. v. Makwanyane* rejected the potential persuasive effect of U.S. decisions on the death penalty because of the difference in the text of the U.S. and South African constitutions.⁷⁹ In *Carmichele v. The Minister of Safety and Security*,⁸⁰ the same court rejected the holding of *DeShaney v. Winnebago County Department of Social Services*,⁸¹ which provided that the U.S. Constitution does not impose certain positive duties on the government.⁸² In *S. v. Mamabolo*, the court decided not to rely on an area of American First Amendment jurisprudence in deciding a case involving the crime of scandalizing a court, because the South African Constitution "ranks the right to freedom of expression differently" from the U.S. Constitution.⁸³ In *Mohamed v. President of the Republic of South Africa*, the South African court discussed partly supportive Canadian law, only to admit that South African and Canadian constitutional provisions are different.⁸⁴ Finally, Justice Mason of the Australian High Court explicitly rejected plaintiff's reliance on U.S. case law on legislative apportionment in *McKinlay v. Commonwealth*.⁸⁵

most part, treated them very cautiously and usually as not being very helpful in fashioning solutions that are appropriate for Canada.").

78. *R. v. Keegstra*, [1990] S.C.R. 697, 740 (Can.).

79. *S. v. Makwanyane*, 1995 BCLR 665 (SA).

80. *Carmichele*, 2001 (10) BCLR 995 (SA).

81. 489 U.S. 189 (1989).

82. "The provisions of our Constitution, however, point in the opposite direction." *Carmichele*, 2001 (4) SA 938, ¶ 45 (CC).

83. *S. v. Mamabolo*, 2001 BCLR 449, ¶ 41 (CC) (SA).

84. *Mohamed v. President of the Republic of S. Afr.*, 2001 (3) SA 893, ¶ 53 (CC) ("[W]hatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice.").

85. (1975) 135 C.L.R. 57, 63 (Austl.) ("[I]t is simply not correct to say that provisions in our Constitution should receive the same construction as that given to similarly worded provisions in the United States Constitution which have a different context and a different history, more particularly when the suggested construction is of recent origin, reversing an interpretation previously accepted."). *Id.* at 63.

Even when foreign case analyses might be supportive, courts tend to be uneasy about applying them.⁸⁶ Courts do not cite foreign cases strictly as part of their holding, but as an illumination of issues surrounding the case. More commonly, courts admit that they were persuaded by the reasoning of foreign cases.

B. The Legitimacy and Weight of the Dialogue

When courts limit the discussion of foreign cases to a role as a helpful guide in the decision-making process, legitimacy issues usually connected with the introduction of innovative types of arguments generally do not arise. Technically, foreign decisions themselves have no precedential authority, and thus no binding effect, in domestic courts. Therefore, a court's discussion of foreign sources need not be justified from a legal point of view. If foreign sources are used selectively, they do not lead to "arbitrary decision-making,"⁸⁷ as long as the court's analysis is based on legitimate authority.

Under this view, borrowing ideas from foreign jurisprudence is, in essence, hardly different from borrowing ideas from the briefs of the parties or law review articles. Rarely, if ever, does the use of comparative materials stand alone or occur in a vacuum—the fact that a foreign court has argued for the abolition of the death penalty is usually is not a persuasive argument in and of itself. If it were, legitimacy issues would certainly arise.

The fact that a foreign court has used certain arguments does not mean that a domestic court needs to adopt the same arguments—they may be plainly unpersuasive, just as the arguments in the briefs may be unpersuasive. A court is technically not following a foreign court's decision, but rather merely being persuaded by arguments, similar to reliance, for example, on law review articles.⁸⁸

What about considering, referring to, and discussing foreign case law as persuasive authority? In contrast to precedential authority, persuasive authorities are not binding—"highly sophisticated alternative[s] to notions of binding law and mechanical jurisprudence on the

86. In *Mohamed*, 2001 (3) SA 893, ¶ 53 (CC), the South African constitutional court discussed the Canadian constitutional law on whether deportation into a country where the person might face the death penalty is constitutional if the death penalty is unconstitutional in the deporting country, only to admit that the decision of the court is based on South African law.

87. McCrudden, *supra* note 26, at 507 (referring to the misuse of persuasive authorities).

88. Fontana argues that the parties should be encouraged by the judge to discuss, when appropriate, the decisions of the foreign courts. Fontana, *supra* note 32, at 556.

one hand and arbitrary personal license on the other.”⁸⁹ Foreign precedents, thus, are arguably not binding but persuasive.⁹⁰ This assertion, however, assumes that persuasiveness is a result of foreign authority. If we look at the courts’ practice more carefully, we see that what is persuasive in foreign precedents is usually the reasoning of the case, not the fact that the foreign court has reached that specific decision. The fact that the reasoning of the foreign court was found persuasive does not mean that the authority itself was persuasive—similar persuasive arguments could be made in the briefs by the parties.⁹¹ The foreign experience itself would not be a binding authority, but rather dicta. There are no particular constraints on what the judge may enter into dicta. Rather, one should ask, whether the dicta is practical and serves some purpose other than reaching the holding.

This suggests that judges probably discuss foreign decisions without recognizing them as binding if some strategic considerations persuade the judges to do so. That the use of foreign precedent is often strategic can also be demonstrated by the fact that courts omit precedents that do not support the holding. Even though the omission is not always intentional,⁹² but rather due to lack of knowledge of for-

89. H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 264 (1987).

90. Slaughter, *supra* note 39, at 124 (describing the use of foreign precedent as persuasive, but not binding); McCrudden, *supra* note 26, at 502–03 (describing the use of foreign precedent as persuasive authority).

91. The briefs of the parties in the South African Constitutional Court usually refer to foreign precedent when supporting the argument. Therefore, we cannot assess whether the court would be persuaded without the references to foreign precedent.

92. There seem to exist completely intentional omissions. In *Mohamed*, 2001 (3) SA 893, ¶ 53 (CC), the South African Constitutional Court dealt with a case where the South African government handed an alleged terrorist who illegally entered South Africa over to United States’ authorities without seeking an agreement that no death penalty would be involved if Mohamed would be convicted of crimes. The court discussed several foreign cases, including a similar case from the European Court of Human Rights, however, the court referred only to the part of the decision where the actions of the government were condemned, but not to the part where the court, contrary to the holding of the South African constitutional court, explicitly allowed the extradition of the person to a country applying the death penalty as long as the penalty is carried out in conformity with due process rules. *Id.* at ¶ 56. Similar problems occurred in *Prince v. President of the Law Society of the Cape of Good Hope*, 2002 (3) BCLR 231 (SA), where the court found the prohibition of the use of cannabis for adherents of the Rastafari religion constitutional. The only reference of the minority opinion to foreign case law or practice was to the dissent by Justice Blackmun in *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 911 n.54 (1990), which discussed only the question of which government interests such a prohibition might serve. The majority discussed the foreign practice more extensively, but limited the analysis to favorable case law only. See 2002 (3) BCLR 231, ¶¶ 119–127 (CC) (S. Afr.).

eign law,⁹³ precedents are used selectively. The strategic nature of discussing foreign cases becomes even more evident if we consider that judges often discuss foreign decisions among themselves or with the justices of different supreme courts.⁹⁴ Whether to make these discussions public is largely a strategic decision, as the opinion can also be written without inclusion of these discussions. Surely, the legitimacy of “soft use” comparisons does not become an issue when foreign decisions are not discussed in the published opinion, but rather used behind the scenes. Reading and drawing from foreign case law would in such cases be a part of the “general liberal education”⁹⁵ of the judge.

When a court does refer to foreign materials, the question becomes whether it is advisable for it to do so. When making such references, courts must discuss materials that have no authoritative power, do not directly contribute toward the holding in a case, and yet demand an understanding of foreign laws and cases in all their complexity. Because of this, referrals seem to be an unnecessary burden that may even distract attention from a holding’s rationale. By definition, foreign cases do not refer to the case at hand. Foreign cases not only take place in a different factual setting, but also in an extremely different socio-cultural setting. The informational advantage gained through deciding cases or controversies only, much emphasized when describing the courts’ proper functions, would simply be lost.

93. An example comes from the European Court of Justice, where Advocate General Tesauro used U.S. precedents on affirmative action only selectively, omitting the most similar case with different conclusions from the ECJ holding. See Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051. *Kalanke* cites *Regents of University of Cal. v. Bakke*, 483 U.S. 265 (1978); *United Steelworkers of America, AFL-CIO-CFL v. Webster*, 443 U.S. 193 (1979); *City of Richmond v. J. A. Croson*, 488 U.S. 469 (1989), but not *Johnson v. Transp. Agency*, 480 U.S. 616 (1987)). This has been attributed to ignorance; not intentional omission. See McCrudden, *supra* note 26, at 526.

94. Fontana, *supra* note 32, at 548 (describing the encounters between justices of different supreme courts); McCrudden, *supra* note 26, at 510–11 (describing the use of colloquia for judges on human rights issues).

95. This is how Tushnet legitimizes expressivist uses of comparative constitutional law. See Tushnet, *supra* note 27, at 1236–37 (“[J]udges of wide learning—whether in comparative constitutional law, in the classics of literature, in economics, or in many other fields—may see things about our society that judges with a narrower vision miss. . . . In this aspect, comparative constitutional law operates in the way that general liberal education does.”).

C. Conclusion

Judicial use of foreign precedents as a source of ideas and arguments can be a useful enterprise. In any case, this use cannot be prohibited, as such use is often not uniformly documented in the written opinion. However, a court's public admission that it was inspired by foreign decisions does not add or diminish weight from the legal argument. This admission may only serve strategic purposes about what the court wants to achieve through the decision. At the same time, courts need to balance potential strategic gains with the possibility of misunderstanding and misapplying foreign case law.

VI. THE USE OF COMPARATIVE LAW IN MAKING NORMATIVE JUDGMENTS

Constitutions often use terms that are difficult to interpret, such as the U.S. Constitution's Eighth Amendment prohibition of "cruel and unusual" punishment, or the German constitutional directive to protect "human dignity."⁹⁶ Similar difficulties are met in judicial balancing. Balancing is a process of weighing different values and making normative judgments on preferred values. Balancing different constitutional values, although often criticized,⁹⁷ is both common and theoretically unavoidable.⁹⁸ Most courts explicitly admit this, and some, like the German⁹⁹ or South African¹⁰⁰ constitutional courts, elevate balancing to a fundamental tenet constitutional jurisprudence.

Much of constitutional jurisprudence is about deriving meaning from broad principles and finding the right balance between different values. In determining the content of such broad principles and finding the right balance between conflicting values, one may apply dif-

96. Article 1 of the Basic Law of Germany: "Human dignity is inviolable." GG Art. 1.

97. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

98. The philosophical underpinnings of balancing decisions in constitutional law derive from the claim that the constitution embodies principles, and not rules with all-or-nothing character. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, *passim* (1977).

99. The German lawyers talk about the principle of "practical concordance" (*praktische Konkordanz*), according to which the different constitutionally protected values need to be harmonized. See Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 851 (1991); Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 970.

100. Richard J. Goldstone, *The South African Bill of Rights*, 32 TEX. INT'L L.J. 451, 459-64 (1997) (overview of the principles of interpreting the Bill of Rights of the South African Constitution).

ferent methods. One such method is moral philosophy.¹⁰¹ Others evaluate constitutional content by looking at the constitutional framers' intent.¹⁰² Further, some advocate the use of comparative materials.

A. The Opinions of the World Community in the Jurisprudence

Cases where comparative materials are used in normative reasoning abound.¹⁰³ As an example, this is seen in the area of the Eighth Amendment's prohibition of "cruel and unusual punishment," in U.S. constitutional analysis. In *Atkins v. Virginia*, much of the court's analysis relied on normative use of comparative materials, and it is preceded by several other cases employing normative analyses. In *Trop v. Dulles*, one of the arguments against denationalization as a punishment was that statelessness is a condition "deplored in the international community of democracies."¹⁰⁴ In *Rudolph v. Alabama*, the dissenters from denial of writ of certiorari contested the permissibility of the death penalty for rape, based, in part, on international experience.¹⁰⁵ Finally, the Court's decision in *Coker v. Georgia*, which

101. MICHAEL J. GERHARDT ET. AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 181–210 (2nd. ed., 2000)

102. *Id.* at 99–136.

103. Often, two different types of normative reasoning are identified—positive and negative. In positive analysis, the court refers to the practice of several countries, determines that such practice is widespread, and argues that the court should follow this practice. In negative reasoning, the court refers to the foreign practice, determines that this kind of practice is associated with unacceptable regimes, and rejects the practice as normatively unacceptable. See Fontana, *supra* note 32, at 551. However, there is no clear-cut difference between the two approaches. The positive argument assumes that the unacceptable regimes do not have similar practice—otherwise the practice could be rejected as being widespread among those countries under the negative argument. The argument would be consistent only if it could be shown that the practice is widespread among the acceptable regimes and non-existent among the unacceptable regimes. This, of course raises a practicability issue discussed below.

104. 356 U.S. 86, 103 (1958) (Warren, C.J.). "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids that to be done." *Id.* (footnotes omitted).

105. 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari). Justice Goldberg thought that the following question was worth answering: "In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate 'evolving standards of decency that mark the progress of [our] maturing society,' or 'standards of decency more or less universally accepted?'" *Id.*, 889–90 (footnotes omitted).

held the death penalty for conviction of rape unconstitutional, directly discussed international experience in its analysis of the issue.¹⁰⁶ In *Thompson v. Oklahoma*, the Court invalidated the death penalty for persons under age the age of sixteen, and again noted that a contrary decision would be inconsistent with the practice of many advanced democracies.¹⁰⁷ The use of foreign experience did receive a blow in *Stanford v. Kentucky*, a death penalty case for juveniles under age eighteen,¹⁰⁸ but again found support in the *Atkins v. Virginia* decision.¹⁰⁹

Atkins v. Virginia was succeeded by *Patterson v. Texas*,¹¹⁰ where Justice Stevens, joined by Justice Ginsburg and Justice Breyer, argued in a dissent from denial of a stay of execution that there is an “apparent consensus that exists among the States and in the international community against the execution of a juvenile offender.”¹¹¹

106. 433 U.S. 584, 596 n.10 (1977) (“It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”).

107. 487 U.S. 815, 830 (1988) (footnotes omitted) (“The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”). The case is especially interesting for the remark that “[J]uvenile executions are also prohibited in the Soviet Union.” *Id.* at 831. References to the practices of non-democratic countries may thus play a role.

108. 492 U.S. 361, 369 (1989).

109. See *supra* notes 1–5, and accompanying text.

110. 536 U.S. 984 (2002). About two months later, Justice Stevens, with whom Justice Souter, Justice Ginsburg and Justice Breyer joined, dissented from denial of petition for writ of habeas corpus, but the six-page dissent did not refer to foreign experience at all. See *In re Stanford*, 537 U.S. 968 (2002) (Souter, J., dissenting). However, on the same day, Justice Breyer referred to foreign experience when dissenting from denial of certiorari in a case dealing with the delays in carrying out capital punishment. *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting) (“Courts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel. . . . Consistent with these determinations, the Supreme Court of Canada recently held that the potential for lengthy incarceration before execution is a ‘relevant consideration’ when determining whether extradition to the United States violates principles of ‘fundamental justice.’”). Justice Thomas wrote a concurrence from denial of certiorari, condemning the use of the foreign precedents. *Id.* (Thomas, J., concurring).

111. *Patterson v. Texas*, 536 U.S. 984 (2002) (Stevens, J., dissenting). The issue was decided by the court in favor of the constitutionality of this punishment in *Stanford v. Kentucky*, 492 U.S. 361 (1989). The dissent is more remarkable because in *Atkins v. Virginia* Justice Stevens, writing for the majority, implicitly denied that *Stanford v. Kentucky* should be overturned. The majority discussed the difference between the death penalty for mentally retarded and juveniles: “A comparison to *Stanford v. Kentucky*, in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the

Courts engaging in other areas of constitutional analysis have also utilized comparative analysis. For example, the dissent by Justice Rehnquist in *California v. Minjares*, where he claimed that he felt “morally certain that the United States is the only nation in the world in which the most relevant, most competent evidence as to the guilt or innocence of the accused is mechanically excluded because of the manner in which it may have been obtained”¹¹² implies that other nations would not condemn at least some use of illegally obtained evidence. Justice Harlan argued in his *Poe v. Ullmann* dissent that criminal punishment for the use of contraceptives is unconstitutional, supported by the fact that other democracies take no similar measures.¹¹³ In *Washington v. Glucksberg*,¹¹⁴ foreign experience was used to show that suicide has been condemned by many countries,¹¹⁵ and that assisted suicide is prohibited by most.¹¹⁶ The Supreme Court has in several instances referred to the importance of free speech, arguing that freedom of speech is essential for democracy by referring to contrary practices in non-democratic countries.¹¹⁷ At the same time, the Court has justified certain limitations on free speech by referring to the practice of similar democratic countries.¹¹⁸ There are several cases

threshold age for imposition of the death penalty.” *Atkins v. Virginia*, 536 U.S. 304, at 316 (2002) (citation omitted).

112. 443 U.S. 916, 919 (1979) (Rehnquist, C.J., dissenting).

113. 367 U.S. 497, 554–55 (Harlan, J., dissenting) (“[A] diligent search has revealed that no nation, including several which quite evidently share Connecticut’s moral policy, has seen fit to effectuate that policy by the means presented here.”) (footnotes omitted).

114. 521 U.S. 702 (1997). In this case, empirical arguments based on foreign evidence were also made. See *infra* note 174 and accompanying text.

115. *Id.* at 711 (“for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide”); *Id.* at 774 (Souter, J., concurring) (“The dominant western legal codes long condemned suicide.”).

116. *Id.* at 711 (“[A] blanket prohibition on assisted suicide . . . is the norm among western democracies.” (quoting *Rodriguez v. British Columbia* (Attorney General), [1993] D.L.R. (4th) 342, 404 (Can.)). The foreign experience was also discussed in the oral arguments. See Christopher McCrudden, *A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court*, in *LAW AT THE END OF LIFE: THE SUPREME COURT AND ASSISTED SUICIDE* 125, 134–37 (Carl E. Schneider ed., 2000).

117. For an extensive overview, see Fontana, *supra* note 32; Slaughter, *supra* note 39; Dammann, *supra* note 30.

118. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (Scalia, J.) (“[O]ur society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas.”). This quotation seems to imply that limitations are justified, partly because the other countries accept them. Of course, the citation does not answer the counterfactual—what if other countries would not accept such limitations?

where the Court has condemned the practice of some countries that would not serve as a good example to the United States.¹¹⁹

Foreign courts and legislative bodies have also utilized foreign materials. The House of Lords has rejected the right to assisted suicide based on the lack of consensus among different countries.¹²⁰ The South African Constitutional court, when limiting the use of deadly force for making arrests, declared that “South African law on this topic is brought into line with that of comparable open and democratic societies based on dignity, equality and freedom, for instance *Tennessee v. Garner* in the United States and *McCann v. United Kingdom* in Europe.”¹²¹ In a case involving the constitutionality of mandatory life sentences, the court noted that “there are many examples of other open and democratic societies which permit the legislature to limit the judiciary’s power to impose punishments.”¹²² The court has noted that “open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself. Many societies also accept limits on free speech in order to protect the fairness of trials.”¹²³ In *Jordan v. State*, where the court decided that the prohibition of prostitution does not excessively infringe the constitutional right to economic activity or privacy, it explicitly relied on comparative arguments.¹²⁴ Sometimes, courts admit that a single

119. For an exemplary list, see Fontana, *supra* note 32, at n. 275–77, and accompanying text. Yet, this kind of reasoning from comparative analysis could be persuasive only if the line of argument could be “turned around” by showing that the practice is characteristic to the “pathological” case only, and that no other country has adopted it.

120. *Regina (Pretty) v. Dir. of Pub. Prosecutions*, [2002] 1 A.C. 800. Lord Justice Bingham relied on the “very broad international consensus.” Other justices held similar opinions.

121. *S. v. Walters*, Case CCT 28/01, ¶ 52, available at <http://www.concourt.gov.za> (references omitted).

122. *S. v. Dodo*, 2001 (3) SA 382, ¶ 27 (CC). Thereafter, the court discussed the practice and case law in the United States, Canada, Australia, Germany, India, New Zealand, the United Kingdom, and Namibia.

123. *Islamic Unity Convention v. Indep. Broad. Auth.*, 2002 (5) BCLR 433, ¶ 29 (SA) (holding unconstitutional certain regulations of broadcasting).

124. *Jordan v. State*, 2002 (11) BCLR 1117, ¶ 56 (SA) (footnotes omitted) (“Open and democratic societies adopt a variety of different ways of responding to prostitution, including outright prohibition. The European Court recently underlined the wide discretion that states have in relation to prostitution as an economic activity. In the circumstances, therefore, we are satisfied that [criminal punishment for prostitution] constitutes a measure designed to promote or protect the quality of life as contemplated by [the constitution] and that it is a measure considered justifiable in open and democratic societies based on freedom and equality. It is therefore not inconsistent with the right [freely to engage in economic activity].”). In regard to privacy, the court held that: “open and democratic societies vary enormously in the manner in which they characterise and respond to prostitution. Thus practice in such countries ranges from al-

foreign case amounts to persuasive authority. A justice of the Irish Supreme Court, for example, referred to the German experience as being “persuasive authority (as a comparative constitution) on fundamental principles of democracy and equality which, as a basic tenet, are common to both Constitutions.”¹²⁵

Supranational courts, such as the European Court of Justice, use similar ideas.¹²⁶ In the very first group of cases before the court, comparative analysis was the basis for creating principles of Community law.¹²⁷ The practice was continued in the *Internationale Handelsgesellschaft* case, where the court mentioned that in determining the extent of fundamental rights in the community, it was “inspired by the constitutional traditions of the Member States.”¹²⁸ The parties to the cases usually refer to the practice of Member States, and opinions of the Advocate General often contain comparative assessments of the

lowing prostitution but not brothel-keeping to allowing both; suppressing both; to setting aside zones for prostitution; and to licensing brothels and collecting taxes from them. The issue is generally treated as one of governmental policy expressed through legislation rather than one of constitutional law to be determined by the courts. We are unaware of any successful constitutional challenge in domestic courts to laws prohibiting commercial sex. The matter appears to have been treated as one for legislative choice, and not one for judicial determination. The issue is an inherently tangled one where autonomy, gender, commerce, social culture and law enforcement capacity intersect. A multitude of differing responses and accommodations exist, and public opinion is fragmented and the women’s movement divided. In short, it is precisely the kind of issue that is invariably left to be resolved by the democratically accountable law-making bodies.” *Id.* ¶ 90 (footnotes omitted).

125. *In re Bunreacht Na hEireann*; McKenna v. Taoiseach, [1996] 1 I.L.R.M. 81, 113 (Ir.) (citing the Official Propaganda Case, 46 BVerfGE 125 (1977)).

126. KIIKERI, *supra* note 24, at 99–152; McCrudden, *supra* note 26 at 522–23; J.H.H. Weiler & Nicholas J.S. Lockhart, “Taking Rights Seriously” *Seriously: The European Court and its Fundamental Rights Jurisprudence*, 32 COMMON MKT. L. REV. 51 (1995); C.N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 PACE INT’L L. REV. 267 (1994).

127. Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT’L L.J. 656, 663 (1997).

128. Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide*, 1970 E.C.R. 1125.

legal situation in the Member States,¹²⁹ although the Court itself normally refrains from express citations to foreign cases and laws.¹³⁰

Commonalities between countries, such as a common history or constitutional approach, have also been used as the basis of normative reasoning through reference to foreign materials.¹³¹ The most obvious example of “genealogical,” or historical commonality reasoning, is the jurisprudence by the Commonwealth courts. For example, the Australian,¹³² Canadian,¹³³ and Pakistani¹³⁴ courts have long held examples from English law to be persuasive, as did the U.S. Supreme Court in the beginning of its existence. The main reason for this is the shared heritage of common law. Similarly, in *Knight v. Florida*, Justice Breyer argued for review of a case involving the execution of death row inmates after long delays (nineteen and twenty-five years), arguing 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. In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment.”¹³⁵ However, Justice Breyer viewed these precedents as

129. Case C-353/99 P, Council of the European Union v. Hautala, Opinion of the Advocate General Léger, ¶ 56 (footnotes omitted) (concerning access to E.U. documents and analyzing the practices of Member States). “According to consistent caselaw now enshrined in the Treaties, fundamental rights form an integral part of the general principles of law with which the Court of Justice ensures compliance. To that end, it draws on the constitutional traditions common to the Member States and on evidence provided by international instruments concerning protection of human rights in which Member States have cooperated or to which they have acceded.”

130. Kakouris, *supra* note 126, at 276 (“As a rule, the Court does not make detailed reference to any comparative examination which preceded its judgment Not only is there usually no detailed reference, but there is no reference at all.”).

131. See Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319, 323 (1957) (arguing that historical association between different courts has primary importance in explaining the persuasiveness of foreign precedents).

132. See Jianfu Chen, *The Use of Comparative Law by Courts: Australian Courts at the Crossroads*, in THE USE OF COMPARATIVE LAW BY COURTS 25 (Ulrich Drobnig & Sjeff van Erp eds., 1999).

133. H. Patrick Glenn, *The Use of Comparative Law by Common Law Courts in Canada*, in THE USE OF COMPARATIVE LAW BY COURTS 59 (Ulrich Drobnig & Sjeff van Erp eds., 1999).

134. Tayyab Mahmud, *Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT’L L.J. 40, 47 n.17 (1995) (“Pakistan’s judiciary, like that of other post-colonial common law jurisdictions, treats case law and other authoritative texts from other common law jurisdictions as strong persuasive authority. Pakistan’s constitutional cases are rife with citations to Indian, American and English cases and treatises.”).

135. 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari).

“useful even though not binding,”¹³⁶ though he did not delineate the features of that “usefulness.”

These positive examples of applying foreign experience in normative reasoning are by no means conclusive evidence that courts unequivocally do, or should, accept the use of international standards or the practice of courts in similarly situated countries. The dissenters in *Atkins v. Virginia* have made it clear that the use of foreign materials continues to be viewed as illegitimate by some.¹³⁷

B. The Legitimacy and Weight of Comparative Normative Reasoning

There are two basic arguments against courts drawing normative conclusions based on foreign experience. The first of them is a general argument against normative reasoning and balancing as such and warrants no thorough discussion here.¹³⁸ The second argument, based on the democratic basis of judicial decision-making, is directed against comparative reasoning and warrants closer inspection.

1. *The World Community and the Democratic Nature of Judicial Decision-Making.* The democratic basis argument is concerned with the fact that courts are part of a national constitutional system, and thus exercise public power. Only the views and the values of the people living in the particular country are thus argued to be relevant.¹³⁹ Given vastly different cultures and values, it is argued that the experience of one country is hardly transferable to another system. This argument is concerned primarily with cultural relativism.¹⁴⁰ Cultural relativists argue that standards of justice in the Western world are not similar to standards in the East, going so far as to say that standards are not similar among the countries of the Western world—

136. *See id.*

137. *See supra* notes 1–5.

138. *See, e.g.,* Aleinikoff, *supra* note 97, at 1004 (“Severe problems beset balancing approaches to constitutional law.”).

139. *See* Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1122 (1996) (“... we judges of the American democracies are servants of our peoples, sworn to apply, without fear or favor, the laws that those peoples deem appropriate. We are not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own.”).

140. *E.g.,* Choudhry, *supra* note 28, at 831. Note that this cultural relativism argument only looks similar to the particularism argument when “borrowings” are refuted on practical accounts. Here, relativism is the question of legitimacy. In particularism, the relativism is the question of practicability and feasibility. This reflects what Fontana, *supra* note 32, at 615–18, describes as the difference between “cultural particularism” and “pragmatic particularism”.

often at times even within the same country. A specific country may consider certain values much differently than others because of historical¹⁴¹ or present concerns in the society. The fact that many countries maintain similar values does not necessarily mean that these values will be shared by all countries, nor that such values should be enforced by the courts in those countries.

Many of the challenges posed in evaluating international law arise when balancing different legal values. The most common form of legal balancing deals with juxtaposing individual and community values. Certainly, there are some guidelines in a constitution's structure regarding its balance between individualist and communitarian values. However, the most significant determinant of finding the right balance of legal values lies in the present society. If the society supports communitarian values, the courts, in theory, should be more able to uphold limits on individual rights such as free speech.¹⁴² Social scientists have spent considerable time researching the extent to which countries are 'individualist' or 'collectivist.' The results of this research support the hypothesis that countries differ in legal values and that these differences are at times quite significant,¹⁴³ as in where values of democratic and authoritarian countries are compared. Therefore, balancing decisions in some countries will not necessarily reflect the values of other countries.

Even assuming that international opinions can contribute to the determination of domestic rights, one must still determine what the international consensus is—an exercise which raises several practical problems. Is it enough if the numerical majority of all countries have adopted a certain position? Or is it enough if most of the "democratic" countries have adopted a position?¹⁴⁴ How does one determine what the opinion of a country is? One could certainly argue that one

141. The German jurisprudence on freedom of speech is exemplary in this case. See Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies"*, 85 MICH. L. REV. 277 (1986) (showing how German history has influenced debate over criminalizing assertions that the Holocaust never existed).

142. E.g., KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 129 (1995).

143. For a review of the research, see Daphna Oyserman et al., *Rethinking Individualism and Collectivism: Evaluation of Theoretical Assumptions and Meta-Analyses*, 128 PSYCHOL. BULL. 3 (2002).

144. See the overview of such problems surrounding the interpretation of the European Convention of Human Rights in François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in *THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS* 283, 305 (Mireille Delmas ed., 1992).

only needs to look at the laws adopted in the particular state. If different legislatures adopt similar positions on a moral issue, a consensus among societies would arguably be evident.¹⁴⁵ There are additional problems with this method, however. What if a high court has determined the law, overriding the opinion of the legislature? What if the opinion of the legislature does not reflect the consensus within the state? The opinion polls might reveal different dominant values within the society. Such questions are difficult suggesting that a thorough comparison often is simply not possible.¹⁴⁶

As mentioned in the introduction to this article, comparative analysis was a matter of considerable dispute in *Atkins v. Virginia*. In *Atkins*, the majority found evidence that there was a consensus among states that executing developmentally disabled criminals constituted cruel and unusual punishment. However, the finding was based on complex considerations: "It is not so much the number of these States [abolishing death penalty for mentally retarded] that is significant, but the consistency of the direction of change."¹⁴⁷ The dissenters could not agree with this analysis:

The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the following: "It is not so much the number of these States that is significant, but the *consistency* of the direction of change." . . . But in what *other* direction could we possibly see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound* to be in the one direction the Court finds significant enough to overcome the lack of real consensus. . . . In any event, reliance upon "trends," even those of

145. For instance, see the dissent by Rehnquist in *Atkins v. Virginia*:

[T]he work product of legislatures and sentencing jury determinations . . . ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values. . . . I would take issue with the blind-faith credence [the Court's decision] accords the opinion polls brought to our attention. An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results.

536 U.S. 304, at 324–26.

146. Rudolf Bernhardt, *Thoughts on the Interpretation of Human-Rights Treaties*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 65, 67 (Franz Matscher & Herbert Petzold eds., 1990).

147. *Atkins*, 536 U.S. at 304, 315.

much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication. . . .¹⁴⁸

In fact, it is quite hard to determine what a “national consensus” is. It is doubtful that there can be such a thing at all, particularly considering the difficult nature of cases involving broad principles of justice. Even if a court decision on an issue exists, it is not guaranteed that the decision is accepted by the majority of the population. In addition, there exists the fear that a decision could be based on a passing fad of the time and could later be overruled.¹⁴⁹ These issues suggest that even if one is compelled to follow a single foreign court, deciphering a consistent view informing a consensus is difficult. Employing the *stare decisis* principle in a single legal system is often difficult enough.¹⁵⁰ Yet, several arguments are useful in addressing these legitimacy and practical problems, depending on the type of normative reasoning used. For the purposes of this article, our inquiry will focus on arguments stemming from international law, the text of the constitution, and the borrowed statute doctrine.

2. *International Law as a Basis for Comparative Normative Reasoning.* The use of international law is the principal way of legitimizing normative reasoning through comparison. This is somewhat surprising. Surely, if a court does not consider itself bound by international law—either customary or treaty-based—international arguments lose their force. When obligatory norms of international law exist, those norms carry great weight. However, for norms that have not yet arisen to that level, states must determine how best to balance values and how to interpret broad principles of justice.¹⁵¹ One must

148. *Id.* at 344–45 (Scalia, J., dissenting) (quoting majority) (emphasis in original) (internal citations omitted).

149. *E.g.*, *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Thomas, J., concurring) (“[T]his Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”).

150. On the *stare decisis* principle, see generally D. NEIL MACCORMICK & ROBERT S. SUMMERS, *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (1997). On the rate of overturning precedent in the U.S. Supreme Court, see SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992* (1995).

151. Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 *NOTRE DAME L. REV.* 1217, 1218–19 (1998) (“[If comparison is used to] fashion fundamentally new human rights claims, it could lead to the flattening of the diversity of national practices and cultures simply because a certain number of states have made common political decisions regarding contested social values.”); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human*

bear in mind that international custom does not become customary international law merely because of general state practice—international legal doctrine demands that the practice be “accepted.”¹⁵² Therefore, one might argue that, where no general state practice can be ascertained, the opinions of other countries are in fact irrelevant.

Three arguments can be put forward against this assertion. First, comparative analysis remains a crucial tool to ascertain whether the state practice component of customary international law in fact exists. Second, there is great utility in interpreting constitutional norms “internationally.” Third, one must take into account the way international law is developed.

The first argument is based on the notion that reference to foreign practice is a key tool employed by courts whenever they analyze whether customary international law exists regarding an issue. For instance, the German Constitutional Court analyzed international practice when it had to determine whether constitutional rules against double jeopardy prohibit bringing criminal charges if an earlier criminal sentence had been applied abroad.¹⁵³

The second argument for uniform application of international law among different countries involves policy considerations. For example, use of foreign practice when interpreting public policy clauses when resolving conflicts of laws “eliminates the parochial character of [a] clause and . . . tends to narrow and internationalize its application.”¹⁵⁴

The third argument for uniform application deals with the development of international law and the application of evolving international standards. The application of international standards is most clearly visible in international human rights adjudication. The European Court of Human Rights repeatedly refers to the state of law in the Member States when deciding controversial issues, thus deciding international disputes according to the standards common to the Member States.¹⁵⁵ For example, the court has demanded recognition

Rights, 15 EMORY INT’L L. REV. 391 (2001) (arguing that the development of international law needs to take into account the particularities of different cultures).

152. See MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 47–55 (2nd ed., 1997).

153. BverfGE 75, 1 (15).

154. Drobnič, *supra* note 10, at 15.

155. KIKERI, *supra* note 24, at 153–90; McCrudden, *supra* note 26, at 522; François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in THE EUROPEAN

of gender re-assignment of transsexuals in official government documents as part of the right to privacy based on the “clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”¹⁵⁶ Similarly, in *Dudgeon v. United Kingdom*,¹⁵⁷ the court relied on European consensus in striking down laws criminalizing sodomy in Northern Ireland. Further, an array of cases concerning minority rights have discussed the need to protect the lifestyles of minorities. In these cases, the court has relied on an “emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle. . . .”¹⁵⁸

In contrast, the Inter-American Court of Human Rights is not as eager to analyze the human rights standards of the parties to the American Convention of Human Rights, but this might be caused by the fact that it mostly deals with gross human rights violations where reference to such norms is simply unnecessary.¹⁵⁹

When national courts cite international human rights cases in determining the content of domestic civil rights,¹⁶⁰ the use of comparative experience by the cited international human rights court indi-

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 283, 305–09 (Mireille Delmas ed., 1992) (giving an overview of the cases utilizing this approach).

156. *Goodwin v. U. K.*, 22 Eur. Ct. H.R. (ser. A) (1996), at ¶ 85.

157. *Dudgeon v. U. K.*, 45 Eur. Ct. H.R. (ser. A) (1981).

158. *Lee v. U.K.*, application no. 25289/94, ¶ 95, available at <http://www.echr.coe.int/Eng/Judgments.htm>. However, the consensus is not “sufficiently concrete” in order to create standards for particular situations. *Id.* ¶ 96.

159. David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 1, 11–12 (David Harris & Stephen Livingstone eds., 1998).

160. The European Court of Human Rights has had a significant impact on the domestic adjudication in Member States. See Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994*, 15 HUM. RTS. L.J. 81 (1994) (reviewing the influence in Austria, Belgium, Netherlands and Ireland). After the enactment of the Human Rights Act, the courts in the United Kingdom are forced to apply not only the provisions of the European Convention of Human Rights as transposed into the British law, but they need to interpret those provisions in the light of the jurisprudence of the European Court of Human Rights. Human Rights Act, 1998, c.XXX § 2(1)(a) (Eng.) (“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.”). See generally Michael Supperstone & Jason Coppel, *Judicial Review after the Human Rights Act*, 4 EUR. H.R. L. REV. 301 (1999).

rectly impacts the jurisprudence of domestic courts. In these cases, domestic courts follow the lead of other countries, brokered by the international human rights court.¹⁶¹

3. *Constitutional Text.* In some cases, a country's constitution directs national courts to take into account foreign experience. Arguably, the most famous provision directing this type of analysis is contained in the South African Constitution, stating that the courts "may consider foreign law."¹⁶²

Some courts use more implicit constitutional provisions to justify utilizing foreign materials. For instance, a constitution contains may limit the inquiry standards found in democratic societies.¹⁶³ The European Convention on Human Rights contains similar clauses in Articles 8 through 11, allowing for restrictions to convention rights only if the restrictions are "necessary in a democratic society." This clause has warranted inter-state comparisons to determine the permissibility of such restrictions. However, the interpretation of supra-national clauses by the European Court of Human Rights shows that using international consensus as a human rights standard is problematic also of the wide latitude left to individual states. Namely, the jurisprudence of the European Court of Human Rights has often allowed states a wide "margin of appreciation" to determine what is really necessary for democracy in a particular state.¹⁶⁴ Occasionally,

161. The similar approach has been taken in other types of litigation, for example in transnational commercial litigation. This is even the case where no international dispute settlement body exists, including such treaties as the Vienna Convention on the International Sale of Goods. In such cases, the need for uniform interpretation of the treaty mandates the court to compare foreign judgments. See the decision of the *House of Lords in Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251, 293 (H.L. 1980) (L.J. Scarman) ("Our courts will have to develop their jurisprudence in company with the courts of other countries. . ."). Drobni, *supra* note 10, at 8-9 (arguing for the uniform interpretation of the convention).

162. Section 39 provides: "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." S. AFR. CONST. § 39 (1996).

163. *E.g.*, according to the Article 1 of the Canadian Charter of Rights and Freedoms, the charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

164. See generally HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996) (discussing the doctrine of margin of appreciation); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 240 (1996) (discussing the doctrine of margin of appreciation in the jurisprudence of the European Court of Human Rights).

the court attempts to determine what is necessary through an examination of standards adopted by the signatories to a particular treaty. This approach is troubling because the commonality of standards between the states does not necessarily tell us when we should appreciate a divergence from these standards in a particular country.¹⁶⁵ Similarly, a domestic constitutional provision calling for adopting a standard necessary in a democratic society has to take into account that different societies have different values and different necessities. It is the duty of the court to appreciate these differences.

The preceding discussion has shown that international law, federal law, and the text of the constitution can legitimize the use of international standards. However, it must be borne in mind that not all courts are part of a federal system or have to apply international norms themselves, and that not all constitutions contain general clauses directing courts to look at international standards. Moreover, it may actually be the duty of the court not to succumb to international pressures and thereby preserve the particular culture of the society in which it operates. Further, the legitimacy of applying international standards does not eliminate the practical problems of determining what the international standards actually are. This problem must be kept in mind when determining the content of broad constitutional principles or making balancing decisions.

4. *The Borrowed Statute Doctrine.* The final argument for the legitimacy of comparative normative reasoning relies on the borrowed statute doctrine—when a statute or constitution has foreign origins, a court may feel especially compelled to follow foreign interpretation of that statute or constitution.¹⁶⁶ In such cases, the courts are not bound by a broad, difficult-to-establish “international consensus,” but rather by a more limited set of cases. Thus, a court would look to the “parent” constitution and its interpretation in resolving constitutional problems. The very fact that a constitutional provision has been borrowed, or that the legal system more generally has roots in a foreign system, makes the courts in this other system an author-

165. Carozza, *supra* note 151, at 1233 (“[I]nter-state comparison will not itself give us the reasons to choose in any instance whether to affirm a uniform international standard of human rights or whether to allow the play of difference and discretion among states.”).

166. In Germany, see Ulrich Drobnig, *The Use of Foreign Law by German Courts*, in *THE USE OF COMPARATIVE LAW BY COURTS* 127, 134–35 (Ulrich Drobnig & Sjeff van Erp, eds., 1999) (discussing cases where the German Federal Supreme Court has referred to Swiss and Austrian practice because the rules they applied were inspired by the Swiss and Austrian rules).

ity. Choudhry¹⁶⁷ and Fontana¹⁶⁸ call this “genealogical” interpretation. Dammann justifies use of the borrowed statute approach as a result of its unique ability to incorporate the intentions of the drafters of the constitution or the statute in question, thus arguably making it a type of ‘intentionalist’ comparison.¹⁶⁹ Yet, the borrowed statute approach may suffer from its inability to effectively take into consideration the unique values and conditions of the borrowing state. While it is a useful that may provide great interpretive assistance, it may not possess enough legitimacy to be extensively relied upon in interpreting domestic laws.

C. Conclusion

It appears that the use of comparative experience when defining broad constitutional categories or balancing conflicting values is rather limited. Each country has its own unique values and, unless binding international obligations exist, domestic courts should not import foreign values. Moreover, foreign values are often difficult to determine. Instead of applying a rigid method to determine the “average” or “dominant” foreign values, courts should look at the values of its own society.

VII. THE USE OF COMPARATIVE LAW IN EMPIRICAL ARGUMENT

A. Comparison and Prediction

Balancing decisions in constitutional jurisprudence not only involve normative issues, but also involve empirical questions. One of the basic tenets of proportionality analysis is to ask whether the challenged measure in fact pursues the aim that has been brought forward to justify the measure. In order to determine this, a prediction has to be made.¹⁷⁰ Use of comparative experience in creating empirical arguments¹⁷¹ thus seems logical. In fact, how else can one find empirical evidence that an interpretation is valid? Governments and courts are

167. Choudhry, *supra* note 28, at 866–85.

168. Fontana, *supra* note 32, at 550.

169. Dammann, *supra* note 30, at 520–21.

170. *See generally*, David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541 (1991) (discussing normative constitutional analysis and the role of judicial fact-finding in constitutional theory).

171. *See generally* Tushnet, *supra* note 27, at 1238–69.

not equipped with laboratories where they could have two “experiments” run at the same time, with different interpretations of the law. Similarly, as the states in a federal system might serve as laboratories,¹⁷² foreign countries could serve as laboratories in the world community.

In *Printz v. U.S.*, Justice Breyer argued that the court should look at the experience of the European federal systems in order to determine whether it is dangerous to assign the States enforcement powers under federal laws.¹⁷³ In *Washington v. Glucksberg*, the experience of the Netherlands was discussed thoroughly.¹⁷⁴ In *Zelman v. Simmons-Harris*, Justice Breyer referred to the British and French experience of regulating religious schools.¹⁷⁵ However, this type of comparative analysis is not extensive and foreign courts appear to make such inferences with even less frequency than the U.S. Supreme Court.¹⁷⁶

172. See generally DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 85–88 (1995) (for an overview of the issues); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397–400 (1997) (discussing innovation in a federal system).

173. Breyer argued:

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. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the “state,” member nation, or other subsidiary government, and helps to safeguard individual liberty as well.

521 U.S. 898, 976–77 (1997) (citations omitted).

174.

This concern [that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia] is further supported by evidence about the practice of euthanasia in the Netherlands. . . . [The Dutch government’s own study] suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. . . . There is . . . a substantial dispute today about what the Dutch experience shows. Some commentators marshal evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity. . . . This evidence is contested.

521 U.S. 702, 734–35 (1997).

175. 536 U.S. 639, 725 (2002).

176. McCrudden, *supra* note 26, at 526 (“This approach appears to be much less frequent in courts outside the U.S.A.”); McCrudden, *supra* note 116, at 145 (concluding that the U.S. court relies on empirical evidence from abroad more regarding how a law operates in practice even though U.S. courts are generally “remarkably insular” in their approach to what amounts to persuasive legal authority).

B. The Legitimacy and Weight of ‘Empirical Use’

There is one fundamental objection to the use of comparative experience in constitutional empirical argument, which relies on the rejection of empirical arguments across the board. Thus, some authors reject the use of empirical arguments of any type, arguing that these kinds of arguments cannot solve constitutional questions.¹⁷⁷ However, the objection is weak, as courts do in fact rely on empirical predictions.

1. *The Practical Problems of Comparison.* The weight and legitimacy of comparative reasoning depends on successfully solving practical problems by drawing inferences from comparative empirical analysis. Whereas the legitimacy of comparative reasoning for empirical purposes raises few questions, there is much less agreement on whether comparative reasoning can in fact produce a sound basis for decision-making. Some are optimistic, but many are cautious.¹⁷⁸ There are several reasons for this.

First, courts often use economic and social data in making empirical arguments, as opposed to statutes or cases. Courts are often not equipped with the skills necessary to deal with this kind of data. Arguably, empirical analysis, or “constitutional fact-finding,” has not been the strongest skill of the U.S. Supreme Court.¹⁷⁹

Second, experience from one country might shed minimal light on its possible consequences in another country. This argument is usually brought forward by opponents of transplanting legal theories from one country to another.¹⁸⁰ Legal transplants might not work when there are significant differences between the “donor” and “recipient” countries. Political differences between countries are a great impediment to such transplants because differences in the form of

177. See e.g., Matthew A. Edwards, *Posner’s Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 328–33 (2002) (providing an overview of the controversy).

178. E.g., Tushnet, *supra* note 27, at 1269 (“[W]e might properly be rather skeptical about what we can truly learn when we think about constitutional experience elsewhere in functionalist terms.”).

179. See generally Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court’s Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279 (1995) (providing a critical overview of the Supreme Court).

180. See generally Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (discussing uses and misuses of foreign law in the process of law making); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995) (discussing the transplantation of legal rules and arguing for reforms in comparative law). For a prominent support of legal transplants, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2nd. ed. 1993).

government or the prominence of interest groups may be significant. Further, complex relationships between different institutions complicate the transferability of a singular or small portion of the legal system from one country to another¹⁸¹—“[P]articuliar institutions serve complex functions in each constitutional system, and there is little reason to think that directly appropriating an institution that functions well in one system will produce the same beneficial effects when it is inserted into another.”¹⁸² Essentially, the notion is that the performance of a certain legal institution in one country cannot be ascertained based on its performance in another.

Such deficiencies are alleviated by the insights that comparative political research has given, particularly the methodological advances of social sciences in comparative research. However, despite these advances, obstacles to gaining significant and meaningful empirical evidence remain.

2. *Comparative Politics and Empirical Inferences.* Drawing inferences from social and economic data is the basis for empirically oriented social sciences. A considerable amount of literature dealing with the methodology of drawing such inferences has been developed by social science research. Courts usually draw inferences from foreign experience in two ways—either by making references to a single foreign case,¹⁸³ or by utilizing several cases to ascertain trends and developments.¹⁸⁴

The most obvious advantage of case studies¹⁸⁵ is that they enable a court to analyze the experience of another country in detail. Thus, when referring to foreign experience, the court is essentially concluding that similar outcomes would be expected at home. This conclusion is based on the assumption that there is a causal linkage between rules and outcomes and that this causal linkage also exists in the dif-

181. See generally Kahn-Freund, *supra* note 180 (discussing the conditions that must be fulfilled in order for those preparing legislation to avail themselves of rules or institutions developed in foreign countries.)

182. Tushnet, *supra* note 27, at 1307.

183. *E.g.*, *Wash. v. Glucksberg*, 521 U.S. at 786 (replying on the experience of the Netherlands).

184. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Justice Breyer, relying on British and French experience). One of the briefs relied on the experience of Netherlands, Australia, and United Kingdom, see *infra* note 188.

185. On the usefulness and methodology of case studies in comparative politics, see B. GUY PETERS, *COMPARATIVE POLITICS: THEORY AND METHODS* 137–55 (1998); GARY KING, ROBERT KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 211 (1994).

ferent system, possibly even under different circumstances. Both of these assumptions are heavily contested in evaluating the usefulness of case studies.

The first assumption, that a causal link between rules and outcomes exists, presupposes that it is relatively easy to identify the consequences of adopting a rule. We could thus easily determine that what followed was caused by the rule, rather than merely being a coincidental byproduct of the rule. The critique to this assumption points to the fact that there is no certain way to establish the causal linkage between adoption of a rule and subsequent consequences. Any number of variables might actually have caused the observed outcome, not just the adoption of the rule. The experience is thus hard to generalize to a wider array of cases.¹⁸⁶ For example, a recognition of multi-variable causation was seen in *Zelman v. Simmons-Harris*, where the court noted that a long period without serious religious strife, such as experienced in Great Britain and in France, may be a consequence of a number of factors. Religious financing of schools may in fact have had nothing to do with this. Rather, other factors might have had such a strong influence on the relationships of the different religious groups that the financing of religious schools did not cause major upheavals.

Thus, relying on the experience of a single country or a small number of countries arguably raises the specter that arguments developed will be anecdotal. There is a danger that such constitutional comparative legal analysis would devolve into a contest of determining who can produce a better anecdote. This “battle of anecdotes” should not be viewed as a permissible legal strategy. For example, the deterrent effect of the death penalty cannot be dispositively proven by comparing crime rates in a death penalty state to rates in another state where the death penalty has been abolished.

For social scientists, selecting only those cases that support an argument, or selecting cases because they support an argument, is one of the basic violations of the rules of empirical inference.¹⁸⁷ *Zelman*, the school voucher case, is a good example of this error. The dissenters in *Zelman* relied on the experience of France, Great Britain, and the countries in the Balkans, where they found evidence that religious schools might have harmful effects. The dissenters never discussed

186. Tushnet, *supra* note 27, at 1265–67.

187. Epstein & King, *supra* note 11, 112–14

contrary foreign experience, as extensively discussed in the respondent's brief.¹⁸⁸

Case studies, when supported by sound theory, can assist in legal analysis, however, case studies by themselves do not warrant generalized legal conclusions.¹⁸⁹ Case studies at best offer tentative hypotheses that must be tested before any generalized conclusions can be made.¹⁹⁰ An anecdote may assist in refuting absolute claims, by referring to positive experience from other countries. This does not mean, however, that the foreign solution is necessarily reasonable or acceptable in the domestic context.

In addition to case studies, there is utility in relying on comparisons involving just a few countries as well as more in-depth, statistical studies involving a large number of countries. In the first instance, comparisons usually rely on evidence from countries selected consciously for the analysis. The "most similar systems design" method is based on the assumption that if two "otherwise similar" countries adopt different institutions or legal rules on one issue and obtain different outcomes, the difference in these outcomes is most probably explained by the difference in the institution or the rule.¹⁹¹ The basic argument in support of legal transplants is similar—any difference in outcomes between two countries must be caused by different legal rules, as the other variables are held constant.¹⁹² Such comparisons suffer from similar deficiencies as case studies, simply because of the differences among countries.

Statistical studies involving a large number of countries purportedly compensate for the impossibility of drawing general conclusions from case studies. The statistical methods (usually multiple regres-

188. Brief of Amici Curiae on Behalf of the Assoc. of Christian Schs. et al., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), available at 2001 WL 1699133 (discussing the experience of foreign countries, especially Netherlands, England and Australia). In fact, the discussion by Justice Breyer suggests the other practical problem with drawing empirical conclusions—that of comparability and transferability of the conclusions. He admits that the British and French experience might not be very significant because these countries are religiously more homogeneous than the United States.

189. *But see* Tushnet, *supra* note 27, at 1267 ("Inferences from small numbers are possible, however, if they are supplemented by a theoretical account that provides reasons for thinking that particular cases exemplify more general social tendencies.").

190. KING ET AL., *supra* note 185, at 210–11.

191. ADAM PRZEWORSKI & HENRY TEUNE, *THE LOGIC OF COMPARATIVE SOCIAL INQUIRY* 39 (1970).

192. Fontana, *supra* note 32, at 560 ("[T]he more similar to the United States the legal issue, legal system, legal history, and social situation that the other country faces, the more desirable the use of refined comparativism becomes.").

sion analyses) attempt to find relationships when controlling for the variation in other variables. The use of statistical methods in judicial decision-making seems limited, though, as such studies establish general trends that might not apply in specific cases.

These methodological problems suggest that conclusive evidence is almost never found through comparative analysis.¹⁹³ When courts base their decisions on inconclusive evidence, the results are neither beneficial to comparative law nor legal analysis. Some empirical inferences are clearly reasonable.

Many major issues in comparative politics are still open to argument. Thus, even the use of expert witnesses in the courtroom to explain and support the transferability of foreign law¹⁹⁴ to the domestic context helps little. Meaningful comparative studies take time, and the results of such studies would be far from conclusive evidence for judges.

C. Conclusion

The use of comparative experience to make empirical predictions is theoretically a cure for many ills of legal reasoning. However, its “wrong” use can be as harmful as the misapplication of any social science data. The “right” use of comparative experience, however, is enormously difficult to achieve. Even when accomplished, there are few clear-cut conclusions to be drawn from its application. The practical hopes for finding help from comparative analysis are thus modest.

The benefits of comparative empirical reasoning, however, appear to be greatest when foreign experience is taken from a very similar country or system, as is the case in comparative normative analysis. When using similar countries, comparative empirical reasoning benefits from the “most similar systems design,” whereas comparative normative analysis benefits from federal or international “brokerage.” Comparative experience can serve as a persuasive authority in

193. Jennifer Widner, *Comparative Politics and Comparative Law*, 46 AM. J. COMP. L. 739, 744–45 (1998) (suggesting that comparative research entails tradeoffs between accuracy, generality, and parsimony).

194. Fontana, *supra* note 32, at 556 (“a judge should encourage litigants to argue comparative constitutional law to courts . . . sometimes even using expert witnesses on foreign law who can help the judge determine the relevant comparative constitutional law and its transferability”); “If the court is concerned about contextual differences and how a comparative rule would work in the American context, the court may appoint someone trained to study differing institutional contexts who may look at sources beyond written constitutional, statutory, and decisional law to determine how the law has actually worked in another country.” *Id.* at 564

legal decision-making when utilized to compare the experiences of similar countries.

VIII. THE STRATEGY OF COMPARATIVE REASONING

Thus far, this article has discussed the role of comparative analysis in reaching conclusions in a legal argument and it is suggested that the reasons for inserting comparative elements into judicial opinions may be strategic. I will now turn more closely to the issue of strategic considerations and discuss the circumstances where one can expect to find such strategically-based comparative references. The following is a positive analysis. Its goal is not to persuade or justify comparative references, but to explain them. The question at hand is to determine why some courts utilize comparative analysis more than others.¹⁹⁵

A. Comparative Reasoning as an Element of Judicial Strategy

The search for explanations regarding comparative reasoning must begin with analyzing the motivation of the relevant actors—the judges or the court in general. This is a field that has drawn considerable attention from scholars from both political science¹⁹⁶ and the law.¹⁹⁷ Based on the motivation of judges, specific models can be set up. This can be done on two levels—individual and institutional.

B. Institutional Motivation to Engage in Comparative Reasoning

Institutional analysis evaluates the court as a unitary actor and deals with the goals of the court as a single institution. Institutional predictions look at the strategic behavior of the court, hypothesizing that the court wants to persuade its audience.¹⁹⁸ One prominent predictive model is based on separation-of-powers considerations, which hypothesize that the court wants to make policy that will not be overturned by subsequent executive or legislative action.¹⁹⁹ In applying

195. There are some attempts to explain this. See Tripathi, *supra* note 131, at 344–45; McCrudden, *supra* note 26, at 516–27.

196. *E.g.*, Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749 (1994).

197. See, *e.g.*, RICHARD A. POSNER, *OVERCOMING LAW* 117–23 (1995); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 832–44.

198. *E.g.*, McCormick, *supra* note 25 at 528–29 (1997) (“[A] case is cited because it contributes to convincing the relevant audience (which includes, but is by no means limited to, the immediate parties) of the appropriateness of the outcome.”).

199. The literature on this model is abundant. Besides political scientists, several legal scholars have engaged in this kind of analysis. See generally Jeffrey A. Segal, *Separation of*

this predictive model to a court's use of comparative reasoning, one would also predict that courts use comparative arguments in order to persuade other branches of government that the court's analysis is sound.

Relatively young constitutional courts, rather than established regimes, may find particular use for comparative experience based on the need to seek judicial legitimacy by referring to more experienced constitutional courts. For instance, young constitutional courts can justify entering certain areas of policymaking by referring to other courts which have acted similarly.²⁰⁰ In addition, these courts can persuade other governmental bodies that their judgment is substantively in line with the practice of other democratic countries.²⁰¹ This might be especially true for courts in countries undergoing political transition, in order to show the way for democratic development. Further, demonstrating that courts throughout the world have dealt with a particular question might help prevent accusations that the court is interfering with political questions more appropriately addressed by other branches of government.

This discussion pertains only to the legitimacy of the court, which is important for how its decisions will be perceived by other actors and institutions in the domestic complex, and not necessarily for making the legal argument better in and of itself. Moreover, for some courts referring to foreign case law might diminish the legitimacy of a holding, rather than enhance it.²⁰² Indeed, people may view borrow-

Powers Games in the Positive Theory of Congress and Courts, 91 AM. POL. SCI. REV. 28 (1997) (comparing models of voting behavior by Supreme Court justices); William N. Eskridge Jr., *Re-neging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (evaluating Supreme Court statutory interpretation, specifically in the civil rights context); Cornell W. Clayton, *The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be So Positive About the Judicialization of Politics?)*, 65 LAW & CONTEMP. PROBS. 69 (2002) (evaluating John Ferejohn's arguments on the judicialization of politics.)

200. For instance, on Zimbabwe, see Lovemore Madhuku, *The Impact of the European Court of Human Rights in Africa: The Zimbabwean Experience*, 8 AFR. J. INT'L. & COMP. L. 932, 943 (1996) (“[R]eferences to comparative international cases is a part of a well designed judicial policy of activism. Judges do not want to be seen to be openly making law. . . . [T]he ECHR has been a great help.”).

201. Slaughter, *supra* note 39, at 116 (“[B]y pointing to the actions of fellow states, a national court can reassure itself (and its government) that it will not disadvantage the nation in dealing with other nations. On the other hand, an advocate arguing before such a court can urge the government to get in line with fellow governments, suggesting the possibility of exclusion if a government remains a hold-out.”).

202. This seems to be the case with the U.S. Supreme Court. Even courts that use comparative case law often make the point that they do not apply foreign law, but just get ideas from it. *See supra* notes 70–75 and accompanying text.

ing ideas from foreign decisions as surrendering to “legal imperialism.”²⁰³ The courts in more powerful countries might be less enthusiastic about incorporating comparative analyses than courts in less powerful countries, as powerful political organs would normally not consider the country bound by the opinions and attitudes of other countries. For example, this might explain why the U.S. Supreme Court does not readily use foreign experience.²⁰⁴ The fact that the Court has remained on the sidelines in what has become a growing international dialogue may be troubling,²⁰⁵ but is an unfortunate result of strategic calculations. The desire to maintain legitimacy in the eyes of the domestic constituency might also explain the fact that courts in liberal democracies cite precedent from liberal systems only, to the exclusion of authoritarian regimes.²⁰⁶

Another reason why the courts are motivated to cite foreign precedents is that the court identifies itself with other courts around the world. By engaging in comparative analysis, the court may be seen as a part of an “international community” of higher courts. For instance, the American courts could exert influence on foreign judicial practices²⁰⁷ and spread the American way of thinking and legal reasoning, announcing the American “constitutional gospel.”²⁰⁸ One of the reasons that the U.S. Supreme Court has not been cited by for-

203. JAMES A. GARDINER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID TO LATIN AMERICA* (1980) (on the United States’ assistance to South America).

204. Louis Henkin, *Constitutionalism and Human Rights*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 392 (L. Henkin & A.J. Rosenthal eds., 1990) (“International influence on U.S. constitutional rights can only be recent, is smaller, and is less likely to be recognized. To some extent there is an unwillingness by Americans to admit such influence: that we should be governed by ideas from foreign sources is not congenial to us.”); McCrudden, *supra* note 26, at 519–20.

205. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 *COLUM. L. REV.* 537, 561 (1988) (finding the apparent reluctance of the U.S. Supreme Court to consider overseas interpretations of its own cases “troubling”); L’Heureux-Dubé, *supra* note 39, at 40 (“It is to be hoped . . . that the United States Supreme Court will begin to consider, in more depth, the opinions of other high courts around the world.”).

206. McCrudden, *supra* note 26, at 517–18.

207. Justice Stevens has explicitly argued this in a dissent: “The Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilized world—will be deeply disturbed by the ‘monstrous’ decision the Court announces today.” *United States v. Alvarez-Machain*, 504 U.S. 655, 687 (1992).

208. Fontana, *supra* note 32, at 571–72. (“If American constitutionalists are convinced that they have the right answer, one way to spread this constitutional gospel is through a respectful analysis of the decisions of other constitutional courts around the world.”) Again, whether this is the proper role of the court and the proper source of legitimacy is not clear.

foreign courts as often as it has in the past is arguably because of its hesitancy to engage in international discussions.²⁰⁹

C. Individual Motivation to Engage in Comparative Reasoning

Another perspective on comparative reasoning offered by political science models focuses on the attitudes and goals of individual justices. This approach is based on the fact that a court, as such, cannot have preferences and opinions—courts always reflect the preferences and opinions of the individual justices sitting on the bench. There is little controversy among political scientists that justices seek to influence legal policy. Political scientists do differ on their theories of how justices behave in order to achieve their policy objectives. The attitudinal model suggests that justices vote their sincere preferences.²¹⁰ According to rational choice models, judges are constrained by both internal and external factors. Internally, they need to accommodate and bargain in order to gain support from the other justices. Externally, they need to consider interaction between different branches.

Applying these notions to comparative constitutional analysis, we may posit the following hypotheses: attitudinalists would predict that judges use a comparative constitutional law argument whenever it supports their position.²¹¹ Under a rational choice model, however, a judge would not use comparative arguments so readily, but would first consider how these arguments might be perceived by the other institutions as well as by other judges. We know that three of the justices currently on the U.S. Supreme Court, namely Rehnquist,²¹² Scalia,²¹³ and Thomas,²¹⁴ have openly declared that they generally do not consider comparative analysis appropriate in legal analysis. Given these declarations, if the remaining Supreme Court justices desire to have an impact on their peer justices' votes, they should probably avoid the use of comparative arguments.

209. L'Heureux-Dubé, *supra* note 39, at 30, 37–38 (arguing that the opinions of the Rehnquist court, which does not often cite foreign precedents, are less often cited by foreign courts).

210. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (providing an overview of Supreme Court rationale for judicial policy).

211. In fact, almost all of the Justices on the U.S. Supreme Court have used comparative constitutional law arguments. *See* Fontana, *supra* note 32, at 545–48 for the overview.

212. *Atkins v. Virginia*, 536 U.S. at 2252–54 (Rehnquist, C.J., dissenting).

213. *Atkins*, 536 U.S. at 2264 (Scalia, J., dissenting).

214. *Patterson v. Texas*, 536 U.S. 984 (2002).

D. A Role for Law in Comparative Constitutional Reasoning

The individual and institutional approaches described above seem to neglect the position of law in judicial decision-making. Should we not expect to find comparative arguments in those cases when reference to foreign opinions makes the legal argument better? At the very least, the foreign experience might offer pedagogical guidance in finding good legal arguments or help the court to fill a vacuum that exists. Would we not expect a court to use comparative reasoning at least in the early years of its jurisprudence? After enough time has passed and domestic precedents suffice, the recourse to foreign judgments would become unnecessary.²¹⁵ Smithey, using case law from the Canadian Supreme Court and African Constitutional Court, finds evidence that judges rely on precedent because of its utility in cutting information costs and decreasing uncertainty.²¹⁶ Using foreign decisions might thus offer self-assurance for courts that they have employed a sound method of legal analysis.²¹⁷ However, self-assurance could be achieved after consulting foreign experience, and it would thus be unnecessary to engage in time-consuming discussions in the opinion, thereby saving the court from the possibility of embarrassing itself and the public by misunderstanding an area of foreign law.

We would still expect a court to use comparative constitutional arguments for legal purposes, if they help to improve a legal argument.²¹⁸ There are several factors that make comparative reasoning a

215. McCrudden, *supra* note 26, at 523–24.

216. Smithey, *supra* note 26. *See also* Koopmans, *supra* note 24, at 545 (stating that the use of comparative experience is “occasioned by the lawyer’s search for fresh perspectives, in particular when completely new legal problems are to be solved”); Glenn, *supra* note 89, at 280 (“The idea gains currency that the extent of borrowing of foreign authority is a simple function of the adequacy of local sources, and that local sources *can* be adequate if enough law is produced suitable to local conditions.”); Yash Ghai, *Sentinels of Liberty or Sheep in Wolf’s Clothing? Judicial Politics and the Hong Kong Bill of Rights*, 60 MOD. L. REV. 459, 479 (1997) (“The courts are willing to consider cases from foreign jurisdictions, although as some areas get explored, there is less need for them.”); Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 281 (1998) (“As the Court gains experience and precedents take root, the Court’s need to canvass international and foreign comparative jurisprudence for insights and guidance may diminish.”).

217. McCrudden, *supra* note 26, at 518 (describing a pedagogical impulse to bind countries to like-minded states).

218. Of course, no consensus as to what constitutes a perfectly legitimate argument exists. However, there are some lines of analysis that are universally accepted as being sources of legal argument, such as text, intention of the framers, precedent, and purpose of the statute. For a comparative overview, see D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 511–44 (D. Neil MacCormick

good argument in one court, but not another. For example, different societies might disagree on what appropriate legal decision-making entails. Whenever consensus exists that the constitution should be interpreted according to original intent behind a constitutional provision, references to foreign precedent are less likely to occur than when judges assert that the constitution should be interpreted in light of the evolving societal standards.²¹⁹

The foregoing analysis shows that for some courts comparative arguments are more compelling than for others. The courts in a federalist system or the courts bound by international law should use comparative arguments more readily than courts in a more independent system. Also, courts in similar societies and legal systems should be better equipped to use empirical arguments based on comparative analysis.

However, the legal model cannot account for the “soft” use of precedent. Citing and discussing foreign decisions does not add to a holding’s legal significance as a matter of precedent. There are necessarily other strategic factors which a court considers when citing foreign authorities. Maximizing an argument’s persuasive power is largely determined by legal strategy, and not by some abstract rules of what counts as a good legal argument.

IX. CONCLUSION

The analysis has shown that the use of comparative constitutional law by courts is rather limited. Discussing foreign judgments may provide inspiration for judges, but citing them in the opinion does not make the argument itself stronger in terms of precedential authority. Interpreting broad constitutional principles or balancing constitutional values needs to take into account the particular cultural and social setting of the court more than uncertain notions of “international consensus.” Learning from the experience abroad may help

& Robert S. Summers eds., 1991). This article cannot answer the empirical question whether the courts actually do follow legal arguments, a claim contested by political scientists. *See e.g.*, JEFFREY SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 279–311 (2002); HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999) (questioning whether the individual justices rarely are influenced by precedent). *But see* Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465 (2001) (seeking to highlight the way behavioralists approach the analysis of legal influence, to highlight differences with the legalist approach and to suggest additional avenues for a more complete analysis).

219. McCrudden, *supra* note 26, at 524–25.

to conceptualize legal approaches, but foreign experience will not provide information about a decision's potential domestic impact.

Yet, the analysis of comparative constitutional reasoning has shown potential utility. Empirically analyzing predictive theories on the use of comparative reasoning by different courts may help shed light on the strategy of judicial decision-making itself. Do the younger constitutional courts indeed discuss foreign decisions more than their more experienced counterparts? If yes, why do they do so? Is it because these courts want to convey to their public that they are interpreting law even though they have in fact entered the realm of politics—whatever the difference between these two disciplines may be? Or do courts refer to foreign experience because they genuinely want to reach the best legal conclusion? Support for the latter hypothesis would certainly be an important finding for those who believe that judges are generally not over-ambitious policy-makers, but sincerely aiming to reach the best legal decisions.