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Cover Page Footnote

J.D. Candidate, 2005, Fordham University School of Law. Thank you to my family and friends for their endless support. Thank you also to Professor James Fleming for suggesting the topic of comparative law and for always making time when he had very little.

A SHEEP IN WOLF'S CLOTHING: WHY THE DEBATE SURROUNDING COMPARATIVE CONSTITUTIONAL LAW IS SPECTACULARLY ORDINARY

*Matthew S. Raalf**

INTRODUCTION

In the summer of 2003, the U.S. Supreme Court took a step in expanding its substantive due process jurisprudence. In so doing, it also added to the debate surrounding the use of comparative constitutional law in constitutional interpretation. In *Lawrence v. Texas*[1] the Court overruled *Bowers v. Hardwick*[2] and held that the "vital interests in liberty and privacy"[3] derived from the Fourteenth Amendment of the U.S. Constitution[4] extend to homosexuals engaging in consensual sexual conduct.[5] Justice Kennedy, writing for the majority, stated:

> Of *even more* importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the

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1. 539 U.S. 558 (2003).

2. 478 U.S. 186, 190-91 (1986) (declining to extend the Court's privacy jurisprudence to include a right of homosexuals to engage in sodomy).

3. *Lawrence*, 539 U.S. at 564.

4. *See* U.S. Const. amend. XIV, § 1 (reading in pertinent part "nor shall any State deprive any person of life, liberty, or property, without due process of law").

5. *Lawrence*, 539 U.S. at 578-79. An in-depth discussion of the implications of *Lawrence* to the law of privacy is beyond the scope of this Note. For an extended discussion, see generally Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002-2003 Cato Sup. Ct. Rev. 21; James E. Fleming, Lawrence*'s Republic*, 39 Tulsa L. Rev. 563 (2004); and Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 Sup. Ct. Rev. 27 (2003).

> conduct were invalid under the European Convention on Human Rights.... Authoritative in all countries that are members of the Council of Europe (21 nations [in 1981], 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our *Western civilization*.[6]

Justice Kennedy's choice to cite to "Western civilization" was not unprecedented, nor particularly uncommon.[7] Even in the specific area of substantive due process, precedent exists for references to foreign practice.[8] But, as prevalent as the use of these materials is the disagreement about their relevance among judges and scholars.[9] One only needs to turn fifteen pages within the *Lawrence* opinion to see this unrest come to life in Justice Scalia's dissent:

> Much less do [constitutional rights] spring into existence, as the court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization,"... but rather rejected the claimed right to sodomy on the ground that such a right was not "deeply rooted in *this Nation's* history".... The Court's discussion of these foreign views... is therefore meaningless dicta ... since "this Court ... should not impose foreign moods, fads, or fashions on Americans."[10]

This split within the Court illustrates quite aptly the status of the debate about comparative materials in U.S. constitutional jurisprudence. America's commentators have engaged in a thoughtful debate that provides a poignant reply for each significant point.[11] This discourse, focused on whether comparative materials should be used in domestic constitutional jurisprudence, does not receive further comment here. Instead, this Note examines a situation of which *Lawrence* is the most recent reminder. Unanimously accepted or not, and with or without a legitimate foundation in American legal tradition, comparative materials have been cited in domestic

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6. *Lawrence*, 539 U.S. at 573 (emphasis added) (citing Dudgeon v. United Kingdom, 3 Eur. Ct. H.R. 40 (1981)).

7. At least one recent commentator indicates that such usage remains scarce. *See, e.g.*, Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 Yale J. Int'l L. 409, 413-23 (2003) (comparing the attitudes of the Supreme Courts of the United States and Canada with respect to foreign materials in constitutional decisions). However, especially recently, the frequency seems to be increasing. For several examples of the United States Supreme Court making comparative references, see *infra* Part I.C. Furthermore, such references have appeared in the lower federal courts. *See* Chen v. Ashcroft, 381 F.3d 221, 230-31 (3d Cir. 2004).

8. *See* Washington v. Glucksberg, 521 U.S. 702, 734 (1997) (discussing the experience of the Netherlands in assessing the state's interest in regulating assisted suicide). The decision also referred to a similar debate in other countries. *Id.* at 718 n.16.

9. *See infra* Part I.D.

10. *Lawrence*, 539 U.S. at 598 (quoting Foster v. Florida, 537 U.S. 990, 990 n. (2002) (Thomas, J., concurring in denial of certiorari)).

11. For further discussion of this debate, *see infra* Part I.B.

decisions.[12] Accordingly, this Note goes past the threshold debate about whether comparative materials should be used, and instead, compares the usage of such materials to other, more settled methods of constitutional adjudication to come to a better understanding of how comparative materials are used.

Part I of this Note examines typical uses of comparative materials in other constitutional democracies, and then outlines the main points in the domestic debate which, up to this point, has burdened their incorporation into American jurisprudence. This part then notes both the arrival of comparative materials in domestic jurisprudence and the illusory role they currently seem to play. In light of the arrival of comparative materials on the landscape of American jurisprudence, Part II discusses the recurring conflict between interpretivism and supplementation in constitutional interpretation, and assesses the common arguments from both sides regarding methods of constitutional interpretation. Part III contextualizes comparative materials, viewing them in light of the existing methods of constitutional jurisprudence discussed in Part II, and illustrates that while there may be right and wrong answers to legal issues, comparative materials cannot be considered "wrong" while other well-settled methods are considered "right."[13]

I. THE NEW AMERICAN ANOMALY

This part aims to reformulate the distinction between the global comparative discourse and American participation (or lack thereof). Rather than usage versus silence, the distinction can more aptly be

12. The U.S. Supreme Court lags far behind the rest of the world in the overall use of comparative materials. *See infra* Part I.A. However the list of instances in the U.S. Supreme Court's jurisprudence is not quite as meager as some commentators have tried to suggest. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 316-17 n.21 (2002) (citing "the world community" to help support the notion that mentally retarded offenders should not be executed); Knight v. Florida, 528 U.S. 990, 995-97 (1999) (Breyer, J., dissenting from denial of certiorari) (discussing Canada, the European Convention on Human Rights, the United Nations Human Rights Committee, Jamaica, and India to help support his assertion that the Court ought to address the topic of undue delays on death row); Printz v. United States, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting) (discussing the tension between centralized governments and local control in Switzerland, Germany, and the European Union); Washington v. Glucksberg, 521 U.S. 702, 718 n.16 (1997) (noting that Canada, Great Britain, New Zealand, and Australia are all "embroiled in similar debates" regarding physician-assisted suicide); New York v. United States, 326 U.S. 572, 583 n.5 (1946) (discussing Canada, Australia, and Brazil to support its decision regarding Congress's taxation of the states). Despite these examples, at least one commentator observes that comparative references "continue to be few and far between." Harding, *supra* note 7, at 419.

13. *Cf.* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147, 147-98 (1998) (using a similar style of analysis to show the reader that prior restraints may have no stronger justification in copyright than in other areas of protected speech).

described as usage versus somewhat illusory usage. Part I.A discusses the global usage of comparative materials as a point of comparison with domestic usage. Part I.B presents the debate that has surrounded the use of comparative materials in domestic constitutional jurisprudence. Part I.C then mentions several U.S. Supreme Court cases in which comparative materials were used. Finally, Part I.D examines the tentative manner in which the court and commentators have approached comparative materials.

A. *The Global Discourse*

The extensive use of comparative materials in foreign tribunals adds a new dimension to constitutional adjudication around the world.[14] One of the best examples of the breadth of the developing global discourse exists close to home. The Supreme Court of Canada "consistently looks to the law of other nations for guidance and inspiration."[15] And in virtually all foreign countries comparative references are made by "borrowing from, responding to, or otherwise interacting substantially with external sources of law, including foreign sources that do not fit directly into the home system's formal hierarchy of positive legal norms."[16] While at times American references to comparative materials are even more tentative and cursory than Justice Kennedy's in *Lawrence*,[17] foreign courts do "not merely cite th[ese] foreign cases in a passing, pro forma way, but

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14. *See, e.g.*, Paolo G. Carozza, *"My Friend is a Stranger": The Death Penalty and the Global* Ius Commune *of Human Rights*, 81 Tex. L. Rev. 1031 (2003) (discussing the development and depth of global discourse in the area of human rights); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819 (1999) (discussing various ways in which foreign courts tend to justify participation in comparative constitutional law). In the area of capital punishment alone, a great number of international cases have used comparative materials. *See, e.g.*, Alkotomanybirosag [Hungarian Constitutional Court], Dec. No. 23/1990 (X.31) AB (Oct. 24, 1990), *translated in* 1 E. Eur. Case Rep. Const. L. 177 (1994) (Hungary); Bachan Singh v. Punjab (1983) 1 S.C.R. 145 (India); Lithuanian Constitutional Court, Case no. 2/98 (Dec. 9, 1998), *available at* http://www.lrkt.lt/doc_links/main.htm; Public Prosecutor v. Lau Kee Hoo, (1983) M.L.J. 157 (Malay. Fed. Ct. 1982) (Malaysia) (citing and discussing *Punjab*, among others, including foreign cases); State v. Makwanyane, 1995 (3) SALR 391 (CC) (South Africa); Republic v. Mbushuu, (1994) T.L.R. 146 (Tanzan. High Ct.) (Tanzania).

15. Harding, *supra* note 7, at 411. Harding points out that between 1984 and 1994, 23% of all cases cited by the Supreme Court of Canada were foreign. *Id.* at 416. For examples of these cases, see *Morgentaler v. The Queen*, [1988] S.C.R. 30, and *The Queen v. Keegstra*, [1990] S.C.R. 697, both of which discuss large areas of U.S. constitutional doctrine.

16. Carozza, *supra* note 14, at 1045. For a sampling of cases which engage in dialogue with foreign materials in this manner, see *supra* notes 14-15.

17. *See supra* note 6 and accompanying text. For instance, in *Atkins*, Justice Stevens buried his very cursory reference to comparative materials within a long footnote, and referred to "the world community" instead of citing any specific authority. 536 U.S. at 316 n.21.

instead engage[] their substantive reasoning and judgments."[18] Even Great Britain seems to have relaxed its constitutional isolation faster than the United States.[19]

Contrary to American practice, in other countries comparative decisions are cited, discussed at length, and ultimately rejected or used as persuasive reasoning for a similar result.[20] One such example is the Supreme Court of Nigeria addressing the constitutionality of capital punishment in *Kalu v. State*.[21] In *Kalu*, the court looked at several international capital punishment cases, eventually dividing them into two categories: those which recognized a qualified right to life, and others which recognized an absolute right to life.[22] After concluding that Nigeria's constitutional provision had more in common with the qualified rights, the court upheld the constitutionality of capital punishment in Nigeria.[23] Another example comes from an opinion which is "undoubtedly one of the more extraordinary judicial opinions regarding the death penalty ever written."[24] Justice P.N. Baghwati of the Supreme Court of India, in *Bachan Singh v. Punjab*,[25] so extensively dissected the results and rationales of a wide variety of foreign sources, that his dissent was not released until two years after the court had announced its decision.[26] He did not simply make

18. Carozza, *supra* note 14, at 1034. For specific examples of such foreign case law, see *infra* note 20.

19. Harding, *supra* note 7, at 416-17. At least one commentator regards the United States and England as having very similar attitudes toward foreign law. *See* H. Patrick Glen, *Persuasive Authority*, 32 McGill L.J. 261, 283-84 (1987).

20. *See, e.g.*, Bachan Singh v. Punjab (1983) 1 S.C.R. 145, 312-21 (India) (Baghwati, J., dissenting); Lithuanian Constitutional Court, Case no. 2/98 (Dec. 9, 1998), *available at* http://www.lrkt.lt/doc_links/main.htm; Public Prosecutor v. Lau Kee Hoo, (1983) M.L.J. 157, 159-60 (Malay. Fed. Ct. 1982) (Malaysia) (citing and discussing *Punjab*, among other cases, including United States case law); State v. Makwanyane, 1995 (3) SALR 391, 415-41 (CC) (South Africa); Republic v. Mbushuu, (1994) T.L.R. 146, 156-57 (High Ct.) (Tanzania). In fact, at least one of these courts went beyond thorough and respectful treatment of foreign persuasive authority, to the point of showing deference to a foreign tribunal. A Tanzanian court of appeals wrote: "We agree with the learned Trial Judge . . . that court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in our Constitution. That is what we have done *following Furman v[.] Georgia*, in finding that the death penalty is inhuman, cruel, and degrading punishment." Mbushuu v. Republic, [1995] T.L.R. 97, 116 (Ct. App.) (Tanz.) (emphasis added) (citing Furman v. Georgia, 408 U.S. 238 (1972)). For a discussion of the U.S. Supreme Court's approach, by contrast, see *infra* Part I.D.1.

21. *See* Carozza, *supra* note 14, at 1061-62 (citing *Kalu v. State*, (1998) 12 S.C.N.J. 1 (Nig.) (Nigeria)).

22. *See id.* at 1062 (finding qualified rights to life in Tanzania, Zimbabwe, India, the United States, and Jamaica, but finding the rights to life in South Africa and Hungary to be absolute).

23. *See id.*

24. *Id.* at 1047.

25. (1983) 1 S.C.R. at 145.

26. *See* Carozza, *supra* note 14, at 1047-50. In fact, the long delay resulted from the fact that Justice Baghwati drew from an incredible range of materials that undeniably included comparative materials. Notably, the majority had also used

references to other nations, but instead he discussed at length and responded to the arguments and observations raised elsewhere.[27] Strikingly (from the United States' perspective), these in-depth and deferential examinations of comparative materials are normally conducted without self-assuring references to the superior authoritativeness of local law.[28]

The key distinction is not that other countries engage in comparative constitutional practice and the United States does not.[29] While this phenomenon is still a significant difference, whether foreign materials are used might soon become a subordinate issue to how they are used.[30] The above examples of comparativism are accepted within the global community,[31] and it is the length and richness of the discussion, and the perceived degree of deference given to the comparative materials, that would be most atypical and controversial in a U.S. Supreme Court opinion.[32] Part I.B briefly outlines some common arguments made within the context of this controversy.

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comparative materials in its decision (unlike the asymmetry in *Lawrence*) but Baghwati went into far greater detail in using them. *See Punjab*, (1983) 1 S.C.R. at 256-371.

27. Carozza, *supra* note 14, at 1049; *see also Punjab*, (1983) 1 S.C.R. at 312-21.

28. *See* Carozza, *supra* note 14, at 1083 (observing, after conducting a wide survey of many foreign cases, that only two constitutional courts (Nigeria and Tanzania) asserted the superiority of local law, and even in those cases, "the judges made significant efforts to acknowledge and discuss foreign norms").

29. This assertion may have been a point of contention several years ago. It seems that this is still a difficult perception to shed. A few commentators continue to evaluate this difference in quantitative terms, suggesting that the key distinction lies in sheer numbers. *See* Harding *supra* note 7, at 418-20 (expressing the main difference between the Supreme Courts of the United States and Canada in numbers as well as through in-depth discussion of the foreign sources). *But see supra* note 12; *infra* Part I.C. (both providing examples of comparative references by the U.S. Supreme Court).

30. *See* Carozza, *supra* note 14, at 1032-36 (noting that as of yet, the United States is missing out on the richness of the global judicial discussion in the area of human rights, despite instances of mentioning foreign sources in passing). *See generally* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539 (2001) (arguing that comparative materials ought to be used in a manner he describes as "refined comparativism").

31. *See also* William A. Schabas, The Death Penalty As Cruel Treatment and Torture (1996) (noting that there is now a multinational body of comparative law on the death penalty). *See generally* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771 (1997).

32. It can be easily predicted at the very least that Justice Scalia would have reacted with even more hostility had Justice Kennedy gone to great lengths to uncover the European Court's rationale and adopt it in the majority opinion. *See supra* note 10 and accompanying text. Along with his dissent in *Lawrence*, Justice Scalia has consistently objected to the use of comparative materials on the few occasions when they have been used. *See, e.g.*, Atkins v. Virginia 536 U.S. 304, 324-25 (2002) (joining Chief Justice Rehnquist); Printz v. United States, 521 U.S. 898, 921 n.11 (1997); Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989).

B. *The Domestic "Threshold" Debate*

1. The Threshold Objections to Using Comparative Materials

The threshold debate about comparative materials seems to be cut along very predictable and very familiar lines.[33] One commentator has observed that "[o]riginalism and textualism are particularly incompatible with comparative analysis,"[34] because comparativism necessarily looks beyond the text and original intent. Thus, objections to the use of comparative materials have originalist or positivist flavors, while the responses tend to sound in competing theories of interpretation like living constitutionalism.[35] The related concerns of exceptionalism and particularism[36] contain both normative and pragmatic concerns about the use of comparative materials which provide the basis for objection. These two concepts and the arguments derived from them will now be addressed in turn, followed by some common responses.

a. *Exceptionalism*

Exceptionalism can be defined by the assertion that "the United States Constitution is unique and that the experience surrounding it is unique."[37] Implied in this definition is the belief that exclusively domestic sources should be used to interpret the Constitution. Reference to other nations, for the exceptionalist, contradicts this

33. For further discussion of the lines which are alluded to here, see *infra* notes 160-65 and accompanying text (discussing the difference between interpretivists and supplementors), and *infra* Parts II.A-D (applying the arguments of each school of thought to several methods of constitutional interpretation).

34. Louis J. Blum, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 San Diego L. Rev. 157, 162 (2002). Original intent and text are the interpretivists' primary methods of interpretation. *See infra* notes 162-63 and accompanying text.

35. *See infra* Part I.B.2 (discussing some of the responses to these threshold objections). For an illustration of the concept of living constitutionalism, see generally William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433 (1986).

36. Though different terminology seems to be repeatedly used, these are the two terms which tend to be used to describe these concepts. *See* Blum, *supra* note 34, at 163 (noting that the two concepts are very similar); James E. Fleming, *We the Exceptional American People*, 11 Const. Comment. 355, 355-56 (1994) (discussing exceptionalism); Fontana, *supra* note 30, at 616-18 (discussing particularism); *see also* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225 (1999) (not using the same terms, but clearly describing the same concepts as the main lines of objection to the use of comparative materials).

37. Blum, *supra* note 34, at 163. This characteristic has been observed by other commentators as well. *See, e.g.*, Mark Tushnet, Taking the Constitution Away from the Courts 181-82, 188-93 (1999) (characterizing the U.S. Constitution as an expression of national character); Harding, *supra* note 7, at 421 (not using the term exceptionalism but discussing the prevailing American attitudes which could be explained only by the belief that the American Constitution is unique).

belief.[38] To many, "allegiance to the Constitution and a certain kind of respect for the Founding, and for crucial episodes in our history, are central to what it means to be an American."[39] Comparative constitutionalism breaks this allegiance and offends exceptionalist values.[40]

By and large, the Supreme Court has cooperated with exceptionalists. Professor Sarah Harding contends that "[d]espite the fact that a few U.S. Supreme Court Justices have expressed interest in comparative judicial reasoning, the Court as a whole has so far hesitated to move in that direction."[41] This reluctance might be based in part on an "enforcement" model of constitutional adjudication rather than a "dialogical" model.[42] According to Professor Harding, a dialogical court, such as the Supreme Court of Canada, looks for its lower courts to engage it in an ongoing legal conversation, while an enforcement-oriented high court is constantly seeking to re-assert its unilateral control over the law of the land.[43] Put into the comparative context, if the U.S. Constitution is uniquely American, and the Supreme Court of the United States is its sole "enforcer," then it follows that the Court would seek to "establish a monopoly on constitutional interpretation."[44] In the first instance, this tendency

38. *See* Blum, *supra* note 34, at 162-63. Blum names exceptionalism as one of the "significant objections to comparative analysis in constitutional adjudication," but then gives no particular reason why. *Id.* at 162. However the very definition that "the United States Constitution is unique and that the experience surrounding it is unique," would seem to indicate that the exceptionalist would be offended by the mere presence of comparative materials, because to conform to the interpretation of a foreign tribunal would challenge this sense of uniqueness. *See* Bruce Ackerman, We the People: Foundations 3 n.12 (1991) (expressing his opinion that the United States should no longer allow European influence to help define its Constitution); Michael Kammen, *The United States Constitution, Public Opinion, and the Problem of American Exceptionalism, in* The United States Constitution: Roots, Rights and Responsibilities 267 (A.E. Dick Howard ed., 1992) (agreeing with a tradition of American exceptionalism).

39. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L.J. 1717, 1719 (2003).

40. *See generally* Ackerman, *supra* note 38 (attributing the vitality of the American constitutional tradition to American exceptionalism which helps lead to the conclusion that the exceptionalist sustains a fundamental discomfort when interpretive borders are breached).

41. Harding, *supra* note 7, at 423.

42. For a comparison of the Supreme Courts of the United States (which is identified as embodying the enforcement model) and Canada (which is identified as embodying the dialogical model), see *id.* at 423-51.

43. *See id.*

44. *Id.* at 450. Harding argues that the U.S. Supreme Court seeks to limit any outside influence by limiting possible sources of constitutional interpretation, whether they are foreign or domestic: "In short, ensuring coherence through the limiting of sources and participants, rather than persuasion through dialogue, is at the heart of the U.S. Supreme Court's approach to judicial review." *Id.* at 451; *see also* Larry D. Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 4, 14 (2001) ("The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the *only* institution empowered to speak with authority when it comes to the

pertains to the Court's relationship with domestic authority when it comes to interpreting the Constitution,[45] but it is not a great leap for Professor Harding to suggest that the "refusal to engage foreign legal systems arguably stems from similar concerns about maintaining a tight grip on authority."[46] After all, if some Justices are unwilling to trust other American institutions (including lower courts) to contribute to constitutional interpretation, then they likely would be even more reluctant to trust foreign sources.[47] With the institutional self-image of the court limiting the amount and character of materials it is willing to consider,[48] combined with the exceptionalistic concerns put forth by some,[49] the resistance that comparative materials have faced seems understandable.

While it is easy to identify the exceptionalist's objection to comparative constitutional methodology in the normative sense, their objections to its use might leave more pragmatically oriented proponents unconvinced without practical concerns to animate a more concrete fear: that comparative materials will lead to wrong answers. Exceptionalists base their pragmatic criticisms on the idea that it is impossible to accurately measure and account for the inevitable variations between legal systems.[50] While modern constitutional

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meaning of the Constitution."). By contrast, Professor Harding argues that the Supreme Court of Canada does not seek to monopolize the final authority on constitutional issues, and therefore has no reservations about engaging in dialogue with other domestic sources, as well as the constitutional analysis of other nations. Harding, *supra* note 7, at 423-39.

45. The Court, in interacting with other domestic bodies, seeks primarily to establish authority. It

> views itself not as a mediator or partner in an active dialogue but rather as a local law enforcer in the strictest sense. Through direct assertions of authority over both legislative bodies and lower courts, the Court has established itself as very much the final... exclusive authority in constitutional interpretation.

Harding, *supra* note 7, at 451.

46. *Id.*

47. At least one commentator seems convinced that the Court turns to its own precedent more than any other source to solve constitutional questions. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996); David A. Strauss, *Freedom of Speech and the Common-Law Constitution, in* Eternally Vigilant: Free Speech in the Modern Era 32 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457 (2001). For a discussion of the common law method of interpretation, see *infra* Part II.C.

48. *See supra* notes 44-47 and accompanying text.

49. *See supra* notes 37-40 and accompanying text.

50. *See, e.g.*, Daniel H. Foote, *The Roles of Comparative Law: Inaugural Lecture for the Dan Fenno Henderson Professorship in East Asian Legal Studies*, 73 Wash. L. Rev. 25, 36 (1998); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and its Discontents*, 17 Nw. J. Int'l. L. & Bus. 354, 355 (1997). "Direct borrowing or transplantation of legal solutions or doctrines will, in the opinion of many legal scholars, be severely impacted by fundamental cultural and social differences." Blum, *supra* note 34, at 163. Blum notes that other critics could counter this contention by claiming that basic constitutional problems are similar enough so that borrowing

democracies tend to be similar, critics in the United States complain that "[i]dentifying common functions across constitutional systems is always problematic because doing so inevitably omits institutional details unique to the systems being compared."[51]

First, the transplantation problem leads to the worry that perceived similarity can be misleading, so that problems can arise when the constitutional texts are nearly the same, or even identical.[52] Language in many modern constitutions is derived from the U.S. Constitution, so similarities are fairly common.[53] However, the exceptionalist can argue that much of the meaning behind these words frequently develops well after their drafting and in the context of a particular society.[54] This norm of constitutional interpretation creates a funhouse-mirror lens through which comparative materials must be viewed.[55] It is quite possible that two very similar terms found in different constitutions have taken shape in very different ways.[56] In

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solutions or at least rationale is not particularly problematic. *Id.* at 164; *see also* David Beatty, Constitutional Law in Theory and Practice 10 (1995) (arguing that principles of constitutional law are "the same around the world"). For further discussion, see *infra* notes 105-07 and accompanying text; *infra* Part III.B.1 (discussing the transplantation problem of comparative materials relative to similar problems of other methods).

51. Tushnet, *supra* note 36, at 1239.

52. *See* Choudhry, *supra* note 14, at 830 (using the example of China, which uses words like rights and liberties in its Constitution, but pointing out that it may very well be using them differently).

53. *See* Harding, *supra* note 7, at 414 n.25 (asserting that "the influence of the United States Bill of Rights is certainly apparent in the Canadian Charter [of Rights and Freedoms]"). For instance, the Canadian Charter guarantees freedoms of religion, expression, press and the media, assembly, association, livelihood, life, liberty, security of person, security from search and seizure, illegal detentions, from cruel and unusual punishment, from self-incrimination, and a due process equivalent which assures principles of fundamental justice. *See* Can Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §§ 2-12.

54. For instance, the freedom of speech promised in the U.S. Constitution was still being defined almost two hundred years after the clause was drafted. *See* Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *see also* Walter F. Murphy et al., American Constitutional Interpretation 5 (3rd ed. 2003) ("Moreover, a constitutional text may appear to be, or indeed be, quite different after interpretation from what it was before.").

55. Professor James Fleming uses the metaphor of a mirror when U.S. interpreters look to certain other constitutions. *See* Fleming, *supra* note 36, at 365 (using Germany and Japan as examples). A commentator arguing the transplantation problem might be inclined to build on this metaphor by calling it a funhouse mirror to account for the distortion.

56. The work of some comparative legal scholars includes emphasis on difference where there appears to be none. *See, e.g.*, William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 Wash. L. Rev. 945, 954 (1986) (discussing his hypothesis that words familiar to the U.S. Constitution found in the Chinese Constitution may mean different things because of their respective cultural contexts).

such a case, one of the two nations borrowing from the other may fall victim to a false sense of applicability.[57]

Of course, there is also the problem of obvious differences. The exceptionalist would argue that a comparativist needs to make the claim that all differences are irrelevant in order to overcome the transplantation problem.[58] To produce a convincing theory as to why an infinite list of possible variables is irrelevant would be a tedious task. In doing so, one may begin to question whether the worth of comparative materials does not outweigh their burden.[59] And, even assuming that it is possible to explain away the variables in some cases, one commentator wonders if the endeavor would narrow the range of appropriate situations for comparative materials to the point where their use would probably be far less common than the status quo.[60] This Note next discusses particularism, which, although quite similar to exceptionalism, leads to some distinct criticisms of comparative materials.

b. *Particularism*

Legal particularism, as distinguished from exceptionalism, simply says that constitutions are unique expressions of national identity or character.[61] While the exceptionalist claims that the American Constitution is a unique expression of national character,[62] "[p]articularists claim that a constitution is defined by its people."[63] Other commentators have defined the relationship in reverse. "Indeed, for some countries, constitutions are an integral component of national identity, and reflect one way in which those nations view themselves as different from others."[64] Whether a constitution defines its people or the national identity defines a constitution, it is important to note that particularistic attitudes cause considerable

57. *See* Choudhry, *supra* note 14, at 830 ("[I]t is beyond dispute that legal texts are inherently ambiguous and require reference to extra-textual sources for their interpretation and application in concrete cases.").

58. *See* Tushnet, *supra* note 36, at 1267 (describing a method to correct this translation problem by generalizing away from case-specific peculiarities, then admitting that this is also a troublesome endeavor).

59. *See id.* (noting that an account as to why certain variables are irrelevant is rarely produced).

60. *See id.* at 1265 (noting that the number of cases where even a limited number of variables are adequately accounted for will be small).

61. *See* Blum, *supra* note 34, at 163; Choudhry, *supra* note 14, at 830-32.

62. *See supra* note 37 and accompanying text.

63. Blum, *supra* note 34, at 163 (citing Choudhry, *supra* note 14, at 830-32).

64. Choudhry, *supra* note 14, at 822-23. Some particularists have asserted that using comparative materials is a violation of the nature of American constitutional law. *See* Alford, *supra* note 56, at 946-47; George P. Fletcher, *Constitutional Identity*, 14 Cardozo L. Rev. 737, 739 (1993); Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 Cardozo L. Rev. 865, 877 (1993).

normative discomfort with the use of comparative materials in a manner which is much the same as exceptionalism.[65]

This subtle difference between the two concepts[66] raises a different pragmatic question. How can one asserting particularistic views explain how the rest of the world's constitutional democracies have engaged in such in-depth comparative constitutional discourse,[67] while still asserting that a constitution is a unique expression of national character? It is possible that most other nations do not think in particularist terms and have no such fundamental discomfort with the idea of other nations influencing their constitutional jurisprudence.[68] However, this reply fails to satisfy the claim that all written constitutions enjoy a unique relationship with their people. The more satisfying answer has centered around the concept of a constitutional "license"[69] to use comparative materials. If the constitution of the nation in question authorizes such use, then it can be argued that it is the will of the people of that nation to look to the global community, and the particularist should be satisfied.[70] However, it is a rarity to find a constitution which explicitly authorizes comparative references.[71] It is far more common to see formulations of what might be called an implied authorization, as is done in the constitutions of India and Canada.[72] In much the same way as an American

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65. Actually, the two concepts are so similar that a couple of commentators seem to have expressed exceptionalist notions in particularist terms. *See* Choudhry, *supra* note 14, at 832 (clearly collapsing the two concepts into one in stating "[a]rguably, legal particularism accounts for the steadfast refusal of American courts to rely on foreign case law when interpreting the United States Constitution"); *see also* Fontana, *supra* note 30, at 615 (stating that a particularist, rather than an exceptionalist, argues that the U.S. Constitution is uniquely American).

66. *See supra* text accompanying notes 62-63.

67. *See supra* Part I.A.

68. Development in the Law—International Criminal Law, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 Harv. L. Rev. 2049, 2062-63 (2001) [hereinafter *The International Judicial Dialogue*] (noting that many countries seem to engage in comparative analysis without much reservation).

69. *See* Tushnet, *supra* note 36, at 1231; *The International Judicial Dialogue*, *supra* note 68, at 2062-64.

70. *The International Judicial Dialogue*, *supra* note 68, at 2063-64 (suggesting that the constitutional courts of Canada, Jamaica, India, and South Africa reflect general global legal norms).

71. The South African Bill of Rights is one such rarity. *See* Carozza, *supra* note 14, at 1056; Fontana, *supra* note 30, at 545. The interim constitution of 1993 provided as follows:

> In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.

State v. Makwanyane, 1995 (3) SALR 391, 413 (CC) (South Africa). The wording has since been altered. *See* S. Afr. Const. ch. 2, § 39.

72. *See, e.g.*, *The International Judicial Dialogue*, *supra* note 68, at 2063-64

constitutional interpreter would go beyond the text and use an original intent or custom argument, constitutional interpreters in these countries assert that it is a part of the fabric of both the constitution and culture of the particular nation to be involved in the global discourse, with or without explicit textual authorization.[73] This idea of implied authorization may be helpful for the particularist since "[m]ost of the world's constitutions were written, and most of its constitutional courts were created, within the context of the international constitutional dialogue,"[74] while the particularist will assert that U.S constitutional history was "developed and nurtured" within an isolated and purely domestic tradition.[75] Given that in the U.S. Constitution there is no textual authorization and, according to some scholars, relatively weak footing for implied authorization,[76] a particularist can argue that while the rich international discourse is justified, so too is the general American abstention from it.[77]

2. The Responses to the Threshold Objections

There are two main responses to the normative discomfort articulated in Part I.B.1. First, proponents of comparative materials attack the normative attitudes of the critics by pointing out that Americans may have changed what it means to be uniquely American.

(discussing the fact that most other constitutions were written within the context of a greater global discourse, and therefore comparative constitutional law was easily incorporated into the interpretation of these constitutions). For examples of these implied authorizations at work, see *Kindler v. Canada*, [1991] 2 S.C.R. 779, 856 (Canada); *Bachan Singh v. Punjab*, (1983) 1 S.C.R. 145, 223-25 (India).

73. In fact, South Africa seems to fit this mold in addition to its textual license. In much the same way as the countries which lack any specific text, South Africans consider their constitution to have been ratified within this global community and, therefore, to carry with it an international character. *See The International Judicial Dialogue*, *supra* note 68, at 2063-64. The President of the South African Court, Arthur Chaskalson, went so far as to say that international precedents would demand attention even without the textual hook. *See* Makwanyane, 1995 (3) SA at 413.

74. *The International Judicial Dialogue*, *supra* note 68, at 2064 (further noting that "[t]he Indian constitution (1949), the Jamaican constitution (1962), the Canadian Charter of Rights and Freedoms (1982), and the South African Interim Constitution (1993) were drafted largely by looking to foreign and international experience"); *see also* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 Stan. L. Rev. 1863, 1880 (2003) (pointing out in the context of human rights that an international regime "now forms part of the context of national constitutional regimes, which may make it necessary to reconsider institutional analyses conducted at the national level in isolation").

75. *The International Judicial Dialogue*, *supra* note 68, at 2069-70. *But see infra* note 76.

76. The American argument for an implied license may not be as weak as the particularist might try to suggest. For further discussion, see *infra* notes 91-92 and accompanying text.

77. *See* Tushnet, *supra* note 36, at 1229-30 (arguing that before the U.S. courts engage in comparative constitutional law they need to look to other nations' justifications for using it and articulate a justification of their own).

One way that this point is articulated is through the notion of implied constitutional amendments.[78] This notion asserts that during key eras in American history, there were certain fundamental shifts in the way the Constitution was perceived.[79] While this theory was not developed to justify the use of comparative constitutional law,[80] it is useful to illustrate that fundamental constitutional understandings can and have changed by the will of the American people.[81] By this logic, exceptionalism and particularism and discomfort with the judicial use of comparative materials can be uprooted as more Americans come to believe that the U.S. Supreme Court ought to use comparative materials.[82] It is possible that within a changing society, comparativism "fits with other important trends in contemporary American constitutional jurisprudence."[83] If this is so then at least the normative concerns begin to quiet.

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78. The notion of informal unwritten amendments suggests that society's understanding of the Constitution (and its meaning), if not the text itself, can change as society changes. *See, e.g.*, Ackerman, *supra* note 38, at 22; Ronald Dworkin, Freedom's Law 10 (1996) [hereinafter Dworkin, Freedom's Law]; Ronald Dworkin, Law's Empire 254-59 (1986) [hereinafter Dworkin, Law's Empire]; Richard A. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Cal. L. Rev. 535, 543 (1999).

79. *See* Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 Ark. L. Rev. 1185, 1207-08 (2003). In fact, American constitutional law has been thought of as a "multigenerational project." Strauss, *supra* note 39, at 1719; *see also* Neil Colman McCabe, *"Our Federalism," Not Theirs: Judicial Comparative Federalism in the U.S.*, 40 S. Tex. L. Rev. 541 (1999) (arguing that there is no binding American principle of isolationism rooted into its legal culture). Professor Neil Colman McCabe went so far as to call exceptionalist sentiments "the kind of self-satisfied strutting that gives chauvinism a bad name." *Id.* at 543 (quoting J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 1005 n.134 (1998)).

80. Bruce Ackerman developed this theory as a way of understanding modern constitutional law through his notion of a dualistic democracy. *See* Ackerman, *supra* note 38; Bruce Ackerman, We the People: Transformations (1998).

81. Justice William Brennan was a proponent of this view, often called "living constitutionalism." *See* Brennan, *supra* note 35; *see also* Charles L. Black Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103, 1115-17 (1986) (discussing an analogous progression of philosophy on the Court in the context of the incorporation of the First Amendment, and urging future generations to pursue the same changes by being "a vise that can handle the big beams"). The foremost opponent on the court, Justice Scalia, has asserted that most of the court has turned to living constitutionalism, and therefore the Constitution has become somewhat pliable. *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 39-40 (1997).

82. It is becoming difficult to find recent literature which supports Justice Scalia's dissenting view in *Lawrence*. *See supra* note 10 and accompanying text. The most recent commentators seem to support the notion that comparative materials could be useful. For instance, David Fontana states that the U.S. Supreme Court "must enter the new century with a willingness to deal with a rapidly changing world." Fontana, *supra* note 30, at 622. He further notes that other nations "are developing sophisticated judicial systems with talented judges who write cogent and compelling opinions." *Id.*; *see* Tushnet, *supra* note 36 (posing and attempting to answer the question of how to learn from comparative materials).

83. Fontana, *supra* note 30, at 570.

In addition to abstract notions of implied amendments, some supporters of comparative materials cite the increasing diversity among the American public as a reason to believe that they no longer harbor exceptionalistic or particularistic attitudes.[84] A similar argument suggests that many Americans feel at least as connected to the current constitutional courts of other nations, as they do to the founders of this nation.[85] According to Professor David Strauss, "[r]elatively few people alive today are even descended from the people who participated in the great constitutional decisions of the past."[86] This, in light of the long way American society and the world as a whole have come since the eighteenth century, provides advocates of comparativism another reason to believe that the normative objections to comparative materials are going the way of the dinosaur.[87]

A second criticism of the normative concerns with comparativism is that far from being a recipe for constitutional disaster, differences may actually be useful.[88] Comparative materials can be used to gain perspective and provide a check on deviations from contemporary values and morals which are to guide the Court's decision.[89] It has been argued that uniqueness, which is relied upon so centrally by both

84. *See id.* at 622 (pointing out that America is becoming more and more multicultural); Strauss, *supra* note 39, at 1723-24 (noting a gradual detachment from the founding generation as time continues to pass). In light of the United States' rich and still expanding diversity, one might wonder if so many Americans would experience such severe discomfort with comparative materials, the fear of which has continued to hold them back. *See* Fontana, *supra* note 30, at 622 (suggesting that American constitutional law needs to deal with changes such as multiculturalism and that therefore comparativism is an appropriate measure).

85. *See* Strauss, *supra* note 39, at 1723-24.

86. *Id.* at 1724.

87. Professor Strauss argues that adherence to the Constitution and its interpretation should be justified and thought of in terms that "can appeal to any reasonable member of our society today, even to people who reject the idea of belonging to any American cultural or quasi-ethnic tradition." *Id.; see also supra* notes 78-83 and accompanying text.

88. *See* Choudhry, *supra* note 14, at 856-57. In fact, some nations which tend to believe that their constitutions are unique still engage in the use of comparative materials, without articulating a basis for some constitutional authorization, express or otherwise, precisely because they are different. *See* Carozza, *supra* note 14 (discussing many nations which use comparative materials and various reasons for doing so). In addition, despite its textual license, South Africa still maintains that its constitution is unique and requires unique interpretation. *See* Du Plessis v. De Klerk, 1996 (3) SALR 850, 911 (CC) (South Africa) (asserting that "when all is said and done, the answer to the question before us is to be sought, first and last; in our Constitution"). The South African Constitutional Court engages in comparativism, however, not only because of its textual license, *see supra* notes 70-71 and accompanying text, but also on the theory that comparison does not undermine difference, but in fact furthers it. *See* Choudhry, *supra* note 14, at 855-56.

89. In cases which call to value judgments, wise judges will "consider international approaches . . . to be an aid in correcting, or balancing, that inevitable subjectivity of the judges that is due to their being situated in a specific historical and cultural context." Carozza, *supra* note 14, at 1065.

exceptionalists and particularists, relies on comparative materials because the concept of difference is itself "defined in comparative terms," and without them, a commitment to constitutional difference would be impossible.[90]

While the preceding responses address the provincial attitudes of exceptionalism and particularism, there are still pragmatic concerns to overcome. With respect to particularism, there is the problem that the U.S. Constitution does not seem to authorize the use of comparative materials.[91] With that notion in mind, at least one theorist has attempted to formulate an implied authorization from the U.S. Constitution.[92] According to Professor Mark Tushnet, in the same way as some other nations seem to, Americans could simply cite their recognition of themselves as participants in a larger society to authorize comparativism in domestic cases.[93] However, this might be unconvincing without a more mature switch in national philosophy.[94] Instead, Tushnet bases implied authorization on a particular interpreter's conception of the Constitution.[95] But perhaps the most convincing case for an implied license is made in the name of

90. Choudhry, *supra* note 14, at 857. As applied to constitutions, it follows that "a constitution is only unique by comparison to other constitutions that share some feature or characteristic which that constitution does not." *Id.* at 856 (using the example of a general limitations clause in the Canadian Charter of Rights and Freedoms, which was only different because it had not been done in *other constitutions*). *See* Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) § 1.

91. *See supra* notes 74-77 and accompanying text.

92. *See* Tushnet, *supra* note 36 (using the concepts of functionalism, expressivism, and bricolage to provide such a license).

93. For further explanation of the idea that other nations relying on a self-perception that they are participants in a global community to license the use of comparative materials, see *The International Judicial Dialogue*, *supra* note 68, at 2062-64. *See, e.g.*, Kindler v. Canada, [1991] 2 S.C.R. 779, 856 (Can.) (liberally using comparative materials without explicit authorization); Bachan Singh v. Punjab, (1983) 1 S.C.R. 145, 196-225 (India) (same); Pratt v. Attorney-General for Jamaica, [1994] 2 A.C. 1, 30-31 (P.C. 1993) (appeal taken from Jamaica) (same). Professor Tushnet, in his discussion of expressionism, which views a constitution as a national expression and sounds very akin to particularism as described in this Note, seems to suggest that within such a theory, the very desire of a people to look to comparative materials abroad is enough to license the same. *See* Tushnet, *supra* note 36, at 1269-85.

94. For a summary of the argument that isolationist views are dying out in contemporary American society, see *supra* notes 78-87 and accompanying text.

95. *See* Tushnet, *supra* note 36, at 1238-1306. Another approach has been observed in Justice Breyer's jurisprudence. Tushnet suggests that Justice Breyer seems to believe the usage of comparative materials is authorized when more fundamental methods of constitutional interpretation fail to settle a question. *See id.* at 1233; *see also* Printz v. United States, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting). Justice Breyer's approach seems to be that general interpretive methods might provide a license when a doctrine (federalism, in this case) relies on something (in this case, empirical judgments), that comparative materials provide relatively conveniently.

originalism.[96] In *Printz v. United States*, Justice Scalia contended that comparative analysis was "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."[97] Supporters of comparativism can argue that he was only half right,[98] because the Constitution demonstrates "a degree of openness to international cooperation that was innovative for the eighteenth century" as they drafted the Constitution.[99] Contrary to Justice Scalia's view, they argue that "[c]omparative constitutional analysis by the Framers argues in favor of, not against, the same analysis by later interpreters."[100] Working with such a flexible concept, an interpreter in the U.S. could sketch a plausible license to use comparative materials.

The far more difficult and long-standing debate on the pragmatic side has been the transplantation problem.[101] One attempt to overcome this is to argue that comparative materials may be used in order to maintain a difference.[102] This contention notices that transplantation concerns erroneously assume that comparative

96. Because originalism licenses comparative materials on their critic's own turf, it may be the best case for an American license. *See supra* note 34 and accompanying text (mentioning that originalists tend to be those who object to comparative materials). For a detailed discussion of the evidence for a constitutional license to use comparative materials in the name of original intent and history, see Fontana, *supra* note 30, at 574-591.

97. *Printz*, 521 U.S. at 921 n.11.

98. The second half of this assertion, that comparative materials were relevant to writing the Constitution, is well supported. *See, e.g.*, Bernard Bailyn, The Ideological Origins of the American Revolution (1967) (same); Carl Becker, The Declaration of Independence: A Study in the History of Political Ideas (Vintage Books 1958) (1922) (same); Peter S. Onuf, The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787 (1983) (same); Clinton Rossiter, 1787: The Grand Convention (1966) (same); Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1969) (same); David A.J. Richards, *Revolution and Constitutionalism in America*, 14 Cardozo L. Rev. 577, 584-86 (1993) (discussing the comparative influence on the Founding Era). The first half of this assertion, however, that comparative materials are irrelevant to subsequent interpretation, has been questioned on original intent grounds. *See, e.g.*, The Declaration of Independence para. 1 (U.S. 1776) (speaking of a "decent respect to the opinions of mankind"); Fontana, *supra* note 30, at 579 (asserting that the evidence for Justice Scalia's distinction is insufficient to suggest that the founders intended for comparative references to cease at ratification).

99. Neuman, *supra* note 74, at 1899.

100. McCabe, *supra* note 79, at 544. He further notes that "[w]hen the Framers . . . wished to ban a particular method of constitutional interpretation, they expressly said so." *Id.* The Ninth Amendment is cited as an example, while it is noted that "[t]he Federalist Papers do not demonstrate any original intent of the Framers to ban comparative constitutional analysis as a method of interpretation." *Id.* at 545.

101. *See, e.g.*, Oscar G. Chase, *Legal Processes and National Culture*, 5 Cardozo J. Int'l & Comp. L. 1, 1-2 (1997) (arguing that "differences present formidable barriers" and using the civil litigation rules of Germany as an example); Fontana, *supra* note 30, at 616-17 (referring to the transplantation problem as a long featured debate); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 7 (1974).

102. *See supra* notes 88-90 and accompanying text.

materials will somehow bind the domestic court and poison local doctrine.[103] The implicit argument is that if one thinks of comparative materials as simply a point of comparison, rather than precedent, then transplantation concerns begin to diminish.

However, despite diminishing the transplantation problem, confining the use of comparative materials to maintain a better understanding of why the American constitutional tradition is unique confines their use to a small area. This boundary has already been breached, considering that in *Lawrence*, Justice Kennedy used comparative materials to help justify a constitutional right, and in so doing overruled an American constitutional precedent.[104] When trying to address the transplantation problem more generally, supporters state that "courts should be more aware that there are important historical, cultural, and legal relationships between the United States and other countries . . . ."[105] Additionally, as the United States becomes more multicultural, links between the traditions and cultures of other countries and the American fabric strengthen.[106] To some, these differences now only require "slightly different accents and emphases, but they do not appear in any way to limit or control the otherwise global scope of the discourse."[107] Furthermore, the supporter of comparative materials can argue that if one is troubled by the transplantation problem, one should also be troubled by the direct application of the intent of the founding generation as much as by consideration of a recent case from the Supreme Court of Canada, for instance.[108] It is quite plausible that reference to American society circa 1800 makes for a more distorted translation than would reference to its constitutional neighbors today.[109] This reality has helped contribute to the argument that most of American

103. *See* Harding, *supra* note 7, at 417 (noting that the use of comparative materials does not require that they be followed or perceived to be binding).

104. *See supra* notes 1-2, 6 and accompanying text.

105. Fontana, *supra* note 30, at 550.

106. *See id.* at 573. For further discussion, see *supra* notes 84-87 and accompanying text.

107. *See* Carozza, *supra* note 14, at 1078.

108. Canada's Charter of Rights and Freedoms was modeled closely after the U.S. Bill of Rights, and it has been frequently interpreted over the last twenty years. *See* Harding, *supra* note 7, at 414; *supra* note 53 (listing some freedoms secured by the Canadian Charter). A lack of familiarity with the Founding Era is the basis for this problem. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 557 n.151 (2003) (discussing the possibility that the best use of the writings of the founders is to acquaint the modern-day interpreter to the legal world of the framing).

109. *See, e.g.*, Konrad Zweigert & Hein Kötz, 1 Introduction to Comparative Law 15 (Tony Weir trans., 2d ed. 1987) (stating that comparativism offers "the opportunity for finding the 'better solution' for [t]his time and place"); Fontana, *supra* note 30, at 566-72 (arguing that comparative materials provide an updated perspective and more complete set of "data points," otherwise unavailable to the interpreter); *see also* Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993) (discussing the difficulties inherent in translating across the ages from the present to the founding).

constitutional interpretation has failed to account for far too many variables already.[110] For instance, whatever peaceful aspirations the founders may have had for the U.S. system of federalism ended with the Civil War.[111] "One could argue that continuing to refer to the Framers' intent in this regard is akin to studying the drawings and notes of the architect for an edifice that collapsed long ago."[112] Despite these concerns, however, reference to the framers' intent is far from obsolete.[113]

The above material is a sample of the philosophic debate surrounding the incorporation of comparative materials into U.S. constitutional interpretation. It seems destined to continue with little chance of coming to rest one way or the other. However, while the debate continues, Part I.C will demonstrate that comparative materials have arrived, in some capacity, in American constitutional jurisprudence.

C. *The Domestic Arrival of Comparative Materials*

The unresolved philosophical issues burdening comparative constitutional law create new issues in and of themselves. But in order to explore these issues one must move past the threshold debate without an adequate resolution to it. Even the most vocal critic cannot deny that the use of comparative materials is growing: their very presence moves the inquiry past the threshold debate of whether comparative materials should be used, to the more pertinent question of how they should be used.

Many of the Supreme Court's current Justices have spent some time overseas engaging in the comparative discussions which tend to cause so much controversy.[114] In front of his international brethren, Chief Justice Rehnquist has taken a pro-comparativism position, despite

110. Fontana, *supra* note 30, at 570 (noting that "[c]onstitutional scholarship focusing on the judiciary and on [textual] constitutional interpretation has failed to sufficiently analyze important extralegal changes such as multiculturalism and technological advancement"); *see also* Erwin N. Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 Harv. L. Rev. 81, 81 (1960) (noting that the Supreme Court is isolated and remote); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 4 (1998) (asserting that the Court should not look backwards for "true" meanings but instead find "workable solutions to the complex and rapidly changing legal problems of our age").

111. McCabe, *supra* note 79, at 546.

112. *Id.* (quoting Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 Yale L. & Pol'y Rev. 187, 188 (1996)).

113. *See infra* Part II.B.1 (asserting that original intent is very prevalent in American constitutional jurisprudence and is widely regarded as a legitimate way to interpret the Constitution).

114. *See* Fontana, *supra* note 30, at 548-49 (discussing Chief Justice Rehnquist and Justices O'Connor and Breyer).

objecting to it in at least one of his opinions.[115] Further proof of this slow shift in attitude can be observed in "a latent practice in American constitutional adjudication: American judges have occasionally been using, and should continue to use, comparative constitutional law...."[116] And, in light of a handful of comparative cases, it is unclear that the U.S. Supreme Court militantly maintains the isolationist philosophy ascribed to it by some commentators.[117]

In 1997, in *Raines v. Byrd*,[118] the Court held that members of Congress, although authorized by the Line Item Veto Act[119] to challenge its constitutionality,[120] lacked standing to do so.[121] In so holding, Chief Justice Rehnquist observed that "some European constitutional courts operate under one or another variant of such a regime."[122] In *Washington v. Glucksberg*,[123] the Court refused to extend constitutional due process protections to physician-assisted suicide.[124] In doing so, Chief Justice Rehnquist made extensive use of

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115. Chief Justice Rehnquist, in his dissenting opinion, objected to the use of comparative materials in *Atkins v. Virginia*, 536 U.S. 304, 324-25 (2002), then made the following remarks at a ceremony celebrating the fortieth anniversary of the German Basic Law:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to the decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process. The United States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving constitutional courts in the world today . . . that approach will be changed in the near future.

William Rehnquist, Constitutional Courts—Comparative Remarks (1989), *reprinted in* Germany and Its Basic Law: Past, Present, and Future—A German American Symposium 411, 412 (Paul Kirhchof & Donald P. Kommers eds., 1993).

116. Fontana, *supra* note 30, at 542. Fontana goes on to note, however, that they have been used "in a certain kind of way." *Id.* For a further discussion of the effects statements like this have caused, see *infra* Part I.D.2.

117. *See, e.g.*, Blum, *supra* note 34 (noting some of the criticisms and the relative unwillingness of the U.S. Supreme Court to use comparative materials despite discussing *Knight v. Florida*, 528 U.S. 990, 995-98 (1999); *Raines v. Byrd*, 521 U.S. 811, 828 (1997); *Washington v. Glucksberg*, 521 U.S. 702, 732-34 (1997); and *Culombe v. Connecticut*, 367 U.S. 568, 577-601 (1961), in all of which the Court used comparative materials, although to varying degrees).

118. 521 U.S. at 811.

119. 2 U.S.C. §§ 691-692 (2000).

120. *See id.* § 692(a)(1).

121. *Raines*, 521 U.S. at 830.

122. *Id.* at 828.

123. 521 U.S. 702 (1997).

124. *Id.* at 728.

comparative materials, discussing the experience of the Netherlands to inform his own decision.[125]

The Chief Justice is not alone in citing comparative sources. In *Knight v. Florida*,[126] Justice Breyer dissented from a denial of certiorari.[127] The petitioner had claimed that excessive delay in execution violated the Eighth Amendment's prohibition against cruel and unusual punishment.[128] In arguing for certiorari, Justice Breyer made extensive use of comparative materials in an attempt to show that the topic of undue delay on death row is one which the U.S. Supreme Court ought to address.[129]

Another example of the U.S Supreme Court's use of these materials can be found in *Atkins v. Virginia*, where the court held that execution of mentally retarded criminals violates the Eighth Amendment of the U.S. Constitution.[130] In support of this holding, Justice Stevens noted that "the world community" had condemned imposition of the death penalty on mentally retarded offenders.[131] This short list of examples is not exhaustive, as the Supreme Court's periodic sampling of foreign authority slowly builds.[132] Following suit recently, comparative

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125. *Id.* at 734. Chief Justice Rehnquist wrote the following:

> This concern [about the difficulty in policing physician-assisted suicide] is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patient's explicit consent.

Id. In addition, he had referred to Canada, Great Britain, New Zealand, and Australia earlier in his opinion. *See id.* at 718 n.16.

126. 528 U.S. 990 (1999).

127. *See id.* at 993.

128. *Id.* (Justice Breyer referring to the delay as "astonishingly long").

129. *Id.* at 995-98. Justice Breyer cites Jamaica, India, Zimbabwe, and the European Court of Human Rights for the proposition that undue delay on death row violates human rights, and cites Canada and the United Nations Human Rights Committee as opposition, in order to support granting certiorari. *See id.* at 995-96.

130. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

131. *Id.* at 316 n.21. Interestingly, Chief Justice Rehnquist, after citing foreign authority in both *Raines* and *Glucksberg*, spoke out against reference to it in *Atkins*. *See id.* at 324-25 (Rehnquist, C.J., dissenting) ("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.")).

132. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 389 (1989) (Brennan, J., dissenting) (arguing that nearly all of Western Europe has abolished the death penalty, twenty-seven countries ignore it in practice, and sixty-five countries which have capital punishment specifically prohibit the execution of juveniles); Culombe v. Connecticut, 367 U.S. 568, 588-90 (1961) (distinguishing India and Scotland from the United States, England, and Canada); Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (citing a United Nations survey of the laws of eighty-four nations and asserting that "[t]he civilized nations of the world are in virtual unanimity"); Bunting v. Oregon, 243 U.S. 426, 439 (1917) (citing the average daily working times in Australia, Great

references can now be found in the lower federal courts.[133] However, as discussed below, this usage has yet to mature to a level comparable to that of the global discourse.

D. *Building a Rhetorical Asterisk*[134]

Both the Court and commentators have contributed to the underlying notion that comparative materials, although mentioned, have little or no influence in domestic constitutional jurisprudence.

1. The Supreme Court

Despite the slow accumulation of comparative references discussed above, their character is more properly described as a "polite reference," rather than persuasive authority.[135] The Justices seem very tentative, despite some enthusiastic comments to the justices of other nations,[136] about using comparative materials in any substantive or substantial way. Instead of dissecting the reasoning of foreign courts, a few commentators have noted that the U.S. Supreme Court tends to treat the existence of international norms "merely as empirically observable facts rather than expressions of considered judgments."[137] Both *Raines*[138] and *Glucksberg*[139] provide examples of

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Britain, Denmark, Norway, Sweden, France, Switzerland, Germany, Belgium, Italy, Austria, and Russia). For further examples, see *supra* note 12.

133. *See* Fontana, *supra* note 30, at 549. For an example of such a case, see *supra* note 7.

134. The term "rhetorical asterisk" is being used here to refer to the sum effect of all the ways in which comparative materials tend to be tempered, whether structurally within opinions, with no probative value disclaimers, or by advocating weak versions of comparativism.

135. Harding, *supra* note 7, at 420. This characterization supports the notion that the real difference between the United States and other nations in the comparative law context is not in quantity of instances (though this continues to be a difference), but in their quality. *See supra* Part I.A. For specific illustrations of such a minimal usage, see, for example, *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Breyer, J., dissenting from denial of certiorari); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring); *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999); *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari); *Barclays Bank v. Franchise Tax Board*, 512 U.S. 298, 324 n.22 (1994); and *American Dredging Co. v. Miller*, 510 U.S. 443, 466 (1994) (Kennedy, J. dissenting).

136. *See supra* notes 114-15 and accompanying text.

137. Carozza, *supra* note 14, at 1086-87; *see also* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 Duke L.J. 223, 247 (2001) ("Unlike the use of comparative experience in other nations' constitutional courts . . . references to foreign constitutional experience in the U.S. Reports rarely concern the reasoning of other constitutional courts."); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 Oxford J. Legal Stud. 499, 526 (2000) ("Foreign law, including foreign judicial decisions, is currently interesting to US courts, if at all, largely as data rather than as statements of legal or moral values in

this treatment.[140] Despite this limited use, the Justices have also found it necessary at times to explicitly note that comparative materials have little bearing on the result and are not binding. For instance, in *Knight*, Justice Breyer used comparative materials extensively,[141] only to add that they are "useful even though not binding."[142]

Furthermore, at times only the most diligent of readers will even discover the foreign reference. *Atkins*[143] provides the best example of this:

> In the main text of the opinion, the Court measures the existence of a national consensus regarding the "evolving standards of decency" that mark the progress of a maturing society. Only after reaching a conclusion on the basis of legislative developments in the United States does Justice Stevens add a long footnote to list "[a]dditional evidence" providing "further support to our conclusion that there is a consensus among those who have addressed the issue." There, almost buried among the opinions of medical associations, religious organizations, and general polling data is this single sentence: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[144]

Finally, a few Justices completely reject any place for comparative materials in domestic opinions and speak out against them even as they are used. In *Stanford v. Kentucky*, Justice Scalia asserted that "it is *American* conceptions of decency that are dispositive," and that the Court's interpretive task was to decide what was "accepted among our people."[145] Justice Thomas also seems to think that comparativism has no place in domestic adjudication. In *Foster v. Florida*, he asserted that "this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."[146]

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their own right."). For examples of U.S. cases using foreign law as such, see *supra* note 132.

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

139. Washington v. Glucksberg, 521 U.S. 702 (1997).

140. *See* Blum, *supra* note 34, at 184-86, 187-92 (discussing in some detail the way in which comparative materials were used in these two instances).

141. One commentator observed that in Justice Breyer's opinion, "[f]oreign sources are the predominant authority cited." *Id.* at 180.

142. Knight v. Florida, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of certiorari).

143. Atkins v. Virginia, 536 U.S. 304 (2002).

144. Carozza, *supra* note 14, at 1032 (citing *Atkins*, 536 U.S. at 316 n.21).

145. Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989). Justice Scalia has echoed this sentiment a few times. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); *Atkins*, 536 U.S. at 324-25 (joining Chief Justice Rehnquist); Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

146. Foster v. Florida, 537 U.S. 990, 990 n. (2002). Justice Scalia quoted this language in *Lawrence*. *See supra* note 10 and accompanying text.

2. Commentators

The Justices are not alone in feeling the effects of the threshold debate. Commentators also have burdened comparative materials with various "asterisks," in the form of cautionary disclaimers reminding the reader of the limited authority of comparative materials, despite trying to lend them support.[147] Writers advocating the use of comparative materials have constructed sets of limitations on them, possibly as a defense mechanism to deflect objections.[148] Whether sketching a framework of "refined comparativism"[149] or making fairly tenuous connections to theories of the Constitution,[150] by the time some commentators have justified the appearance of comparative materials, they have considerably diminished their role as a method of interpretation.[151] One such example goes to great lengths to support comparativism, only to add the self-evident disclaimer that it "should be viewed as a form of persuasive authority, or authority that attracts adherence as opposed to obliging it."[152] At least one commentator has even suggested that the only thing which saves comparative materials from their criticisms is their shortcomings.[153] Because comparative materials have "been used in constitutional interpretation such that they are not central to any conclusions reached, and that the resulting interpretation of the Constitution could stand independently of foreign support," they can be tolerated.[154] And, despite their more prevalent use, it seems that some commentators cling to isolationist conceptions of the Court, and continue to note that "the U.S. Supreme Court rarely treats foreign constitutional or other legal experience as relevant."[155] The threshold debate seems to have caused great discomfort with comparative

147. *See, e.g.*, Blum, *supra* note 34 (both arguing that comparative materials can be used, but only if limited in one way or another); Fontana, *supra* note 30.

148. After sketching the threshold concerns, it has been the case that writers try to show that the usage of comparative materials is sufficiently limited so as not to be offensive to those who tend to believe that the American experience is unique. This cautious endorsement is animated by the fear that any attempt to go straight through the threshold debate will meet too many dissenters to gain acceptance. *See* Blum, *supra* note 34, at 160; Fontana, *supra* note 30, at 556-74.

149. *See* Fontana, *supra* note 30.

150. *See* Tushnet, *supra* note 36.

151. *See, e.g.*, Blum, *supra* note 34 (seemingly gutting comparative materials so as to silence critics who would raise issues like the transplantation problem).

152. Fontana, *supra* note 30, at 557. At times, the Justices have also used language like this. *See supra* notes 135-46 and accompanying text.

153. *See* Blum, *supra* note 34 (arguing throughout that the justification for the use of comparative materials lies in their lack of probative value).

154. *Id.* at 171.

155. *See* Harding, *supra* note 7, at 421; *see also* Glen, *supra* note 19, at 287 (discussing an American legal implosion); Marian McKenna, *Introduction: A Legacy of Questions*, *in* The Canadian and American Constitutions in Comparative Perspective ix, xi (Marian C. McKenna ed., 1993) (noting that scholarship in the United States continues to look inward).

materials, and their use is likely to remain transparent so long as each mention of them requires burdensome rhetoric to the effect that they serve little purpose.

Therefore, despite their arrival in domestic opinions, comparative materials carry with them a sort of rhetorical asterisk in the form of various disclaimers or their structural usage in a particular opinion.[156] This burden leaves their role in judicial opinions largely undefined and marginalized.[157] The arrival of comparative materials then, is not yet an arrival. As one commentator put it, any meaningful insight from foreign materials remains "just beyond the current reach of U.S. law."[158] One very apt sentence by Professor Tushnet illustrates both the problem, the rhetorical asterisk, and without being aware of it, its solution: "[M]y claim is, in the end, rather modest: U.S. courts can *sometimes* gain insights into the appropriate interpretation of the U.S. Constitution by a *cautious and careful* analysis of constitutional experience elsewhere."[159]

II. A CONSTITUTIONAL STANDOFF: THE INTERPRETIVIST SUPPLEMENTOR DIVIDE

Part I showed that while comparative references are on the rise, a rhetorical asterisk burdens them and is preventing the United States from enjoying the full breadth of the global discourse. This part contextualizes the threshold debate via a brief discussion of the American constitutional jurisprudence that provides the backdrop for it.

As mentioned above, the threshold debate is cut along familiar lines.[160] Methods of constitutional interpretation, and the proponents of them, can, for the most part, be put into two categories: interpretivists and supplementors.[161] To some extent, the Justices who

156. *See supra* note 142 and accompanying text (for an example of such a disclaimer); *supra* notes 143-44 and accompanying text (for an example of such structural usage).

157. While the Court has begun to use comparative materials, it continues to use them in the ways described above. *Compare supra* Part I.D.1 (discussing the ways in which comparative materials are used in the U.S.), *with supra* Part I.A (discussing the richer global discourse). For a sampling of these cases, see *supra* notes 118-32 and accompanying text. It has been suggested that perpetuating this is the inability of American Constitutional scholarship to endorse the use of these materials in a more unqualified way. *See* Fontana, *supra* note 30, at 545-46.

158. Carozza, *supra* note 14, at 1033.

159. Tushnet, *supra* note 36, at 1228 (emphasis added).

160. *See supra* notes 33-35 and accompanying text.

161. *See, e.g.*, John Hart Ely, Democracy and Distrust 1 (1980) (mentioning the "long-standing dispute in constitutional theory"); Michael Perry, The Constitution, The Courts, and Human Rights 10-11 (1982) (discussing a distinction between interpretive and non-interpretive (supplemental) review); Dorf *supra* note 110, at 4 (not using the term "supplementor" but expressing a similar categorical constitutional divide); *cf.* Richard Posner, *Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 281, 285 (1979) (discussing the difference between positive and normative

have been most hostile to the use of comparative materials are those who could be described as interpretivists.[162] The interpretivist is likely to view the Constitution as positive law, and tends to rely very heavily on the constitutional text and original understanding.[163] For others, who could be referred to as supplementors, the Constitution is a normative attempt to embody fundamental justice, to be interpreted

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economic analyses of the law, which parallels interpretivists (positivist) and supplementors (normative)).

162. *See* David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 Harv. J.L. & Pub. Pol'y 795, 829 (1996) (describing the approach of the interpretivists and alluding to their views on non-interpretivist methods). The school of constitutional interpretation referred to as "interpretivists" privilege the text and the intent of the founders. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1209-17 (1987); *see also* Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 363-72 (1977) (discussing why, in his view, the Constitution ought to be "fixed" in time, and therefore the document and the original intention should be paramount); Ely, *supra* note 161, at 1-9 (describing interpretivism); Perry, *supra* note 161, at 10-11 (calling interpretivism a theory which claims only interpretive judicial review is legitimate, and all "non-interpretive" review is illegitimate); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 11, 14 (1971) (asserting that substantive due process is an "improper doctrine," because the Court must decide on liberties without guidance from the text of the Constitution, and attempting to formulate an original intent justification for *Brown v. Board of Education*, 347 U.S. 483 (1954)); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 374-76 (1981) (noting the tension between "perfectionists" and interpretivists because perfectionists look to sources beyond the constitutional text and original intent).

163. *See* Fallon, *supra* note 162, at 1232 (describing the positivist approach as one of "disinterested social science," suggesting a more mechanical application of rules and principles derived from the Constitution); *see also* Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L.Q. 695, 695 (1979) (representing the interpretivist school of thought as one which includes textual analysis, including structural implications, and "historical discourse"). Not surprisingly, supplemental methods of constitutional interpretation are criticized by interpretivists as "nothing but results-oriented judicial creation, enabling the judge to impose his idiosyncratic preferences as positive law." Crump, *supra* note 162, at 830. At times the Justices assert interpretivist attitudes in the opinions themselves, in order to justify avoiding making value-infused decisions. *See, e.g.*, Harris v. McCrae, 448 U.S. 297, 326 (1980) (asserting that the lower courts exceeded their power in weighing interests, as the role of the courts is limited to interpreting the Constitution); Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963) ("It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition . . . .'" (citation omitted); Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955) (asserting that the court will not strike down unwise legislation with only the vague language of the Due Process Clause). Possibly in an attempt to stigmatize methods that overtly reach past the text and original intent, positivists have described other methods of constitutional interpretation with the oxymoron, non-interpretivist interpretation. *See* Crump, *supra* note 162, at 829-30. For further discussion of the interpretivist's perspective, see Berger, *supra* note 162; Perry, *supra* note 161, at 10-11; and Bork, *supra* note 162.

more broadly or abstractly.[164] The roots of this dichotomy run right down to the foundation of constitutional law.[165]

With this dichotomy in mind, the comparative materials debate might be just one more battlefield on which this larger war is being fought. Therefore, the exchange discussed in Part I might be better understood in the context of arguments for and against other and better established methods of constitutional interpretation. To that end, this part discusses such arguments in order to compare them in Part III to those which burden comparative materials.

A. *Textual Interpretation*

1. The Interpretivists' Perspective

The interpretivists do not have to expend much effort justifying their reliance on the constitutional text. So long as interpretivists are able to base a decision on the text, their cries about the inferiority of other methods seem to hold water.[166] Proponents of other methods of

164. *See* Fallon, *supra* note 162, at 1232 (suggesting the normative approach concerns itself more with "ought"). This ought-oriented approach naturally lends itself to a broader constitutional approach to effectuate not just correct, but also desirable results. Supporters of normative conceptions of the Constitution might reply to the originalists with the claim that while judicial abuse of extra-textual methods is properly characterized as non-interpretivism, responsible use of them is properly referred to as supplementation, and is necessary for a workable constitutional regime. *See* Crump, *supra* note 162, at 831 (suggesting that while supplementation is legitimate and indeed necessary, rejecting the view of a pure interpretivist, a distinction between supplementation and non-interpretivism ought to be preserved, "with the difference between the two being a matter of degree"); *see also* Thomas C. Grey, *The Constitution as Scripture*, 37 Stan L. Rev. 1, 1-2 (1984) (arguing that "we are all interpretivists," with the only question revolving around whether and how much to supplement). For further articulation of this perspective, including the assertion that the Constitution consists of abstract principles, see Brennan, *supra* note 35; Ronald Dworkin, Life's Dominion 118-47 (1994).

165. Crump, *supra* note 162, at 829-30. *Compare, e.g.*, Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990) (advocating interpretivist approaches), *and* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989), *with* Dworkin, *supra* note 164, at 118-47 (also advocating views which implicitly favor supplementation rather than narrow adherence to original intent), *and* Brennan, *supra* note 35 (generally advocating the supplementor's conception of the Constitution), *and* Grey, *supra* note 164, at 1-2 (arguing that supplementation is also an interpretivist stance, the only difference being the degree to which one supplements and when).

166. *See* Fallon, *supra* note 162, at 1195 (noting that "[w]here the text speaks clearly and unambiguously . . . its plain meaning is dispositive"). For further examples, see *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974); *United States v. Butler*, 297 U.S. 1, 62-64 (1936); and *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 381 (1821). *See also* Philip Bobbitt, Constitutional Fate 24-28 (1982); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional 'Interpretation,'* 58 S. Cal. L. Rev. 551, 554, 591 (1985) (arguing that judges believe they ought to maintain a connection to the constitutional text and that this textual focus ought to be maintained); Fredrick Schauer, *An Essay on Constitutional*

constitutional interpretation are unwilling to contest an interpretivist on the claim that the text ought to be regarded as the primary method.[167] And, naturally, interpretivists feel that as long as they stay reasonably close to the constitutional text, they are a safe distance from the judicial policymaking that they set out to avoid.[168]

2. The Supplementors' Perspective

The supplementor[169] replies to the interpretivist's reliance on the text not with fruitless arguments against its legitimacy, but with the observation that "the text of the Constitution seems to matter more for less important questions—seemingly an inversion of the way the constitution should be interpreted."[170] Supplementors seek to justify the use of other methods of interpretation because the text simply does not resolve many difficult constitutional questions.[171] This problem is caused in part by the limitations of old language describing

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Language, 29 UCLA L. Rev. 797, 798 (1979) (lamenting the fact that modern interpreters tend to assume too quickly that the text provides no answer as they dive into history, theory, philosophy, and policy). As another commentator put it, "[y]ou cannot make an argument for any constitutional principle without purporting to show, at some point, that the principle is consistent with the text of the Constitution." Strauss, *supra* note 39, at 1731. For a discussion of the relevance of the plain meaning of words in legal interpretation, see generally Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 279, 288-338 (1985).

167. John Hart Ely, for instance, would probably admit that his democratic reinforcement theory cannot be dispositive if it flies in the face of specific text. *See* Ely, *supra* note 161, at 4, 41 (discussing the danger of an anti-democratic body which irreversibly invalidates legislation in the name of the Constitution without textual support, and then asserting that his theory is primarily to define the text's "open-ended provisions," not to trump specific ones).

168. Bork, *supra* note 165, at 145-53 (contending that interpretivism "is capable of supplying neutrality" and voicing concerns that other approaches to interpretation are not so restrained).

169. The term supplementation refers to what is sometimes called "non-interpretivism." They allude to the same methods, but non-interpretivism carries with it a sense of illegitimacy. *See* Crump, *supra* note 162, at 829. For a discussion of the divide between interpretivists and supplementors, see *supra* notes 160-65 and accompanying text.

170. Strauss, *supra* note 39, at 1740. *Compare* Bowshar v. Synar, 478 U.S. 714 (1986) (asking if the comptroller general can play a role in the implementation of laws, and doing so with textual arguments), *and* Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993) (inquiring into designation of congressional employees and their status as ex-officio members of an agency formalistically), *with* Morrison v. Olson, 487 U.S. 654 (1988) (inquiring into the constitutionality of agencies generally and not using formalistic textual analysis). For additional discussions, see Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 Harv. L. Rev 1328, 1340 (1994) (lamenting the tendency of the court to provide formal, more textual analysis in insignificant cases, and formless balancing in serious cases); and Pushaw, *supra* note 79, at 1187 (pointing out that "[a]lthough Justice Scalia is the most famous . . . textualist," he is unable to remain true to "this approach because of practical judicial obligations").

171. Fallon, *supra* note 162, at 1196 (asserting that "the language of the Constitution . . . resolves so few hard questions"); Strauss, *supra* note 39, at 1726.

ideas to last through the centuries, a problem that was anticipated by the framers:

> Anti-Federalists complained that the Constitution's language was ambiguous and obscure. The Constitution's supporters responded that the document had been drafted with as much precision as possible, but they acknowledged that some indeterminacy was inevitable. In Federalist 37, James Madison argued that even superhuman drafters could not have produced a perfectly precise document, since "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas." . . . As Madison explained in a later letter, the vocabulary that existed at the time of the framing was geared to the "known ideas" of the day, but the framers were trying to describe "new ideas"; such innovations "must be expressed either by new words, or by old words with new definitions." Thus, "[i]t . . . was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . ."[172]

As a result, supplementors point out that textual interpretation relies on other methods to pick up where the text leaves off.[173] Another way to cope with this limitation is for an interpretivist to make an argument in the name of the text that is actually based on some type of broad structural inference.[174] Supplementors argue that both of these maneuvers allow for the type of judicial policymaking that interpretivists condemn.[175]

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172. Nelson, *supra* note 108, at 525-26; *see also* Ronald Dworkin, Taking Rights Seriously 131-49 (1977) (observing that the drafters seem to have spoken at times in general concepts, rather than specific conceptions); Murphy et al., *supra* note 54, at 8, 8-9 (discussing the fact that "[a]lthough many clauses of the constitutional text are models of clarity and specificity, many others seem to invite debate"); Law and Politics: Occasional Papers of Felix Frankfurter, 1913-1938, at 30 (E.F. Pritchard & Archibald MacLeish eds., 1939) (asserting that many clauses of the Constitution "leave the individual Justice free, if indeed they do not compel him, to gather meaning, not from reading the Constitution, but from reading life").

173. As Professor Richard Fallon points out, the constitutional language will often support multiple readings. "In such cases, nontextual factors may guide selection among the plausible alternatives." Fallon, *supra* note 162, at 1254. For instance, the phrase "cruel and unusual punishments" can hardly be interpreted without some reference to history and value judgments. U.S. Const. amend. VIII.

174. *See* Crump, *supra* note 162, at 845. For an example of such an inference, see *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969). For further discussion, see Charles Black, *Structure and Relationship in Constitutional Law* (1969).

175. *See supra* note 163.

B. *Original Intent*

1. The Interpretivists' Perspective

Once again, the main hurdle of the interpretivist is not to justify the usage of original intent, as it is generally regarded as legitimate in constitutional adjudication.[176] To the interpretivist, reference to the intent of the framers and ratifiers is part of what it means to be an American.[177]

But in light of the limitations of the text,[178] the interpretivist relies on original intent to provide flexibility in constitutional interpretation.[179] To that end, interpretivists argue for "abstract" or

176. *See* Fallon, *supra* note 162, at 1244-45 (ranking original intent second in his hierarchy and stating, "I know of no constitutional case in which the Supreme Court has held that, although the framers' intent would require one result, another must be upheld on some other ground"). Original intent is so well respected by judges, that at times it is utilized even when the holding seems at variance with that intent, perhaps in an effort to better justify a decision simply by its presence. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 92-100 (1970) (discussing in detail the history of trial by jury, and holding that the number twelve is not an indispensable part of the Sixth Amendment despite some historical evidence to the contrary); Bell v. Maryland, 378 U.S. 226, 288-312 (1964) (Goldberg, J., concurring) (discussing in great detail the original intent of the framers of the Fourteenth Amendment). Interpretivists in particular tend to view original intent as controlling, co-extensively with the text. *See supra* notes 162-63 and accompanying text. However, other constitutional interpreters might entitle original intent to some lesser amount of weight. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 224, 229-34 (1980); Perry, *supra* note 166, at 570 (asserting that "[t]o consult [original intent] is one thing, however; to accord [it] authoritative status is something else"). Further still, a few commentators suggest that original intent has no proper place in constitutional interpretation. *See* Dworkin, Law's Empire, *supra* note 78, at 359-81; Fallon, *supra* note 162, at 1198 (noting that "several important scholars have recently argued that the intent of the framers generally has no justifiable place in constitutional argument"); Terrance Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033, 1062-64 (1981) (discussing the problem that even the core of the framers' intent—which is difficult for modern interpreters to ascertain in the first place—cannot remain constant, hence complete allegiance to it can be questioned); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 Cal. L. Rev. 1482, 1482 (1985) (opening his article by asserting his "ambition to establish that the intent of the framers, drafters, and adopters of the Constitution is not an authoritative source for discovering the Constitution's meaning").

177. Professor Strauss writes: "Just as part of being an American is *acknowledging obligations of mutuality with others who live today*, so part of being an American is to maintain continuity with those earlier generations. One way we do that is to adhere, at least to some degree, to their decisions on questions of constitutional law." Strauss, *supra* note 39, at 1722-23 (emphasis added). This statement seems to suggest that considering original intent is discretionary, just as use of comparative materials would be. In addition, the italicized portion suggests that it is just as much a part of being an American to respect the views of humanity generally, which would seem to weigh in favor of the consideration of comparative materials. For further evidence in favor of the proposition that it is becoming part of being an American to respect multinational norms, see *supra* notes 78-87 and accompanying text.

178. *See supra* notes 170-72 and accompanying text.

179. *See* Nelson, *supra* note 108, at 538 (discussing the fact that the Constitution's

"sophisticated" originalism, which they claim successfully applies the general purposes of the founders to modern circumstances, rather than being hung up on specific intents or expectations articulated at the constitutional and ratifying conventions.[180] They argue that this amount of flexibility allows for an interpreter to be a committed originalist while "other methods... elevate the idiosyncratic preferences of unelected judges to the status of fundamental law."[181] This flexibility, constrained by abstract notions of the framers' scheme, is considered by the originalist as "the lesser evil" when compared to the potential for judicial abuse found in methods of interpretation which more openly call for normative value judgments.[182]

2. The Supplementors' Perspective

In order to challenge the idea that the Constitution can be adequately defined by the text and original intent alone[183] and facilitate the acceptance of additional methods of constitutional interpretation, supplementors reject the notion that originalism can be stretched to cover all constitutional questions.[184] As evidence of this,

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provisions "lent themselves to a range of permissible interpretations"). However it seems that Madison, at least, hoped that once the ambiguous clauses were given meaning they would be settled. *See id.* at 538-39.

180. *See, e.g.,* Crump, *supra* note 162, at 823-24; Fallon, *supra* note 162, at 1254-58 (using the terms "sophisticated" and "abstract," respectively); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 Va. L. Rev. 669, 674-86 (1991) (discussing the theory developed by Robert H. Bork which he calls sophisticated originalism, designed to provide greater flexibility to the interpretivist). This practice of applying general schemes to modern problems provides the originalist with a response to the critique that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." Brennan, *supra* note 35, at 438. For a few other responses to Justice Brennan's comment, see Crump, *supra* note 162, at 821-22.

181. Crump, *supra* note 162, at 821 (citing Berger, *supra* note 162, at 363-64, 407-08, 417-18; Robert Bork, *Styles in Constitutional Theory*, 26 S. Tex. L. Rev. 383 (1985); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rev. 455 (1985)); *see also* Bork, *supra* note 165, at 145 (referring to non-originalism as uncorrectable "re-writing of the Constitution").

182. *See* Scalia, *supra* note 165, at 862 (concluding that he prefers originalism as the lesser evil after extensive discussion of its strengths and weaknesses relative to those of other interpretive approaches).

183. Professor Strauss has noted that "[c]ritics have powerfully attacked the notion that constitutional interpretation can rely *exclusively* on the text and the original understandings...." Strauss, *supra* note 39, at 1718. For the claim that these methods are the only ones which are legitimate and should be used exclusively, see Berger, *supra* note 162; Perry, *supra* note 161, at 10-11; Bork, *supra* note 162; and Monaghan, *supra* note 162.

184. *See, e.g.*, Brest, *supra* note 176, at 218-22 (discussing how difficult the historian's task can be); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1, 2 (1986) (beginning his exploration of recently discovered historical documents by warning that there are

they point out that originalism is not a major feature in much of contemporary constitutional adjudication.[185] Aside from a simple rejection of rule by the dead hand of the founders,[186] original intent is constrained by holes in the historical records,[187] as well as evidence in some cases that the founders themselves did not agree on the meaning

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"problems with most of them and that some have been compromised"); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 8 n.33 (1999); Pushaw, *supra* note 79, at 1194-98 (offering a general critique of originalism); Robert J. Pushaw Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 Nw. U. L. Rev. 695, 703 (2002) (asserting that the framers' intent "is often conflicting and misleading"). Of course, this statement is not peculiar to original intent. Some commentators seem to believe that a pluralistic approach to constitutional interpretation is most proper, which rules out the possibility that any method could be exclusive. *See infra* notes 240-43 and accompanying text.

185. One commentator has noted that "as a descriptive theory of contemporary constitutional interpretation, originalism fails spectacularly." Fallon, *supra* note 162, at 1213.

186. Supplementors argue that "originalism was . . . not the original understanding." Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 Fordham L. Rev. 87, 94 (1997). In fact, supplementors argue that the founders expected something more akin to living constitutionalism. *See* Nelson, *supra* note 108, at 524; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985); Pushaw, *supra* note 79, at 1195 ("[M]any framers themselves did not intend that their subjectively attached meaning would control forever."). For instance, in a letter to Madison, Thomas Jefferson said "[t]he earth belongs in usufruct to the living" and "[t]he question [w]hether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water." Letter from Thomas Jefferson, to James Madison (Sept. 6, 1789), *in* 15 The Papers of Thomas Jefferson 392 (Julian P. Boyd & William H. Gains, Jr. eds., 1958). After all, it is somewhat anti-democratic to allow a dead generation to continue to rule. *See* Murphy et. al., *supra* note 54, at 45 (discussing the proposition that in order to be subjects of the law, democratic populations should also be the makers of it).

187. There are entire constitutional areas where there seems to be no original intent to discover. *See* Ronald Dworkin, A Matter of Principle 38-57 (1985); Nelson, *supra* note 108, at 544-45 (noting that the historical records on both the Necessary and Proper Clause and on the Eighth Amendment's ban on cruel and unusual punishment are indeterminate at best). But even when the founders did comment on a particular provision, an originalist is faced with the challenge of constructing an authoritative answer out of a group of intentions, expressed individually. *See* Dworkin, *supra*; Fallon, *supra* note 162, at 1212. This concept of group intent is more difficult to construct than the originalist would like to assert:

> [L]egal texts are contingent, fragile, and ambiguous embodiments of momentary political compromises in a rapid flux of perceptions that shift with social actors' experiences and fortunes; that no sooner are words launched upon the world in legal form than they help to set in motion consequences that cause them to be reevaluated and reinterpreted. Once we are presented with this fluid swirl of multiple, sharply contested and rapidly refigured meanings, the notion that we can pluck one faction's construct from a single instant in time, and pronounce it to be for all time, "The Original Meaning" is made to look completely absurd.

Pushaw, *supra* note 79, at 1193-94 (quoting Robert W. Gordon, *Foreword: The Arrival of the Critical Historian*, 49 Stan. L. Rev. 1023, 1027 (1997)).

of a particular provision.[188] As a result, supplementors argue that there are times when originalism, like the text, teaches contemporary interpreters the core of a doctrine but fails to define its outer reaches.[189]

Furthermore, supplementors argue that even specific originalism can be subject to abuse, as judges have at times given "law office history" accounts of the founding, highlighting materials which point to a result they find favorable.[190] But when originalists attempt to augment originalism to condemn other methods, supplementors point out that they are quite squarely confronting the policy choices that they set out to avoid.[191] So while the interpretivist project is to avoid judicial policymaking,[192] supplementors argue that abstract originalism is a clever cover-up for exactly that.[193]

C. *Common Law Method*

1. The Interpretivists' Perspective

While interpretivists vastly prefer a system of constitutional interpretation which relies exclusively on the text and original intent,[194] respect for the doctrine of stare decisis has led some to propose a common law approach to constitutional adjudication.[195] The interpretivists, however, are wary of the common law method when doctrines develop in such a way that contemporary questions

188. At times, lack of a general agreement at the founding has led to a lack of original meaning for subsequent courts to discover. *See, e.g.*, Leonard W. Levy, Original Intent and the Framers' Constitution 294-95 (1988); Nelson, *supra* note 108, at 522.

189. Even originalists admit this and, in fact, this is when they move to abstract originalism. *See* Bork, *supra* note 165, at 167-68.

190. *See* Pushaw, *supra* note 79, at 1191-94. The interpretivists' use of history "seems to involve not an effort to reconstruct the climate of an earlier generation but rather a picking and choosing of sources that will support a thesis that is arrived at for other, normative reasons." Strauss, *supra* note 39, at 1748. For a thorough discussion of the abuses of history in contemporary America, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 523 (1995) (opening his article by saying "Americans love to invoke history, but not necessarily to learn it").

191. This is because, as Professor Fallon has observed, "there simply is no-value neutral way to choose among possible specifications of the framers' abstract intent." Fallon, *supra* note 162, at 1217.

192. For discussion of the interpretivist's distaste for any constitutional interpretation that might facilitate judicial policymaking, see *supra* notes 162-63 and accompanying text.

193. Fallon, *supra* note 162, at 1257 ("No result may be reached that is not consistent at least with the framers' abstract intent.").

194. *See supra* notes 162-63.

195. *See* Strauss, *supra* note 39, at 1719 ("Much of American constitutional law consists of precedents that have evolved in a common-law-like way, with a life and a logic of their own.").

come to look to precedent to the exclusion of the text or original intent.[196] As opposed to common law areas of study like negligence or adverse possession, constitutional interpretation requires constant reference back to a fixed point of authority, namely the constitutional text.[197] Because these references are not always made, interpretivists fear the common law method's ability to perpetuate constitutional mistakes.[198]

2. The Supplementors' Perspective

As interpretivists have come to accept the common law method, supplementors renew their main critique of interpretivism: it is not sufficient to cover complex constitutional questions. With respect to the common law method, they assert that there are times when "no controlling or even persuasive precedent can be found no matter how broadly the existing decisional corpus is viewed."[199]

Additionally, supplementors re-assert the complaint that while interpretivists are claiming to avoid judicial policymaking, their methodology nonetheless engages in it.[200] While the common law method claims consistency and a lack of judicial subjectivity, "some judges and lawyers simply will 'see' or 'read' the cases differently."[201]

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196. For instance, in the area of freedom of speech, instead of turning to the text of the First Amendment, if speech looks like incitement, one must apply *Brandenburg v. Ohio*, 395 U.S. 444 (1969); if defamatory, one turns to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); and if it appears to be obscene, the standard is *Miller v. California*, 413 U.S. 15 (1973). Even the more narrow interpretivists have admitted to conclusions based on case law, rather than the text or original understanding. *See* Alden v. Maine, 527 U.S. 706, 713 (1999) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia, and Thomas, JJ.); Printz v. United States, 521 U.S. 898, 905 (1997) (Scalia, J.); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.).

197. The common law method "seems less suited to interpretation of a Constitution, for which the text and history provide (relatively) fixed points of authority." Crump, *supra* note 162, at 897. Therefore, precedent, while being a legitimate factor in constitutional analysis, even to the interpretivist, should not bar the way to contrary results. *See* Fallon, *supra* note 162, at 1262. "[S]tare decisis is entitled to less weight in constitutional than in nonconstitutional cases, and the Supreme Court stands ready to 'correct its errors even though of long standing.'" *Id.* at 1245; *see also id.* at 1261-62 (suggesting that had the Court not been able to break from precedent so easily in constitutional law, the error of *Lochner v. New York*, 198 U.S. 45 (1905), would have been preserved pursuant to such a common law habit).

198. *See* Crump, *supra* note 162, at 896 (noting that "this approach can be characterized as permitting the extension by one judge of another's constitutional mistake"). To assume otherwise has been said to presuppose "a fanciful, even romantic account of judicial capacities." Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, 891 (2003).

199. Fallon, *supra* note 162, at 1203 (quoting David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731, 734 (1987)).

200. *See supra* notes 173-75 and accompanying text (regarding textual interpretation); *supra* notes 190-93 and accompanying text (regarding original intent).

201. Fallon, *supra* note 162, at 1203; *see also* Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992) (discussing when a constitutional precedent ought to be

But, more importantly, supplementors reply to interpretivist objections to value arguments and the like with the claim that applying precedent in constitutional cases requires interpretation of past decisions and distinctions that are often riddled with judicial policy choices.[202] And supplementors argue that the common law method might allow for taking the result of a particular precedent, changing its rationale, and improperly claiming to be operating under stare decisis, at a safe distance from judicial policymaking.[203]

D. *Overt Supplementation*

Over the objections of interpretivists, supplementors assert that "[o]ne cannot adequately give meaning to the Constitution . . . merely by reading its language and history."[204] Nor do they believe that the limits of the constitutional mandate have been fully defined by subsequent case law.[205] Supplementors assert that the real substance

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overturned, and identifying four factors that a particular Justice should consult, all of which would seem to support reasonable differences of opinion). As these differences could come out in good faith, consistency might be undermined without offending sensitivity to judicial policymaking. Judges at times will simply "disagree as to what constitutes permissible bases for distinction under the loose doctrine of precedent and how much past decisions fairly could be claimed to establish under a broader approach." Fallon, *supra* note 162, at 1203.

202. *See* Fallon, *supra* note 162, at 1207 (noting that "how a string of decisions ought to be ordered into a pattern or subsumed under a theory, often will . . . be resolved on normative grounds"). In fact, "attention to value arguments frequently will have a spillover effect into the precedential category." *Id.* at 1260; *see also* Edward H. Levi, An Introduction to Legal Reasoning 1-4 (1949) (describing the process of precedential application as a three-step process where the individual judges have many subjective decisions to make); Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 62-91 (1960) (discussing the flexibility inherent in precedent and providing sixty-four examples of judicial treatment of precedent, illustrating a wide spectrum of possible treatments); Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 Colum. L. Rev. 199, 202-03 (1933) (discovering that precedent is an instrument capable of variation and movement that is in ways not directly related to the precedent).

203. *See* Crump, *supra* note 162, at 897-98 (commenting that "[i]t . . . seems fair to doubt an opinion, such as *Roe*, that relies on other opinions without explaining why it does not accept their reasoning"). Interpretivists who do this can be criticized in a manner similar to when they use law office history, abstract originalism, or textual penumbras. For discussion of these problems, see *supra* notes 190 (law office history), 191-93 (abstract originalism), 174 (textual penumbras) and accompanying text. For an example of an instance where a Justice was accused of hiding behind precedent while actually gutting the law which it stood for, see *Casey*, 505 U.S. at 953-55 (Rehnquist, C.J., dissenting) (accusing the joint opinion of Justices O'Connor, Kennedy, and Souter of changing the law while leaving precedent to exist only as "a storefront on a western movie set exists").

204. Crump, *supra* note 162, at 829. For an example of the objections of an interpretivist, see Bork, *supra* note 163, at 696 (asserting that use of supplemental methods would "convert our government from one by representative assembly to one by judiciary").

205. *See supra* note 199 and accompanying text.

of the Supreme Court has opened up to a natural law approach.[206] When sources of positive law would point to more than one, or perhaps a morally undesirable, result,[207] "it is only reasonable for a decision maker to employ moral and political criteria as grounds for preference."[208] As a result, supplementors point out that most "hard cases"[209] as well as the most respected constitutional scholarship tend to feature supplemental methods prominently.[210] While interpretivists continue to insist that supplementation in any form is dangerous to a written constitution, they are faced with the reply that it is both "necessary and intended" as an ingredient in the American system of interpretation.[211]

With these being bedrock assumptions of the supplementors, the project for such an interpreter might be described as one in which he simply tries to distinguish between acceptable and necessary supplementation and objectionable judicial policymaking, properly considered non-interpretivism.[212] The legitimacy of these methods

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206. "In form, the Supreme Court has adopted the [formalistic and positive] views of Justice Iredell. . . . In substance, however, the [normative] beliefs of Justice Chase have prevailed as the Court continually has expanded its basis for reviewing the acts of other branches of government." John E. Nowak & Ronald D. Rotunda, Constitutional Law 352 (4th ed. 1991). Some commentators have argued that rather than attempting to hide supplementation, "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess" and should not be afraid to make value judgments more openly. Alexander M. Bickel, The Least Dangerous Branch 25-26 (1962).

207. One of the great difficulties of being a pure interpretivist is the inability to justify the result of a case like *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Crump, *supra* note 162, at 835-36. For such an attempt, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1140 (1995).

208. Fallon, *supra* note 162, at 1268.

209. This term is now generally used to refer to constitutional cases which are not easily resolved one way or the other through the more conventional and well-established methods of constitutional interpretation. *See* Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975); *see also* Black, *supra* note 81, at 1111 (indicating the presence of supplemental methods in U.S. constitutional adjudication by asserting "[t]he fact that the right to a decent livelihood is not named [in the Constitution] cannot be a valid objection, unless we are prepared to rewrite our constitutional law").

210. *See* Laurence E. Wiseman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical*, 10 Hastings Const. L.Q. 315 (1983) (surveying constitutional scholarship which tended to feature value arguments prominently).

211. Crump, *supra* note 162, at 837. For further discussion, see generally *Commentary on Constitutional Positivism*, 25 Conn. L. Rev. 831 (1993); *Natural Law Symposium*, 38 Clev. St. L. Rev. 1 (1990); Symposium, *Perspectives on Natural Law*, 61 U. Cin. L. Rev. 1 (1992); *Symposium on Law and Philosophy*, 12 Harv. J.L. & Pub. Pol'y. 611 (1989). *But see* Scalia, *supra* note 165, at 856-62 (acknowledging some of interpretivism's weaknesses but finally contending that its weaknesses represent the lesser evil).

212. Some commentators are beginning to reject altogether any categorical distinction, arguing instead that the difference is merely a matter of degree. *See* Grey, *supra* note 164, at 1-2.

then might hinge on their ability to prove useful to the constitutional project while feasibly claiming to provide mechanisms for judicial restraint.

1. Process-Based Interpretation

John Hart Ely, the proponent of the best known process-oriented theory, believed that if courts focused on "reinforcing" representation in the political process, their actions would reinforce democracy and would be consistent with the Constitution.[213] Simultaneously, he rejected any role for value arguments based on substantive rights, interests, or outcomes.[214] Phrased in these terms, Ely presented his method as one which necessarily goes beyond the text, but nevertheless geared it towards restraint on judicial decision making.[215] Ultimately, he claimed a "value-neutral" way to make decisions on the text's open-ended provisions.[216] However, at least one famous interpretivist argued that Ely is "a non-interpretivist whether he knows it or not."[217] The assertion that the Constitution "should be read to thwart majoritarian outcomes only when necessary to advance process values is itself based on a substantive value choice about which constitutional values should be paramount."[218] Simply put, the threshold decision required by Ely's methods is one which substantively values certain processes over others, and also values process over other considerations.[219] Therefore, this method has been

213. *See* Ely, *supra* note 161; *see also* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (discussing the need for judicial intervention when the political process is hindered or when it repeatedly disadvantages "discrete and insular minorities").

214. Ely, *supra* note 161, at 43-72.

215. *Id.* at 41 (asserting that non-interpretivism failed to define the text's open-ended provisions without improperly augmenting the judicial role, and that the approach of the interpretivist, judicial abstinence, can be improved upon, in order to set up the claim that his theory finds a better middle ground).

216. *See id.* at 70 (asserting that "the fundamental value theorists" failed in an attempt to provide value-neutral methodology to define the text's open-ended provisions); *see also id.* at 73-104 (first reconceptualizing the work of the Warren Court around protecting process, not making outright value choices, then presenting his theory in detail as one somewhere between interpretivism and non-interpretivism).

217. Bork, *supra* note 181, at 390; *see also* Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659, 670 (questioning on what basis judges can ascertain what constitutes impermissible process breakdowns if not the "impermissibly subjective search for 'fundamental' interests").

218. Fallon, *supra* note 162, at 1220 (citation omitted).

219. Furthermore, maintaining a distinction between substantive values and process becomes untenable, and "arguments about substantive values inevitably creep into the constitutional calculus." *Id.* at 1221. For instance, moral judgments which minorities would tend to find repugnant are fine, so long as those minorities were not prejudicially excluded from the legislative process which gave rise to those moral judgments. However, the theory does not guide the distinction between permissible

criticized because it hides its value choices under the rug of a false process/substantive value dichotomy.[220]

2. History and Tradition

Another, and perhaps the most common of all supplemental methods of interpretation, is the recognition of history and tradition.[221] More so than process-oriented approaches and value judgments, the history and tradition approach does seem successful in its attempt to supplement without great potential for judicial abuse.[222] However, its strength is also its greatest weakness, as it seems to be "extending protection only to those interests that need it least," by recognizing the interests that should be protected by asking which ones are traditionally protected.[223] In order to extend the constitutional usefulness of this method, it is suggested that judges might begin to tinker with the domain of history and tradition.[224]

3. Value Judgments

Finally, there are value judgments and society's sense of natural law. Within this broad category lie considerations like philosophy and economic theory.[225] While other methods of supplementation claim

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moral judgments as a result of the legislative process and impermissible prejudice during it. *See* Laurence H. Tribe, Constitutional Choices 11-19 (1985).

220. *See supra* note 219 and accompanying text.

221. "This is the approach taken by most Justices who recognize the need for supplementation . . . but who value judicial restraint." Crump, *supra* note 162, at 860. For instance, even Chief Justice Rehnquist and Justice Scalia have appeared to acquiesce to this approach. *See* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 269 (1990); Michael H. v. Gerald D., 491 U.S. 110, 124-26 (1989) (Scalia, J., plurality opinion).

222. Crump, *supra* note 162, at 860 ("Unlike [other supplemental methods], which arguably depend more heavily upon the judge's values, the history-and-tradition approach demands that the judge consult an ostensibly objective source . . . .").

223. *Id.* at 861. It can be argued that the interests which have been traditionally protected need the least amount of constitutional support, as the democratic process is likely to protect them. Justice Brennan voiced this complaint, arguing in *Michael H.* that the Due Process Clause was being limited only to interests that were "'traditionally *protected by* our society,'" and would therefore only protect interests which were already protected. *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting).

224. *See* Crump, *supra* note 162, at 862 (presenting the question of whether a judge might begin to augment history and tradition by considering things like philosophic essays, novels, and poetry). *But see* Bork, *supra* note 181, at 386-87 (criticizing the notion that judges could derive supplementation from "the vision of the philosophers and the poets"). A more interesting question is if the domain of history and tradition ought to be augmented to include all of Western civilization. *See supra* note 6 and accompanying text (using Western civilization as the relevant domain); *infra* notes 287-89 and accompanying text (discussing the ability of comparative materials to widen the scope of this method).

225. *See* Sunstein & Vermeule, *supra* note 198, at 904 (observing that "[p]hilosophy . . ., linguistics, and economics have all contributed to ever more refined normative accounts of interpretation").

some restraining mechanism,[226] interpretivists tend to argue that if nothing else, certainly value judgments go too far. "The focus on contemporaneity contradicts the purpose of a written constitution, and it removes all but the weakest of restraints upon judicial activism."[227] After all, "[i]f the Constitution is whatever five justices say it is, based on their own transient personal notions of morality and sound policy, then there seems to be little point in having a Constitution at all."[228] The reply from supplementors that the Constitution can be viewed as a "living constitution" does not directly address this criticism, but instead asserts that a written constitution runs afoul of the true project.[229]

Despite clearly having tenuous (at best) footing in constitutional adjudication, overt value arguments and the like eventually found their way into opinions quite regularly, and the philosophical objections to them began to fall on deaf ears.[230] Of course, they always had a home within the other methods of interpretation,[231] but "flushing moral judgments out into the open... invites judges to confront the extent to which their views really are infused by moral and political values and to assess arguments and evidence that their beliefs may be mistaken."[232] In other words, value judgments may have had a rhetorical asterisk analogous to that which comparative materials seem to carry.[233] Another possible explanation for this

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226. *See supra* Parts II.D.1-2.

227. Crump, *supra* note 162, at 886. This is a common argument of the interpretivist. *See supra* notes 162-63.

228. Pushaw, *supra* note 79, at 1205.

229. *See* Brennan, *supra* note 35, at 438 (arguing that the current Justices are forced to read the Constitution as twentieth-century Americans).

230. *See* Fallon, *supra* note 162, at 1189-90 (listing "value arguments" as one of five kinds of legitimate constitutional argument). For example, privacy is not mentioned in the Constitution per se, but the court used value judgments (in part) to interpret the liberty encompassed by the Due Process Clause of the Fourteenth Amendment to protect certain aspects of privacy or autonomy. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 94-99 (1987); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 499-502 (1965) (Harlan, J., concurring).

231. *See supra* notes 173-75, 187-93, 199-203 and accompanying text (describing the recurring problem that almost all methods of constitutional interpretation leave enough room for value judgments to slide in through the back door). *But see* Planned Parenthood v. Casey, 505 U.S. 833 (1992). Justice O'Connor, writing for the joint opinion, properly admitted to her endeavor, rather than cloak these judgments in the name of other methods, and wrote "[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment." *Id.* at 849.

232. Fallon, *supra* note 162, at 1268; *see also supra* note 231 (using the example of Justice O'Connor's opinion in *Casey*); Flast v. Cohen, 392 U.S. 83, 97 (1968) (admitting that the federal standing doctrine contains both "constitutional requirements and policy considerations").

233. *Cf. supra* Parts I.C-D (describing the arrival of comparative materials as well as the rhetorical asterisk which burdens them).

eventual incorporation is the fact that in hard cases, where more well-founded methods yield few answers, "[c]hecking particularistic judgments against other indicators of moral and political insight can only enrich the process of decision."[234] Professor Richard Fallon contends that while they clearly and correctly carry the least amount of independent probative value, as all of the easy cases got answered, value judgments became a necessary tool, and somewhere on this journey this need helped to legitimize them.[235] As the threshold debate continues and the number of comparative citations increases nonetheless, it appears that history is repeating itself.[236]

Part III of this Note asserts that the potential utility of the use of comparative materials is no more outweighed by the criticisms discussed in Part I.B than the methods discussed above are outweighed by their own criticisms.

III. A FRESH PERSPECTIVE: CONTEXTUALIZING THE THRESHOLD DEBATE

The aim of this part is not to articulate a justification for the use of comparative materials. It is instead to look at the perspective from which they tend to be approached, and identify one which has been somewhat overlooked. This new perspective might have been unable to answer questions that revolved around whether we should use comparative materials, but it might help answer questions regarding how they are used. Part III.A discusses the perspective from which comparative materials tend to be viewed. Part III.B looks to comparative materials comparatively, rather than on their own terms, in an effort to shed light on the assertion that they are no more flawed than several accepted secondary sources of constitutional law.

A. *Old Perspectives on Comparative Law*

Theories of the Constitution have played a crucial role in academic debate[237]—so crucial, in fact, that supplemental methods could appear

234. Fallon, *supra* note 162, at 1263.

235. *See id.* at 1264 (describing value judgments as occupying the lowest rung on the hierarchal ladder, but also asserting that they tend to influence the vast majority of cases anyway).

236. *See supra* Part I.C (discussing the arrival of comparative materials in domestic decisions despite no real resolution of the threshold debate).

237. *See, e.g.*, Fallon, *supra* note 78. Various constitutional theories are evident in the following: Berger, *supra* note 162; Bickel, *supra* note 206; Philip Bobbitt, Constitutional Interpretation (1991); Bork, *supra* note 165; Jesse H. Choper, Judicial Review and the National Political Process (1980); Dworkin, Freedom's Law, *supra* note 78; Dworkin, Law's Empire, *supra* note 78; Ely, *supra* note 161; Richard A. Epstein, Takings: Private Property, and the Power of Eminent Domain (1985); David A.J. Richards, Toleration and the Constitution (1986); Cass R. Sunstein, The Partial Constitution (1993); Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution (1991); Harry H. Wellington, Interpreting the Constitution: The

illegitimate without some constitutional theory to support them.[238] As a result, several arguments supporting comparative materials have consisted of efforts to justify them in terms of broad theories of the Constitution with which they seem to be compatible.[239]

For the sake of comparative materials, the positive aspect of this perspective is that it facilitates a plurality approach to constitutional interpretation.[240] Given that academics have wide latitude in formulating many constitutional theories, it follows that any number of methods of interpretation could eventually be justified in terms of those theories.[241] Such a dynamic leads to an open-door system for interpreters willing to go beyond the supplementation barrier.[242] At

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Supreme Court and the Process of Adjudication (1990); and Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493, 1520 (1988).

238. *See* Fallon, *supra* note 162, at 1201 (asserting that "[a]t least after we have left the domain of arguments from text, it is always necessary to formulate a theory about a constitutional provision, or ascribe a purpose to it, before any 'derivation' of particular conclusions can occur"); *see also* Murphy et. al., *supra* note 54, at 4 (noting that the American constitutional text must refer the interpreter to political theories). However, these theories are inadequate without concrete methods of interpretation to carry them out, as theories are "'too vague to serve as rules of law' and 'their effective implementation requires the crafting' of precise rules or doctrine." *See* Choudhry, *supra* note 14, at 842-43 (quoting Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 60-61 (1997)).

239. *See* Choudhry, *supra* note 14, at 833-82 (discussing three theories of the Constitution as an attempt to justify the use of comparative materials); Tushnet, *supra* note 36, at 1238-1306 (same, albeit three different theories). One commentator went so far as to say that comparative materials can be "justified no matter what theory of constitutional law one may adopt or what school of contemporary constitutional scholarship one may believe to be the proper methodology for studying American constitutional law." Fontana, *supra* note 30, at 591.

240. At least one commentator has suggested that the founders intended for a plurality of methods to be employed to interpret the Constitution, and cites the text's open-ended clauses as evidence of this. *See* Nelson, *supra* note 108, at 525-29. Others simply argue that "a pluralistic approach combining different methodologies is most appropriate." Crump, *supra* note 162, at 804. One reason to be asserted for this is that "the search for law is too important for any potential external source to be eliminated *a priori*." Harding, *supra* note 7, at 438 (discussing Glen, *supra* note 19); *see also* Murphy et. al., *supra* note 54, at 4-5 (noting that complexities make constitutional interpretation arduous and controversial, and implying that it involves much more than systematic application of rules).

241. The Court does not seem to be in the business of choosing "official" theories of constitutional interpretation. *See* Fallon, *supra* note 78, at 574; Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 13 (1996) (pointing out that the Supreme Court has never made an official choice among competing theories and asserting that it is unlikely that the Court ever will do so).

242. For a discussion of the divide between "interpretivists," who would likely reject the pluralistic approach, and supplementors, who would be more likely to embrace it, see *supra* Part II. *See also* Choudhry, *supra* note 14, at 839-41 (concluding that constitutional adjudication properly draws from a number of different sources and a number of different interpretive styles); Crump, *supra* note 162, at 912-16 (arguing for a pluralistic approach in the specific context of the Due Process Clause); Fallon, *supra* note 162, at 1189-90 (recognizing at least five kinds of constitutional argument). Against this inclusory backdrop, it seems an anomaly that comparative materials would be singled out for exclusion. This can be observed in Justice Scalia's

least to the supplementor, these constitutional teammates complement each other for a more comprehensive constitutional regime.[243]

The problem with theoretical justification of comparative materials is that while it may lead to the appearance of comparative materials, it does not seem to improve their standing relative to other methods of interpretation.[244] Now that comparative materials have arrived in *some* capacity, one can turn to other methods of interpretation to query if the lesser capacity in which they have arrived is justified.[245] But before turning to the specific methods, it is important to note that the entire system of constitutional interpretation is an inexact science.[246] Therefore, the vigor with which comparative materials are

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jurisprudence. *See* McCabe, *supra* note 79, at 542. In *Printz v. United States*, 521 U.S. 898, 957 n.18 (1997), Justice Stevens, in his dissent, criticized Justice Scalia for relying on speculation found in legal literature while rejecting the reasoned judgments of foreign tribunals.

243. Several constitutional doctrines owe their breadth to several interpretive methodologies. *See e.g.*, Crump, *supra* note 162, at 837-38 (discussing the desirability of a plurality approach in substantive due process jurisprudence while rejecting the idea of Robert H. Bork, *supra* note 181, at 387-88, that any supplemental method is inherently nihilistic); Pushaw, *supra* note 79, at 1186-87 (noting that "current textualist and originalist approaches would require tearing down the entire existing structure of Commerce Clause legislation and jurisprudence; adherence to precedent would preserve certain fundamental errors in judicial reasoning; and the notion of a living Constitution would discard our entire past to the shifting winds of politics"). Professor David Crump asserts that rather than compete with each other these methods complement each other. One example he cites is *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), in which the court uses three of the methods he discusses: ordered liberty, importance to the individual, and derivation from precedent (common law). Crump, *supra* note 162, at 839. In addition, Professor Fallon's coherence theory includes an assertion that in most cases, all methods of interpretation will work together to justify a single result. *See* Fallon, *supra* note 162, at 1240-43.

244. *See supra* Part I.D (constructing the rhetorical asterisk by showing that comparative materials are used only when they are very carefully limited). Efforts to add comparative materials to a pluralistic approach to constitutional interpretation through vertical justification can become counterproductive by adding to the rhetorical asterisk. *Compare* Fontana, *supra* note 30 (attempting to support comparative materials, while basing his justification on a limitation he calls "refined comparativism" which essentially justifies them in terms of the very limited use that they have), *with* Choudhry, *supra* note 14 (supporting comparative materials in terms of three constitutional theories and also not adding to rhetoric which would tend to limit their use).

245. For a similar perspective in the area of copyright law, see generally Lemley & Volokh, *supra* note 13.

246. It is hard to assert that the system which gave us the fundamental rights to jog topless and to use a gasoline leaf blower is flawless. *See* Crump, *supra* note 162, at 798-99. He goes on to state that "[r]ecognition of these 'rights' denigrates the Constitution because it unnecessarily countermands the democracy that the Constitution establishes." *Id.* at 799; *see also* David Crump et al., Cases and Materials on Constitutional Law 12-14 (2d ed. 1993) (providing the Madisonian dilemma as one problem with the American constitutional order); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689 (1995) (same). Constitutional judgments have often been questioned. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 228 (1990) (holding that prisoners may be forced to ingest

guarded against might be irrational, at least to an interpreter who favors a pluralistic approach. Perhaps viewing them with respect to the other methods, and in the context of the perpetual tensions between interpretivism and supplementation, will expose this irrationality.

B. *A Comparative Analysis of Comparative Materials*

1. Transplantation Problem

The foremost pragmatic hurdle for comparative materials to clear is the concern for the effects of institutional and cultural differences between legal systems.[247] But if it is a sufficient concern to contribute to a long-standing rhetorical asterisk,[248] then why is the same not attached to the text or original intent? Recall the comments of Madison regarding the language of the Constitution.[249] If one is applying the text of the Constitution, one ought to wonder which is more troublesome: transplantation of language across very similar legal systems with the same roots in a common era,[250] or the transplantation of language across the ages.[251]

Or, in the alternative, with respect to original intent and the respective legal contexts, consider the supplementor's arguments regarding the difficulty in ascertaining group intent,[252] or the detachment many contemporary Americans might feel toward the founding generation that is cited in response to legal exceptionalism.[253] The differences between the legal world of 2004

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certain drugs against their will); Andrews v. Ballard, 498 F. Supp. 1038, 1048-51 (S.D. Tex. 1980) (holding that a person has a constitutional right to obtain acupuncture treatment); Ravin v. State, 537 P.2d 494, 502, 504, 511 (Alaska 1975) (holding that while there is no fundamental federal constitutional right to ingest marijuana, there is a state constitutional right protecting its use in the home).

247. *See supra* Part I.B (discussing the transplantation problem within the context of the threshold debate).

248. *See supra* Part I.D (discussing the way in which both judges and commentators have "asterisked" comparative materials).

249. *See supra* text accompanying note 172.

250. Because most of the countries which actively participate in the constitutional discourse have modeled their constitutions after the U.S. Constitution, those constitutions might be said to have the same roots. The similarity in the wording of the texts is most important for the purposes of transplantation. The European Convention on Human Rights, for instance, protects many rights phrased nearly identically to the U.S. Bill of Rights. *See* Jean-Paul Costa, *The European Court of Human Rights and Its Recent Case Law*, 38 Tex. Int'l L.J. 455, 460 (2003); *see also supra* note 53 (pointing out that the Canadian Charter of Rights and Freedoms is similarly worded to the U.S. Constitution's Bill of Rights).

251. Some argue that in applying the constitutional text, an interpreter must apply contemporary meanings. *See* Bobbitt, *supra* note 166, at 25-26; Perry, *supra* note 166, at 564-65.

252. *See supra* notes 187-89 and accompanying text.

253. *See supra* notes 85-86 and accompanying text.

and the legal world of the framing might be significant enough for concerns of the same order as the comparative materials transplantation concern.[254] "It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions."[255] While concerns about transplanting legal arguments from one nation to another are legitimate, perhaps concerns about transplanting them through the ages are also.[256] After all, the "present day United States obviously resembles late-twentieth-century Canada more closely than it resembles nineteenth-century America."[257] It is ironic that the interpretivists' most familiar complaint against comparativism can be effectively made against their own preferred methods of interpretation.[258]

2. Concerns About Judicial Policymaking

Perhaps the greatest concern of the interpretivists is judicial policymaking,[259] and even supplementors admit that while supplemental methods are necessary, they must be somehow restrained to provide checks on the idiosyncratic preferences of individual Justices.[260] Toward that end, they challenged the interpretivists' term, non-interpretivism, and instead distinguished between permissible supplementation and non-interpretivism.[261] Comparativism is particularly suited to maintain this distinction, in some respects more so than other methods,[262] for two reasons.

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254. *See* Nelson, *supra* note 108, at 557 (noting contemporary society's "relative unfamiliarity with the legal world of the framing").

255. Brennan, *supra* note 35, at 435.

256. *See* Strauss, *supra* note 39, at 1738 (noting that the circumstances of other modern day countries probably resemble current American conditions better than the circumstances surrounding the founding).

257. *Id.* One might guess that the distortion which Professor Strauss speaks of only increases as one moves further back in time.

258. Professor Strauss does not imply that those materials should weigh more heavily in current U.S. jurisprudence simply because Canada today is a closer relative to the United States today than the United States circa 1800. *Id.* He suggests only that originalism is not justified by its great wisdom, nor by some peculiar applicability to current United States conditions. *See id.*

259. *See supra* notes 162-63 and accompanying text; *see also* Bork, *supra* note 163, at 695-96 (voicing his objection to welfare rights theories, which offer inadequate guidelines on judicial policymaking).

260. *See* Michelman, *supra* note 217, at 674 (discussing the tension between the Constitution mandating recognition of transtextual rights and the search for the restrained approach to judicial enforcement that our representative democracy demands); *supra* note 164.

261. *See supra* note 164 (discussing the goal of the supplementor in maintaining a distinction between supplementation and non-interpretivism).

262. A few commentators have suggested, however, that comparative materials are also subject to manipulation. *See* Blum, *supra* note 34, at 195-97 (arguing that Justice Scalia's inconsistent attitudes towards comparative materials in *Printz* and *Glucksberg* stem from the way they are used, though the reader is likely to notice that they simply

First, comparative materials might be less manipulable than some other supplemental methods because they often are limited to the reasoned words of learned judges solving constitutional issues.[263] The claim that supplementation is not synonymous with non-interpretivism needs to be re-asserted with each application of a supplemental method of interpretation. Recall the problem of judicial subjectivity when a judge decides how to treat a line of constitutional precedent,[264] or when John Hart Ely decides that certain processes are to be valued higher than others, and process in general is to be preferred to other, more substantive values.[265] Similarly, one could (and probably will) argue that the threshold step in applying comparative materials, deciding which other nations are similar enough in whichever respects a particular judge deems relevant, is also necessarily subjective and value-laden.[266] However, comparativism's threshold subjectivity reads right on the face of a learned judgment, and when carefully limited to foreign constitutions which are similarly worded to the U.S. Constitution, a comparativist can argue, quite reasonably, that they are merely looking to pre-packaged interpretations of the language they are charged with defining, for the sake of considering more possibilities and limitations

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weigh for him in *Glucksberg* and against him in *Printz*); McCabe, *supra* note 79, at 553 (noting that Justice Scalia has used comparative materials himself on many occasions (despite his objections to them in cases like *Lawrence*), advancing the conclusion that his objections in *Printz* were results-oriented); *see also* Choudhry, *supra* note 14, at 892 (asserting her belief that "courts will not look to foreign jurisprudence with which they disagree on a substantive level"). However, this concern is a thread that runs all the way through the interpretivist/supplementor divide, and is beginning to be regarded as unavoidable. "The Supreme Court Justices [are] unconstrained and therefore decide[] cases as an imposition of will, an exercise in power." Stephen M. Feldman, *History and Interpretation*, 38 Tulsa L. Rev. 595, 604 (2000) (discussing the conclusion of Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982)). These concerns have contributed to a somewhat defensive position by the Court itself, as at times the Justices themselves assert that value judgments are not the province of the Court, and that they are merely applying the law, and the like. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 326 (1980); Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955); Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, Inc., 313 U.S. 236, 246-47 (1941). *But see supra* note 232 (citing two examples of cases where the Justices openly confronted the need for value judgments). For further discussion of how this concern seems to play out in all methods of constitutional interpretation, see *supra* Part II.

263. Despite this valuable check on comparative materials, value judgments have gained far wider acceptance in domestic constitutional adjudication. *See* Fallon, *supra* note 162, at 1189-90. Interestingly, value judgments are justified by Professor Fallon by their prominence in most modern scholarship. *See id.* at 1204. For a survey of value judgments in modern scholarship, see Wiseman, *supra* note 210. The same argument gets comparative materials past the threshold debate, but as of yet has not been able to openly label them as legitimate. Perhaps this is just a function of time and frequency.

264. *See supra* notes 200-03 and accompanying text.

265. *See supra* Part II.D.1.

266. *See supra* notes 21-23 and accompanying text.

inherent in that language.[267] Therefore, it appears no more value-laden than judicial treatment of domestic case law, and does not hide its value judgments like Ely's process-based theory might, under the rug of a false procedural/substantive value dichotomy.[268] Comparative interpretation allows readers to see on the face of an opinion which other nations are borrowed from, and to be able to assess for themselves if these choices reflect values that should be taken into account in domestic constitutional interpretation.

Second, concern for the risk of judicial activism is also somewhat muted in the comparative materials context because of the sensitivity to the threshold debate. Even if their use does eventually become a fully-legitimized method of constitutional interpretation, it would probably remain too conspicuous to be used in the tacit manner which things like value judgments tend to be used, under the guise of textual penumbras, abstract originalism, or precedential synthesis.[269] In fact, when a precedential approach to a constitutional issue is taken, foreign cases might be a class of precedent which is far less susceptible to the common law method problems, like perpetuating a constitutional mistake or bypassing public justification for changes in rationale or doctrine.[270] As the threshold controversy will force judges to carefully explain just what (and how much) they are borrowing from the foreign court, it is unlikely that the problem of borrowing results without explanations of rationale would occur when foreign case law is used.[271] Similarly, the sensitivity to comparative materials would tend to prevent foreign case law from detaching doctrine from the text.[272] Quite to the contrary, distance from the body of domestic

267. For instance, while the Supreme Court of Canada is interpreting its own Charter of Rights and Freedoms in the literal sense, the language is sufficiently similar to assert that its interpretation speaks, to some degree, as an interpretation of the U.S. Constitution. *See supra* note 53. For this reason, some Canadian constitutional cases have included in-depth analyses of American constitutional law. *See e.g.*, The Queen v. Keegstra, [1990] S.C.R. 697 (Can.) (discussing American fighting words doctrine); Morgentaler v. The Queen, [1988] S.C.R. 30 (Can.) (discussing the right to privacy as it developed in the U.S.) (Canada).

268. *See supra* notes 219-20 and accompanying text (discussing the contention that Ely's method hides its value judgments, but makes them nonetheless).

269. *See supra* notes 174-75 and accompanying text (discussing textual penumbras); 191-93 and accompanying text (discussing abstract or sophisticated originalism); 200-03 and accompanying text (discussing precedential synthesis).

270. After several years of disclaiming comparative materials with rhetorical asterisks, it would be less likely for them, rather than a broad structural inference, to be used under the guise of text and carry too much weight. For further discussion of the Justices' hesitant use of comparative materials, see *supra* Part I.D.1.

271. For a summary of this problem as it pertains to domestic constitutional case law, see *supra* notes 200-03 and accompanying text.

272. *See supra* notes 196-98 and accompanying text.

constitutional case law might actually help shed light on its mistakes (rather than perpetuate them) and provide a catalyst for correction.[273]

Part II of this Note asserted that supplementors believe that going beyond the constitutional text is a necessity,[274] and that interpretivists allow for a more disingenuous brand of judicial activism by denying it while reading values into other methods.[275] Furthermore, the greatest tension between the two schools of interpretation is how to appropriately balance flexibility with checks on judicial policymaking.[276] Whether comparative materials provide a palatable compromise between activism and utility is up for debate, but it is important to note that it is the very same debate that surrounds other methods, including original intent, and indeed sometimes even the constitutional text.

3. Adding a Tool to the Plurality Approach

As has been discussed above, a supplementor is especially likely to believe in a pluralistic approach to constitutional interpretation.[277] If one accepts the argument that comparative materials pose no greater risk of judicial activism than other methods, then adding comparative materials as a useful tool to answer hard constitutional questions seems legitimate. For instance, in hard cases, it was explained earlier that the text seems to disappear.[278] In fact, some say that in these cases the primary use of the text is largely to narrow the range of possible results, not to compel a particular answer.[279] In such cases, one must have recourse to non-textual factors to decide between these plausible alternatives.[280] In its rich global usage, comparative

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273. Comparative case law can "be an aid in correcting, or balancing, that inevitable subjectivity of the judges that is due to their being situated in a specific historical and cultural context." Carozza, *supra* note 14, at 1065.

274. *See supra* notes 204-11 and accompanying text.

275. *See supra* notes 174-75 and accompanying text (discussing textual penumbras), 191-93 and accompanying text (discussing abstract or sophisticated originalism), 200-03 and accompanying text (discussing precedential synthesis).

276. *See supra* note 164 (discussing the goal of maintaining some distinction between supplementation and outright non-interpretivism).

277. *See supra* notes 204-11 and accompanying text (discussing the supplementor's belief that the text and original intent do not address all constitutional issues), notes 240-43 and accompanying text (discussing the development of a plurality approach to constitutional interpretation).

278. *See supra* notes 170-73 and accompanying text.

279. Fallon, *supra* note 162, at 1196 ("More commonly, arguments from the text achieve the somewhat weaker but nontrivial result of excluding one or more positions that might be argued for on nontextual grounds."); Schauer, *supra* note 166, at 828 ("Constitutional language can tell us when we have gone too far without telling us anything else.").

280. "[C]onstitutional language often will support or bear more than one reading. In such cases, nontextual factors may guide selection among the plausible alternatives." Fallon, *supra* note 162, at 1254; *see also* James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 Tex. L. Rev. 415, 415 (1982)

materials are also used simply to help define a list of possible results, and not to dictate the correct one.[281] Just as with the majority of textual applications, other methods would be called upon to find or justify the best domestic result. So despite being a non-dispositive, persuasive authority, it will, in many cases, do as much work as the constitutional text.

Another similarity between comparativism and textualism can be observed in easy cases. In such cases, the text might provide its interpreter with a pre-packaged answer to a question.[282] These easy answers are desirable in situations in which the result is not particularly important and there is no need for a prolonged debate.[283] Therefore, another way to explain the text's absence from the most important decisions is to say that when an issue is of great social concern, such that a prolonged debate is demanded, it can be read not to cover the question.[284] In much the same way, comparative materials, because they tend to be reasoned judgments, can offer pre-packaged suggestions for more trivial cases, to be easily applied, when no other method offers such a convenient solution. And, when more important cases come before the court, they can just as easily be distinguished, read differently, or altogether ignored.[285]

In addition, comparative materials help fill in factual data when such is called on by other methods.[286] Recall the problem that the history and tradition approach, while being a well-restrained supplemental method of interpretation, also seems only to protect

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("[R]eading a legal text is often not so much reading for a single meaning as reading for a range of possible meanings.").

281. *See* Carozza, *supra* note 14 (describing how other countries use comparative materials to understand the possible approaches to a particular problem).

282. *See* Strauss, *supra* note 39, at 1731-35. Professor Strauss calls the text a "particularly good focal point" from which to come to agreements about constitutional questions when agreements are "especially valuable." *Id.* at 1734; *cf.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.").

283. For instance, some may think that it would be better for the President's term to be five years, and others three, but in this situation the quick resolution of the question by the text is better than a prolonged debate on the topic. *See* Strauss, *supra* note 39, at 1732.

284. The Constitution "uses language general enough not to force on a society outcomes that are so unacceptable that they discredit the document." *Id.* at 1736. The presence of general provisions in the Constitution to allow interpretive flexibility is thought to be desirable by some commentators. *See, e.g.*, Louis Michael Seidman, "Great and Extraordinary Occasions": Developing Guidelines for Constitutional Change 9-25 (1999).

285. Even in the richer global discourse, the constitutional courts of other nations have often decided to distinguish the decisions of the comparative materials they considered. *See supra* notes 20-26 and accompanying text.

286. This is the type of usage Justice Breyer argued for in his attempt to base a license on need. *See supra* note 95 and accompanying text.

rights which historically have been protected.[287] In order to break the circularity of this method of interpretation, comparative analysis, among other things, has begun to surface more and more frequently as the analysis shifts from *our* nation's history and tradition to the history and tradition of this and other western civilizations.[288] Rather than share a criticism with this well-accepted method, comparativism, when used in conjunction with it, helps address its major shortcoming.

Earlier, this Note mentioned that if one compares the history of value judgments in American constitutional jurisprudence to the current progress of comparative materials, one sees history repeating itself.[289] This Note argued that what ultimately legitimized value judgments was their wide applicability. Similarly, as the sophistication of American constitutional offspring continues to grow, and the international constitutional conversation becomes more vast and diverse, comparativism might become a tool nearly as versatile as value judgments.[290] However, with a far more direct connection to texts similar to the U.S. Constitution, perhaps comparativism should be regarded as more probative than the arguably more subjective notions of value, philosophy, or moral theory.

CONCLUSION

A commentator once described the endeavor of constitutional interpretation as one of "multiple poles in a complex field of forces, among which judges navigate and negotiate."[291] Several arguments advocating the incorporation of comparative materials have been geared towards adding them as another pole in that field.[292] What has been neglected is the fact that while this attempt was successful, albeit slow to develop,[293] the pole which represents comparative materials pulls with less force than all others. However, the analogous arguments in the context of the interpretivist/supplementor debate suggest that this is irrational. Recall the comment of Professor Tushnet mentioned above: "U.S. courts can *sometimes* gain insights into the appropriate interpretation of the U.S. Constitution by a

287. *See supra* Part II.D.2.

288. *Lawrence* is a good example of this shift. In assessing the proposed right to privacy using the history and tradition approach, Justice Kennedy refers to the relevant domain as "our Western civilization." Lawrence v. Texas, 539 U.S. 558, 573 (2003).

289. *See supra* text accompanying note 236. Meanwhile, lack of a wide applicability tends to be the major shortcoming of interpretivist approaches. *See supra* notes 204-11 and accompanying text.

290. *See supra* note 6 and accompanying text for an example of this usefulness.

291. Frank I. Michelman, *A Constitutional Conversation with Professor Frank Michelman*, 11 S. Afr. J. Hum. Rts. 477, 483 (1995).

292. *See* Choudhry, *supra* note 14, at 840-41; Fontana, *supra* note 30, at 557 n.84.

293. *See supra* Part I.C (discussing examples of the arrival of comparative materials into American constitutional jurisprudence).

cautious and careful analysis of constitutional experience elsewhere."[294] This statement illustrates an example of the rhetorical asterisk,[295] defined as language which disclaims or otherwise attempts to reduce the impact of comparative materials, even as they are applied or discussed.[296] As the tension between supplementors and interpretivists shows, this "asterisk" could be applied to any method as the two sides have been articulating arguments for and against methods of interpretation all along. Therefore, Professor Tushnet's statement is not incorrect, but instead proves too much. With the threshold concerns and debate still not resolved adequately in the minds of the opponents of comparative materials, there is a tendency to point out that they are not perfect, even though the imperfections of other methods do not seem so dispositive. Erasing these asterisks is an end in and of itself. Some commentators seem to believe that doing so will change little as far as doctrinal results go.[297] But if supplementors have been winning out, and a pluralistic approach to American constitutional interpretation is a reality, it is less likely that problems stem from the appearance of certain forbidden fruits than from misunderstandings of relative probative weights and illusory debates about constitutional legitimacy. Fears of illegitimacy might cause judges to hold their rationales close to the vest and cloud opinions. Dropping the asterisk could relieve them of this fear and help foster clearer and richer opinions,[298] which could be more accurately scrutinized because the sources and weight of persuasive authority would be more frankly recognized.

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294. *See supra* note 159 (emphasis added).

295. *See supra* note 159 and accompanying text.

296. The language used by Professor Tushnet is more understated than other types of asterisks. While admittedly to a lesser degree, the emphasized language does serve to remind the reader that comparative materials are somehow a weaker method of interpretation than others. For further discussion and harsher examples, see *supra* Part I.D.2.

297. *See, e.g.*, Tushnet, *supra* note 36, at 1230 (noting that "it would be quite surprising to draw dramatically different conclusions" even with a greater incorporation of comparative materials).

298. For a discussion of what might result from comparative materials shedding their burden, see *supra* Part I.A (discussing the benefit that they have conferred on many of the world's constitutional democracies).