The Use and Misuse of Comparative Constitutional Law

Cheryl Saunders*

Abstract

This article examines the extent and nature of the use of foreign law in constitutional adjudication in common law systems outside the United States, with special reference to Australia. Demonstrating that the courts of other common law jurisdictions use foreign case law readily, naturally, and for a variety of purposes, the article reaches two broad conclusions: (1) as a generalization, other common law countries do not share the concern about the legitimacy of comparative precedents that manifests itself in the United States; and (2) as a consequence, other common law countries necessarily share with the United States an interest in the methodology of comparative constitutional law, in order to avoid its misuse. Throughout this article, a series of three decisions handed down by the High Court of Australia over the course of the 1990s is used as a case study to give the arguments context and greater substance.

Introduction

This article deals with one particular aspect of comparative constitutional law: recourse by domestic courts to foreign law and legal experience in the course of deciding constitutional cases. Comparative constitutional law has other uses as well, of course. It is an essential tool for understanding the governance systems of other countries and, therefore, the countries themselves.[1] It is

*Professor of Law, University of Melbourne; Arthur Goodhart Visiting Professor of Legal Science, University of Cambridge, 2005–2006; Ph.D., LL.B., B.A., University of Melbourne. In an earlier form, this article was delivered as a public lecture at the Indiana University School of Law—Bloomington, during my visit to the school as the George P. Smith II Professor of Law, in March and April of 2005. I owe thanks to many people for that opportunity, not least Dean Lauren Robel and George Smith II himself. In finalizing the article, I benefited greatly from questions asked during the lecture and comments received afterwards. I also received helpful research assistance from Megan Donaldson, for which I express my appreciation.

1. Carnes Lord, The Modern Prince: What Leaders Need to Know Now 28 (2003) (noting the stress placed by Aristotle on political leaders "learning about other states as well as one's own, including lessons that might be gleaned from their domestic politics").

inevitably engaged in any constitution-making process,[2] with Iraq only the most recent example, although one which has also served to focus new attention on the nature of the challenge.[3] My subject is deliberately confined to courts, however, and to their use of foreign law. It thus also excludes recourse by domestic courts to international law, for assistance in resolving constitutional questions.[4] Although a parallel phenomenon, now tending to converge with the use of foreign law,[5] the consideration of international law by national courts raises some-

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2. There is a vast literature, which tends to be regional, because of differences in the constitution-making experience. To substantiate the point, however, in relation to different countries, see D.M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT'L J. CONST. L. 181, 185–89 (2003); NICHOLAS R.L. HAYSOM, *Constitution Making and Nation Building*, *in* FEDERALISM IN A CHANGING WORLD—LEARNING FROM EACH OTHER 216 (Raoul Blindenbacher & Arnold Koller eds., 2003); FIJI CONSTITUTION REVIEW COMM'N, TOWARDS A UNITED FUTURE ¶ 1.10 (1996). In Bhutan, King Jigme Singye Wangchuck told a special session of the Lhengye Zhungtsho on March 21, 2005, shortly before the public release of the draft Constitution, that the Constitution drafting committee had "studied the Constitutions of more than 50 other countries. . . . [N]ot to copy other Constitutions but to study and adopt what was good and relevant for Bhutan." Kinley Dorji, *Draft Constitution to Be Distributed to All Bhutanese*, KUENSEL ONLINE, Mar. 23, 2005, http://www. kuenselonline.com/modules.php?name=News&file=article&sid=5207.

3. DAVID L. PHILLIPS, POWER-SHARING IN IRAQ (Council on Foreign Relations, Council Special Report No. 6, 2005) (appending an analysis of "Federalism and Autonomy Arrangements" potentially then relevant to the constitution-making task of the National Assembly), *available at* http://www.cfr.org/content/publications/attachments/Iraq_CSR.pdf. *See also* Brendan O'Leary, *Power-Sharing, Pluralist Federation, and Federacy*, *in* THE FUTURE OF KURDISTAN IN IRAQ 47 (Brendan O'Leary et al. eds., 2005).

4. Australian examples may be found in a series of judgments of Justice Michael Kirby. Newcrest Mining (WA) Ltd. v. Commonwealth (1997) 190 C.L.R. 513, 657, 661; Kartinyeri v. Commonwealth (1998) 195 C.L.R. 337, 386. Other members of the High Court of Australia have expressly rejected the use of international law for this purpose. For a recent, vigorous rebuttal, see *Al-Kateb v. Godwin* (2004) 78 A.L.J.R. 1099, 1112–15 (McHugh, J.). For a more detailed account of the debate within the High Court of Australia, see The Honorable Justice Michael Kirby AC CMG, High Court of Austl., International Law—The Impact on National Constitutions, Address at the American Society of International Law Seventh Annual Grotius Lecture (Mar. 30, 2005), *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_30mar05.html.

5. Convergence is occurring in a variety of ways, including reliance on both sources without clearly distinguishing between them in judgments and scholarship, and in the ambiguous status of supra-national courts from the standpoint of countries that are not parties to the supra-national arrangement. *E.g.*, The Honorable Justice Michael Kirby AC CMG, High Court of Austl., International Law—The Impact on National Constitutions, Address at the American Society of International Law Seventh Annual Grotius Lecture (Mar. 30, 2005), *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_30mar05.html; Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005). For the latter, consider the treatment of decisions of the European Court of

what different questions of principle and method,[6] affecting analysis of both its use and misuse, which distinguishes it from foreign law for present purposes.

Reference by courts to foreign law in determining constitutional questions is presently a controversial practice in the United States. The controversy should be kept in perspective, however. Reference to foreign law in the course of constitutional adjudication in the United States is not a recent phenomenon,[7] nor is it confined to the Supreme Court.[8] Most members of the current Court have referred to comparative sources, at some stage, for a reason other than to dismiss the legitimacy of reliance on them.[9] At least four justices also have made extrajudicial remarks that appear to endorse the use of comparative constitutional law in some circumstances.[10] Based on present indications, it seems likely that references by U.S. judges to foreign law will increase, if cautiously, although changes pending in the composition of the Supreme Court make prediction risky.

Human Rights as foreign law in *Lawrence v. Texas*, 539 U.S. 558 (2003), and as international law in *Al-Kateb*, 78 A.L.J.R. at 1112–15. Logically, the characterization of the Supreme Court of the United States is preferable in this instance.

6. Arguably, the claims of international law are stronger, deriving from membership of the international community and, in some cases, from commitments to international norms accepted by other branches of government, on behalf of the country as a whole. These points of distinction also help to explain the resistance to it: as potentially a much more intrusive influence on domestic law (if influence is allowed), which also circumvents the legislative role of Parliament in common law parliamentary systems. By contrast, the weaker claims of foreign law are generally recognized in the indirect manner in which it is used, through a process of reasoning that lies entirely within the discretion of the court.

7. Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1513 (2003).

8. Margaret H. Marshall, Speech, *"Wise Parents Do Not Hesitate to Learn From Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. Rev. 1633, 1641 (2004).

9. Koh, *supra* note 7, at 1514.

10. Justice Stephen Breyer, Keynote Address at the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 Am. Soc'y Int'l L. Proc. 265 (2003); Ruth Bader Ginsburg, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the First National Convention of the American Constitution Society (Aug. 2, 2003), *in* 22 Yale L. & Pol'y Rev. 329 (2004); Justice Sandra Day O'Connor, Keynote Address to the 96th Annual Meeting of the American Society of International Law (Mar. 15, 2002), *in* 96 Am. Soc'y Int'l L. Proc. 348 (2002); William H. Rehnquist, *Constitutional Courts—Comparative Remarks*, *in* Germany and its Basic Law: Past, Present and Future: A German-American Symposium 411 (Paul Kirchhof & Donald P. Kommers eds., 1993).

It is fair to say, however, that the practice is currently somewhat constrained, in both substance and extent.[11] The series of recent cases that served as a catalyst for the latest round of debate on the merits or demerits of comparative constitutional law in the courts assists to make the point. The references to foreign law in *Atkins v. Virginia*,[12] *Lawrence v. Texas*,[13] and *Roper v. Simmons*[14] are careful and sparing. All three nevertheless attracted particular attention on this ground, and the reaction was vigorous.[15] Both the attention and the reaction might be attributable in part to the divisive nature of the moral questions at issue in these particular cases.[16] Disagreement over the standard by which "cruel and unusual punishment" is to be measured, for the purposes of the Eighth Amendment, was an additional complication in *Atkins* and *Roper*. However, the distinctive character of these particular cases is not a complete explanation. Speaking for the Court, Justice Scalia also took specific issue with a relatively mild reference by Justice Breyer to comparative experience in *Printz v. United States*,[17] a federalism case. It is apparent that, while selective use of foreign law to assist in determining constitutional questions clearly attracts interest and, in some cases, support in the United States,[18] it attracts considerable opposition as well. The opposition

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11. The practice of comparative law analysis is perhaps also constrained in kind. *See* Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 247–54 (2001) (noting the tendency of the Court to refer to "constitutional practice" rather than to the decisions or the reasoning of foreign courts).

12. 536 U.S. 304 (2002).

13. 539 U.S. 558 (2003).

14. 543 U.S. 551, 125 S. Ct. 1183 (2005).

15. Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilisation":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69 (2004); Justice Antonin Scalia, Foreign Legal Authority in the Federal Courts, Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law (Apr. 2, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305 (2004); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL. AFF., Aug. 2004, at 41–42, *available at* http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp; Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005).

16. At issue in the cases were, respectively, the imposition of the death penalty for mentally retarded criminal defendants; the criminalization of homosexual activity between consenting adults; and the use of the death penalty against juveniles.

17. Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

18. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) [hereinafter Tushnet, *Possibilities*]; Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265 (2003); Vicki C. Jackson,

comes not only from scholars and commentators, but from within the Court itself,[19] as well as, most recently, from segments of Congress.[20]

At the risk of oversimplifying what is a typically rich and robust U.S. debate, the opposition is based upon one or both of the following grounds. The first concerns the legitimacy of the use of foreign precedent in constitutional adjudication at all. This is the ground on which Justice Scalia objected to the reference to German federal practice in *Printz*,[21] when he wrote that comparative analysis is "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."[22] The second ground of opposition is the potential for abuse or, less pejoratively, misuse, of foreign law, in terms of either judicial or comparative method. There are elements of this critique in *Roper*: in Justice O'Connor's implicit criticism of the weight accorded to foreign law in the Court's opinion[23] and in Justice Scalia's portrayal of the Court's use of foreign law as selective and acontextual.[24] These two grounds of opposition to the use of foreign law are distinct, unless the methodological problems prove insuperable, thus undermining legitimacy in another way.

In this article I do not dwell further on the debate on these issues in the United States, which is well canvassed in a large and growing literature. Rather, my purpose is to examine the use of foreign law in constitutional adjudication elsewhere in the common law world with particular reference to Australia. I make two arguments in particular. The first is that, as a generalization, other common law countries do not share the concern that manifests itself in the United States about the legitimacy of the use of comparative precedents. The difference is so stark that it raises a further question for comparative constitutional inquiry—why this is so.

Comparative Constitutional Federalism and Transnational Judicial Discourse, 2 INT'L J. CONST. L. 91 (2004); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004) [hereinafter Tushnet, *Cautionary Notes*].

19. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) (rejecting the views of the "world community" as "irrelevant," and stating, "[I]t is a Constitution for the United States that we are expounding . . . ."). Similarly, in *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Scalia dismissed references to foreign law as "meaningless dicta." *Id*. at 598.

20. *See, e.g.*, H.R. Res. 97, 109th Cong. (2005); S. Res. 92, 109th Cong. (2005); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. tit. II (2005).

21. *Printz*, 521 U.S. 898.

22. *Id.* at 921 n.11.

23. Roper v. Simmons, 125 S. Ct. 1183, 1215–16 (O'Connor, J., dissenting).

24. *Id.* at 1225–29 (Scalia, J., dissenting).

The second argument follows logically from the first; it is that other common law countries necessarily share with the United States an interest in the way in which foreign law is used or, to put the point negatively, in avoiding its misuse. Typically, however, the methodology by which foreign legal sources are selected and used by common law courts in constitutional adjudication has attracted little more attention than any other aspect of judicial reasoning. Judges have dealt instinctively with the issues that arise, with results that, predictably, are mixed.

This somewhat uncritical use of foreign law presently faces several challenges. One is a by-product of the closer scrutiny of comparative method in the United States: identifying standards that, as they become acknowledged elsewhere, threaten the legitimacy of the use of foreign law unless the standards are met. This challenge is reinforced by a related controversy over the creativity of the role of judges and by some resurgence of nationalism. A second, more benign challenge comes from the turn against universalist assumptions within the discipline of comparative law itself, both generally and with particular reference to constitutional law,[25] demanding a more sophisticated comparative method sometimes described as dialogical.[26] A third challenge, of a different kind, stems from concern about cost and delay in litigation, which can be exacerbated by unnecessary citation of foreign sources. One possible outcome, of which signs already are emerging, is a more self-conscious use of foreign law by common law courts, which may limit the practice while reinforcing its acceptability.[27]

To give these abstract arguments greater substance, I use as a case study a series of three decisions handed down by the High Court of Australia over the

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25. For a helpful survey of such comparative law trends, see David Nelken, *Comparatists and Transferability*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 437 (Pierre Legrand & Roderick Munday eds., 2003). *See also* ESIN ÖRÜCÜ, THE ENIGMA OF COMPARATIVE LAW ch. 11 (2004); Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2004) (reviewing COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (Norman Dorsen et al. eds., 2003)).

26. *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 836, 855–66 (1999) [hereinafter Choudhry, *Toward a Theory*] (defining dialogical interpretation); Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 4 (2004) [hereinafter Choudhry, *The* Lochner *Era*]; Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 424–38 (2003).

27. *See, e.g.*, Practice Direction (Citation of Authorities), (2001) 1 W.L.R. 1001 (Eng.), *available at* http://www.hmcourts-service.gov.uk/cms/814.htm [hereinafter Practice Direction]. I am indebted to Eugene Fidell for drawing the *Practice Direction* to my attention.

course of the 1990s.[28] In these decisions, the Court accepted that the Australian Constitution protects, by implication, a measure of freedom of political communication and settled the main contours of the doctrine. As will be seen, these are exceptional cases in Australian constitutional law, from the standpoint of both doctrine and judicial method. They are useful for present purposes, however, because they present a range of different issues that were resolved with the assistance of comparative law in a range of different ways. It may be acknowledged that the extent of the reference to comparative law in the early stages of the development of the new doctrine is greater than may be expected in cases in which Australian law is more settled. Indeed, it is obvious from the case study itself that the references to comparative law decline as the Australian doctrine becomes established. Nevertheless, both the manner and the ease of reference to comparative law in these cases is sufficiently representative of the methodology of the High Court in resolving other, less novel questions to justify the use of these cases in this way.[29]

The structure of the rest of the article is as follows. In Part I, I outline the constitutional background against which the three cases that constitute the case study were decided and identify the principal legal questions presented in each. Parts II and III deal, respectively, with the use and misuse of comparative constitutional law in which I explore, in turn, the challenges of legitimacy and method. Each part begins by examining the relevant challenge in principle, before turning to the case study to determine how the challenge is regarded and met, through an analysis of the extent and nature of reliance by the High Court of Australia on comparative constitutional law. Each part also incorporates its own conclusion. The relative lack of concern about the legitimacy of the recourse to comparative law that is manifested in these cases, standing as proxy for practice in common law countries more generally, prompts speculation in the conclusion to Part II about the reasons for the difference in this regard between the United States and the rest of the common law world. The examination in Part III of the manner of the use of comparative constitutional law by the High Court of Australia enables some tentative conclusions to be drawn about how common law courts go about this task and about the strengths and weaknesses of the methodology that typically is employed. A final brief conclusion makes a necessary disclaimer: the article is de-

28. Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520; Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104; Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R. 106.

29. *See, e.g.*, Austin v. Commonwealth (2003) 215 C.L.R. 185; APLA Ltd. v. Legal Servs. Comm'r (NSW) [2005] HCA 44.

signed as a contribution to the beginning, rather than to the end, of academic inquiry into the theory and practice of comparative constitutional law in common law countries, which is still in a relatively early stage.

I. FREEDOM OF POLITICAL COMMUNICATION IN AUSTRALIA: A CASE STUDY

A brief explanation of the Australian constitutional framework may assist to put the case study in context. Like the United States, Australia has a written, entrenched Constitution, which is interpreted and applied by the courts, exercising an undisputed function of judicial review. The principal purposes of the Constitution, when it came into effect at the beginning of the twentieth century, were to establish a federation and to provide a framework for the institutions of the new, national government, the Commonwealth of Australia. The framers of the Australian Constitution drew extensively on the U.S. Constitution for the design of the federation, aspects of the authority of the federal judiciary, and the structure of the Constitution.[30] In one important departure from the U.S. model, however, which is relevant for present purposes, they established the highest court, the High Court of Australia, as a court of final appeal in matters of both federal and state jurisdiction[31] and thus capable of declaring the common law for the whole of Australia. In another departure from the U.S. model, the framers did not include a Bill of Rights, although they indulged in a brief and somewhat confused flirtation with a version of the Fourteenth Amendment.[32] Subsequent desultory attempts to alter the Constitution to provide a greater measure of rights protection have failed.[33] Australia, unique among common law countries, continues to adhere to the essentially Diceyan position[34] that rights are ade-

30. *See* J. A. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 24–26 (1972); John Reynolds, *A. I. Clark's American Sympathies and His Influence on Australian Federation*, 32 AUSTRALIAN L.J. 62 (1958).

31. CONST. § 73 (Austl.).

32. Cheryl Saunders, *Protecting Rights in the Australian Federation*, 25 ADEL. L. REV. 177, 184–86 (2004).

33. *Id.* at 188–91.

34. The effect of the doctrine of parliamentary sovereignty, famously articulated by A.V. Dicey, was mitigated, in his view, by (at least) two factors. One was the character of a representative legislature itself: "the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of . . . the electors . . . ." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 83 (10th ed. 1959). The other was the role of the courts, to whom it fell to interpret statutes enacted by Parliament, applying common law principles and invoking the "spirit of legality." *Id.* at 175, 264, 414.

quately protected by representative, responsible government and by the common law.[35]

The institutions of national government for which the Australian Constitution provides include an elected bicameral legislature and an executive branch of government, drawn from the legislature in accordance with the principles of responsible government. The question of whether the Constitution impliedly protects political communication and, if so, the nature and extent of the protection depends on these provisions. One of the most important is the requirement in the opening words of Section 24 of the Australian Constitution that "[t]he House of Representatives shall be chosen directly by the people."

There are three core cases through which the present doctrine of freedom of political communication emerged.[36] The first, *Australian Capital Television Proprietary Ltd. v. Commonwealth*,[37] was decided in 1992. It involved a challenge to the validity of Commonwealth legislation[38] that prohibited paid political broadcasts in the period leading to a Commonwealth, state, or local election as long, at least, as the Commonwealth government made the necessary regulations to activate the legislation in respect of a particular election. If the legislation was so activated, it also required broadcasters to provide free time for election broadcasts, to be allocated on a basis which tended to favor the established parties.[39] One basis for the challenge was that, by impeding the flow of information about parties and candidates, especially at election time, the legislation interfered unacceptably with the operation of the institutions of representative and responsible government established by the Constitution and with their underlying "fundamental premise" of popular control through electoral processes.[40] The principal questions for the court thus included the following: is there a necessary link between representative government and political communication generally or at an election time? If so,

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35. *See* ROBERT MENZIES, CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH 49–55 (1967) (providing a classical explanation of the Australian position).

36. With the benefit of hindsight, however, the doctrine can be seen to have roots in earlier cases, including *Davis v. Commonwealth* (1988) 166 C.L.R. 79. Each of the three core cases also had a companion case, to which I will make only incidental reference. These were, respectively, *Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1, *Stephens v. W. Australian Newspapers Ltd.* (1994) 182 C.L.R. 211, and *Levy v. Victoria* (1997) 189 C.L.R. 579. Subsequent cases have elaborated particular aspects of the doctrine. *See, e.g.*, Coleman v. Power (2004) 78 A.L.J.R. 1166.

37. Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R. 106.

38. Australian Broadcasting Act, No. 33 (1942).

39. *Australian Capital Television*, 177 C.L.R. at 132 (Mason, C.J.).

40. *Id.* at 110 (argument for the plaintiff television corporation).

could the Court, after a period of ninety years, imply protection for the freedom from the Constitution? What were the contours of the freedom in this case? What was protected? Was the protection unlimited or restricted, and, if restricted, in what respects? What was the role of the Court itself in determining whether the freedom had been infringed? Finally, there was the question presented by the dispute immediately before the Court: did the restrictions actually imposed by the challenged legislation offend an implied freedom?

A majority of the Court held that freedom of political communication was indispensable to representative, responsible government.[41] By implication, it therefore was protected by the Australian Constitution. The freedom protected communication "in relation to public affairs and political discussion"[42] between elected representatives and the people, and between the people themselves.[43] The degree of protection was not absolute but required a balance to be struck between the impact of a challenged restriction on political communication and the competing public interest.[44] In the final analysis, this was a task for the Court.[45] The challenged legislation failed the test and was wholly invalid.[46]

The second decision, in *Theophanous v. Herald & Weekly Times Ltd*.,[47] came two years later. This time, the implied constitutional freedom was raised by a media proprietor in defense to an action of defamation, brought by a serving member of the Commonwealth Parliament, whose performance in that capacity had been the subject of critical media comment. The action was brought in the

41. *See id.* at 146–47, 169, 212. Justice McHugh agreed in the outcome, but limited his decision to political communication during the election period. *See id.* at 227–31. Justice Brennan generally concurred with the existence of the freedom, but dissented on the details of the freedom and its application to the facts. *See id.* at 162. Justice Dawson dissented. *Id*. at 177, 202–03.

42. *Id.* at 138. The formulation differs in other judgments, including in both *Australian Capital Television* and *Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1. Analyzing the variations in *Theophanous*, the joint judgment concluded that "discussion of government and political matters" was a formulation that had the support of five justices in the earlier cases. Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, 121. *See also* Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520, 560 (reapplying the formulation discussed in *Theophanous*).

43. *Australian Capital Television*, 177 C.L.R. at 139, 212; *Nationwide News*, 177 C.L.R. at 74.

44. *See Australian Capital Television*, 177 C.L.R. at 143, 157–58, 169, 217, 235.

45. *Id.* at 144.

46. While the majority invalidated the legislation as a whole, Justice Brennan would instead have invalidated the sections of the legislation restricting communication during state elections on grounds of an implied state immunity. *See id.* at 164; *cf.* at 241 (McHugh, J., dissenting). Justice McHugh also would have held section 95C, dealing with territory elections, valid. *Id.* at 246.

47. *Theophanous*, 182 C.L.R. 104.

state of Victoria, where the law of defamation is based in the common law. The defenses to a defamation action then available at common law were restrictive. In particular, the defense of qualified privilege required reciprocity of interest between those making and receiving a communication.[48] Typically, this was not present when a communication was made to the public at large[49] and thus was of little assistance to the media. Accordingly, the argument for the defendant sought to persuade the Court that the recently implied constitutional freedom of political communication necessitated the development of a new defense in circumstances where the freedom applied.[50]

In *Theophanous*, the Court thus faced several new questions. The first was whether the constitutional freedom could affect legal relations between individual citizens, up to this time grounded solely in the common law, given the source of the freedom in the provisions of the Constitution establishing the institutions of representative government. If the answer was yes, further questions arose about the nature of the interaction between the Constitution and the common law, the requirements of any new defense to defamation, and the parties against whom it would be available.

In a bitterly divided Court, a bare majority of four justices held that the implied freedom applied where a claim in defamation arose from a publication that, *inter alia*, concerned members of Parliament and related to the performance of their public duties.[51] On such "an occasion of qualified privilege," a new defense necessarily was derived from the Constitution itself.[52] Three of the majority justices held that where the constitutional freedom applied, publication would not be actionable where defendants could establish that they were unaware of the falsity of the material published, that they did not publish it recklessly, and that the publication was reasonable under the circumstances.[53] The fourth member of the majority, Justice Deane, would not have required a publisher to establish either absence of recklessness or reasonableness.[54] He expressly

48. *Id.* at 133.

49. *Id.*

50. *Id.* at 119 (quoting paragraphs from the Further Amended Defense, in which the elements of the new defense were stated).

51. *Id.* at 140, 179–80.

52. *Id*. at 140–41. *See also id*. at 185 (Deane, J., concurring).

53. *Id*. at 140–41.

54. *Id*. at 188 (Deane, J., concurring).

acknowledged, however, that there was majority support only for the more limited defense and joined in the orders proposed in the joint judgment.[55]

The third, and for present purposes final, case again raised the scope and nature of the implied freedom in the context of a defense to an action in defamation. The plaintiff in *Lange v. Australian Broadcasting Corp*.[56] was a former Prime Minister of New Zealand. The defendant was the Australian national broadcaster. The suit was brought in the state of New South Wales, where the law of defamation is codified. However, the adequacy of the common law defenses was canvassed, both in argument and in the reasons of the Court.[57] The composition of the Court had changed, and the opportunity was used effectively to reopen the argument in *Theophanous* on the ground that it lacked a "binding statement of constitutional principle," which weakened its authority.[58] Potentially, therefore, the full range of doctrinal questions was before the Court once more: the existence and scope of the implied freedom; its effect on the common law governing private relations; and its consistency with the existing defenses under the law of defamation.

In an unusual, single, unanimous judgment reconciling, at least for the moment, the divisions in the Court, the freedom was affirmed.[59] As in the earlier cases, the rationale for the freedom remained the imperatives of the constitutional provision for representative and responsible government, although the scope of the constitutional command was more narrowly conceived by reference to whatever was "necessary for the effective operation of that system of representative and responsible government provided for by the Constitution."[60] Once again, the freedom was not unlimited: a law that burdened it would not be unconstitutional so long as it was "reasonably appropriate and adapted to serve a legitimate end the fulfilment [*sic*] of which is compatible with the maintenance of the constitutionally prescribed system of . . . government."[61] The question that

55. *Id*.
56. Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520.
57. *Id*. at 524, 575.
58. *Id*. at 554, 556.
59. *Id*. at 560.
60. *Id*. at 567.
61. *Id*. In a variation in the more recent case of *Coleman*, a majority of the Court held that the relevant question should be whether a challenged law is "reasonably appropriate and adapted to serve the end of public order *in a manner* that was compatible with the system of representative and responsible government prescribed by the *Constitution*." Coleman v. Power (2004) 78 A.L.J.R. 1166, 1175 (McHugh, J., concurring) (emphasis added).

had most deeply divided the Court, regarding the jurisprudential character of the freedom and its relationship with the common law, was resolved in Solomonic fashion. The freedom operated only as a limitation on power, but as the common law could not be "at odds" with the Constitution, the Court itself would mold this doctrine to the necessary extent,[62] taking advantage of its capacity as the final arbiter of the common law. The new "extended" common law defense of qualified privilege would be available to the publisher of a political communication to a large audience, as long as the publication was reasonable in all the circumstances.[63] The precise link between this new defense and the Constitution was, however, left unclear.

II. Use of Comparative Constitutional Law

A. Theoretical Framework

There are two particularly prominent themes in the opposition to the use of foreign experience by courts in the course of constitutional adjudication. The first concerns the legitimacy of recourse to foreign sources that came into existence after the Constitution was made or which, presumably, could have had no influence on its making.[64] The second focuses on the methodological challenges, suggesting that appropriate use is unachievable because, for example, the necessary level of understanding of the foreign law in context is unattainable,[65] or the premises of the enterprise are misguided, insofar as they assume convergence on an ideal constitutional system.[66] Significant though these methodological issues are, it is convenient to postpone them until Part III and to focus here on opposition in principle, grounded in concern about legitimacy, to the use of comparative legal sources by courts.

Opposition to the practice on the ground of legitimacy alone varies with the purpose and degree of recourse to comparative experience. While there have

62. *Lange*, 189 C.L.R. at 566.

63. *Id.* at 574.

64. *See generally* Justice Antonin Scalia, Foreign Legal Authority in the Federal Courts, Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law (Apr. 2, 2004), *in* 98 Am. Soc'y Int'l L. Proc. 305 (2004) (discussing the legitimacy of using foreign legal authority); Alford, *supra* note 15 (discussing the use of constitutional comparativism in the United States).

65. Posner, *supra* note 15.

66. Teitel, *supra* note 25, at 2584.

been various attempts in recent years to categorize the uses of foreign law in the course of constitutional adjudication, so as to analyze their significance more effectively, they do not fully cater to the diversity of the ways in which courts refer to the constitutional law and experience of other jurisdictions.[67] One simple model conceives of the uses of foreign legal experience along a spectrum, ranging, at one end, from what has been described as "soft use"[68] of comparative law—in which the court places no reliance on foreign experience in reaching its final conclusions—to, at the other end, what might be described as "hard use" of comparative law—in which foreign experience plays a more significant role in the reasoning of the court. Toward the soft end of the spectrum we find a variety of practices: passing references to foreign experience; presentation of empirical information about how principles or practices urged on the court have worked elsewhere, to enable the court to evaluate competing domestic options; and use of a foreign legal rule or judicial argument to define or justify consideration of an issue, which is then resolved by reference to domestic sources. Toward the hard end of the spectrum are uses of foreign law that more actively shape the conclusions ultimately reached by the court. These include: the borrowing of reasons of other courts; reliance on foreign law to support or to assist with the interpretation or application of a constitutional provision; and empirical recourse to foreign experience in a manner that is used to justify transplantation of the foreign rule, institution, or practice.

By and large, no one objects to the use of comparative experience at the tip of the soft end of the spectrum. The real debate concerns the other end. There, the objection rests on the conception of a constitution as a quintessentially national instrument, drawing its force as superior law from the initial and ongoing agreement of the people and evolving organically over a lengthy period of time in response to national perceptions, national needs, and national values. A court interpreting such an instrument, it is argued, should not use in any substantive way standards, principles, or practices emanating from sources outside the constituted nation, at least without explaining how the decision to do so can be jus-

67. One of the most influential attempts has been Mark Tushnet's three-fold categorization of uses as "functionalist," "expressivist," and "bricolage." *See* Tushnet, *Possibilities*, *supra* note 18. *See* Larsen, *supra* note 15 (distinguishing between "expository," "empirical," and "substantive" use, and further dividing "substantive" into "reason-borrowing" and "moral fact-finding").

68. Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L L. 301 (2004).

tified, and, perhaps, how such use of foreign law fits within an accepted theory of constitutional interpretation.

While the device of the spectrum is useful at one level, it does not fully capture the complexity of the use of foreign experience by courts in which the practice is commonly used. The significance of foreign experience in the reasoning of a court is only one measure of use. To take an obvious example, it does not indicate whether the foreign subject matter is viewed positively or negatively, or, in crude functional terms, whether it is adopted, adapted, or rejected. The purpose of recourse to foreign experience offers another different, if related, dimension with direct relevance to legitimacy. In this context, a distinction may be drawn between constructive use, where foreign experience is used for guidance in some way (whether positive or negative), and the reflective use of comparative law as a technique that "awakens judges to the potential latent in their own legal systems"[69] and gives them a degree of "distance,"[70] while offering "experience of solutions that have proved successful but also, scarcely less valuable, experience of solutions that have for any reason proved unsatisfactory."[71] Yet another dimension focuses attention on the nature of the foreign source from which insight is drawn. While the source may be the interpretation of a legal text, the application of a legal rule, the structure of a legal institution, or empirical evidence of foreign practice, it may equally be an interpretative method, an ideological value, or a step in the process of analogical reasoning.

Some of the recent literature seeks to explain the phenomenon of the use of comparative constitutional law through the metaphor of dialogue. Dialogue is currently in vogue in constitutional law. It emerged initially as a description (and defense) of the effect of the structure of the Canadian Charter of Rights and Freedoms (the Charter) on relations between the courts and the elected branches of government;[72] it offers similar potential to describe the effect of the somewhat different structures for the protection of rights in the United Kingdom and New

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69. Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 111 (2002).

70. Günter Frankenburg, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harv. Int'l L.J. 411 (1985).

71. Lord Bingham of Cornhill, *The Break with the United Kingdom and the Internationalisation of the Common Law*, *in* Centenary Essays for the High Court of Australia 82, 84 (Peter Cane ed., 2004).

72. Peter W. Hogg & Allison A. Bushell, *The* Charter *Dialogue Between Courts and Legislatures*, 35 Osgoode Hall L.J. 75 (1997).

Zealand;[73] and it has been invoked by Barry Freidman as an explanation of the role of the courts in judicial review in the United States.[74] Its application in comparative constitutional law also appears to be sourced in Canada. Justice L'Heureux Dubé, then of the Supreme Court of Canada, used the term in 1998 in reference to the process whereby "judgments in different countries increasingly build on each other," distinguishing "dialogue" from "reception" by emphasizing mutuality and reciprocity.[75]

In its adjectival form, in the context of comparative constitutional law, the term is now principally associated with the work of Sujit Choudhry, who has used it to steer a path between particularist and hegemonic approaches to the use of foreign law, avoiding the pitfalls of functionalism and universalism.[76] The principal characteristic of the dialogical approach, as developed by Choudhry, is its "use as a way of facilitating greater understanding of one's *own* legal system."[77] This is more than the contrast between constructive and reflective use, however; dialogue also takes account of the multiple layers of meaning that may potentially be drawn from foreign legal sources and acknowledges the possibilities of both similarity and difference. Thus, on this approach, as I understand it, while the insights of comparative constitutional law may serve to highlight differences from the comparator jurisdiction, they may reveal similarities as well.

B. Application to the Case Study

These distinctions have very little bearing on the acceptability, in principle, of foreign experience in the courts of other common law countries, although it will be necessary to return to them again in the context of method. As a generalization, the courts in these jurisdictions refer to comparative experience readily and openly, for purposes that traverse the entire spectrum of potential uses of legal authority that might be of assistance in the resolution of a constitutional matter.

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73. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 710 (2001).

74. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004).

75. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998).

76. Choudhry, *The* Lochner *Era*, *supra* note 26, at 52–54.

77. *Id.* at 52.

The case study illustrates both the prevalence and familiarity of the practice. Every judge, in each of the three cases, referred in one way or another to foreign legal experience, in many instances in support of key conclusions in the resolution of the case and in the evolution of the new doctrine. The range and depth of the use of comparative experience is notable. Equally significant is the fact that, despite the controversy that accompanied these cases, no party, and no judge, challenged the legitimacy of the use of comparative law, although differences about the meaning and relevance of particular sources emerged on key issues.[78]

I will postpone to Part III a more detailed consideration of the methodology of the Court, in order to focus instead on the use of foreign law in these cases by reference to some of the analytical tools to which reference has already been made: the significance of foreign experience in the reasoning of the Court; the acceptance or rejection of a foreign example; the constructive or reflective purpose of recourse to foreign law; and the nature, level, and range of the sources used. To make the exercise more manageable, I confine the analysis to the use of foreign law in resolving the four most important doctrinal questions presented to the Court by these cases. The first was whether a freedom of political communication could be implied from the constitutional provision for the institutions of representative democracy and, if so, the scope of the freedom. The second was whether the freedom was absolute or limited in some way and, if so, how. The third concerned the nature of the impact of the freedom on private relations under the common law. The fourth required the identification of the elements of a new defense to an action in defamation, whether drawn directly from the Constitution or based in the common law.

In relation to the first two questions, the use of foreign law was most extensive in *Australian Capital Television* and its companion decision, *Nationwide News*. The different context in which these questions were revisited in *Theophanous* encouraged further recourse to foreign authority, not only for doctrinal purposes, but in relation to divisions now evident within the Court over the character of the Australian Constitution and the scope of the judicial role in relation to it. The threshold questions of the existence and scope of the freedom were in issue yet again in *Lange*. By this time, however, there was a sufficient

78. In *Australian Capital Television*, Justice McHugh took the counsel for the Commonwealth to task for placing emphasis on comparisons for which "no valid analogy exists" and failing to rely on the Constitution of the United States, which he considered "a more valid analogy" for the purpose of determining whether the challenged legislation infringed the implied constitutional freedom. Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R. 106, 240–41.

body of Australian case law, forged in the light of comparative experience, to make further reference to foreign law an unnecessary diversion on these first two questions, although not the latter two.

The question whether the Australian Constitution protects, by implication, a measure of freedom of political communication depends, first, on the existence of a necessary link between freedom of communication and the institutions of representative democracy and, second, on the willingness of the Court to draw such an implication from the Constitution. The two issues are logically connected in the sense that, if the first is found, the second must follow, as long, at least, as the issue is justiciable. Foreign sources played a critical role in establishing this key link, in the absence of any directly relevant Australian law.[79] To support its assertion of the "fundamental importance, indeed the essentiality, of freedom of communication . . . in the modern system of representative government,"[80] the majority turned to case law from Canada, the United Kingdom, the United States, and the European Court of Human Rights,[81] as well as to several foreign legal texts.[82] Inevitably, these sources offered conclusions reached as steps in an argument toward a different end, under different constitutional arrangements. They were, in effect, deductions about the behavior of similar governing institutions, drawn from logic, history, or both, influenced by a shared belief in the value of freedom of speech. A speech by Lord Simon of Glaisdale, on which several members of the Court relied,[83] is broadly typical:

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79. There was indirectly relevant Australian authority, however, on a range of analogous issues, one of which raised, albeit in a different context, the importance of information in a democratic society. Commonwealth v. John Fairfax & Sons Ltd. (1980) 147 C.L.R. 39, 52. *See also* Davis v. Commonwealth (1988) 166 C.L.R. 79. See also the Australian cases cited by Justice Guadron in *Australian Capital Television*, 177 C.L.R. at 212 nn.4–6.

80. *Australian Capital Television*, 177 C.L.R. at 140 (Mason, C.J.), 168 (Deane & Toohey, JJ.), 211–12 (Gauxdron, J.), 231 (McHugh, J.). *See also* Nationwide News Pty. Ltd. v. Wills (1992) 177 C.L.R. 1, 31 (Mason, C.J.), 47–48 (Brennan, J.), 74–75 (Deane & Toohey, JJ.).

81. A list of thirteen principal foreign cases on which the Court relied for this point is conveniently collected in the judgment of Chief Justice Mason in *Australian Capital Television*, 177 C.L.R. at 140.

82. *Australian Capital Television*, 177 C.L.R. at 139 (citing ARCHIBALD COX, THE COURT AND THE CONSTITUTION 212 (1987)); Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, 124 (citing ERIC BARENDT, FREEDOM OF SPEECH 152 (1985); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 42 (1960)).

83. *Australian Capital Television*, 177 C.L.R. at 139 (Mason, C.J.), 211–12 (Glaudron, J.), 231 (McHugh, J.); *Nationwide News*, 177 C.L.R. at 31 (Mason, C.J.), 47–48 (Brennan, J.).

> People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.[84]

The link thus established, the question of interpretative method remained. On this point, foreign experience was used in two different ways. First, the Supreme Court of Canada had, in a series of cases before the adoption of the Charter of Rights and Freedoms, implied protection for freedom of speech and expression from the British North America Act of 1867.[85] While obviously not binding, these decisions offered a precedent, which "by parity of reasoning"[86] could support the technique of implication in Australia, although the Australian freedom was more limited to political communication.[87] Second, the novelty, in Australian terms, of implying into the Constitution a value akin to a right stimulated a debate about the nature of the Australian Constitution and the philosophy of rights protection on which it was based, which implicitly, and in some cases explicitly, sought to understand Australia by reference to constitutional understanding elsewhere. This debate revealed a division of views within the Court that eventually was papered over in *Lange*, although underlying tensions remain.

According to one account, "ultimate sovereignty" in Australia lies with the Australian people, at least since formal recognition of the end of the legal sovereignty of the British Parliament in the Australia Acts of 1986.[88] It followed that elected representatives exercise their powers on behalf of the sovereign people, to whom they are accountable, and for whom a free flow of information is "indispensable."[89] There is (almost) no reference to foreign sources on this point,[90]

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84. Attorney-General v. Times Newspapers Ltd., [1974] A.C. 273, 315 (H.L. 1973) (appeal taken from Q.B.).

85. The cases are identified and analyzed in *Australian Capital Television*, 177 C.L.R. at 141, in a way that is careful not to claim more for them than the contemporary context allowed.

86. *Nationwide News*, 177 C.L.R. at 50.

87. *Australian Capital Television*, 177 C.L.R. at 140–41; *Nationwide News*, 177 C.L.R. at 48–50.

88. *Australian Capital Television*, 177 C.L.R. at 138.

89. *Id*.; *see also* Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, 173–74 (Austl.).

90. *But see id*. at 180 n.37 (citing James Madison, *Report on the Virginia Resolutions*, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 259 (Jonathon Elliot ed., 2d ed., J.B. Lippincott & Co. 1861) (1836)).

although a debt to the tradition of constitutionalism associated with the United States is obvious, if only implicit. In the first instance, this understanding of the relationship between a sovereign Australian people and their elected representatives served to justify the majority's preferred interpretation of the constitutional provision for representative government and representative democracy as protecting freedom of political communication.[91] Once this step was taken, however, the general provenance of the freedom as implied from the institutional structure, rather than as an expressed right, caused the Australian arrangements to be perceived as distinctive[92]—a perception with which the Court grappled from this time on, not always consistently.

The competing account expressly repudiated any similarity between the authoritative foundations of the Australian Constitution and those of the United States.[93] Unlike the Constitution of the United States, "[t]he legal foundation of the Australian Constitution is an exercise of sovereign power by the Imperial Parliament."[94] The Australian Constitution was a statute, albeit "a statute of a special kind."[95] Any implications to be drawn, therefore, "must appear from the terms of the instrument itself."[96] This different understanding of the nature of the Constitution went beyond the juridical character of the instrument and the interpretative method appropriate to it, to the political philosophy on which it was based, which, again, was identified with the aid of comparative method. The Australians placed "faith in the democratic process to protect . . . citizens against unwarranted incursions upon the freedoms which they enjoy,"[97] following the British, rather than the U.S., model.[98]

This mixed use of foreign sources is typical of a dialogical approach. They appear at some, but not all, steps in the reasoning of the various judges; some are used in support of a particular proposition while others are distinguished and dismissed; and in some instances the references are perfunctory, but in most cases they play a significant, although not determinative, role. The resulting

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91. *See Australian Capital Television*, 177 C.L.R. at 240–41.
92. *See Theophanous*, 182 C.L.R. at 125, 167–68.
93. *Australian Capital Television*, 177 C.L.R. at 181.
94. *Id*.
95. *Id*. at 183.
96. *Id*. at 181.
97. *Id*. at 182.
98. *Id*. at 186; *see also* Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, 193 (Austl.).

doctrine and the justification for it are distinctively Australian. They are located in a wider international constitutional tradition, however, through which understanding of them is enhanced.

In dealing with the second issue, of whether the freedom was absolute or limited, foreign law was used somewhat more directly, for a functionalist purpose. By definition, an implied constitutional freedom offers no guidance as to any limits that may validly be placed on it apart from the rationale for the implication itself. Australian jurisprudence, developed in other contexts, was familiar with the concept of freedom as necessarily limited in an ordered society[99] and with the use of proportionality as a tool to determine when a law, directed to another purpose, infringes a constitutional guarantee.[100] But other jurisdictions had longer and greater experience with the existence and nature of limitations on freedom, in the context of constitutionally protected speech. The United States was accepted as the closest analogy for this purpose.[101] Unlike Australia, the Constitution of the United States provides express protection for speech; like Australia, however, the resulting freedom is not expressly limited, requiring courts to determine the existence and scope of any limitation in the absence of constitutional text. Consequently, in *Australian Capital Television*, most majority justices[102] drew variously on U.S. authority in justifying the potential acceptance of a limitation on the freedom by "laws of general application";[103] in distinguishing between different types of restrictions and in identifying tests for the validity of each;[104] and in asserting the particular significance of restrictions on communication in the conduct of elections.[105] In dissent on the application of the freedom to the particular legislation at issue in *Australian Capital Television*, Justice

99. *See Theophanous*, 182 C.L.R. at 150.

100. *See id*. at 151.

101. *See Australian Capital Television*, 177 C.L.R. at 240–41.

102. *Cf*. *id*. at 217–18 (discussing regulation of political discourse).

103. *Id*. at 143 (citing Cohen v. Cowles Media Co. (1991) 59 L.W. 4773, 4775); *id*. at 169 (citing Miller v. TCN Channel Nine Pty. Ltd. (1986) 161 C.L.R. 556, 557, 591, 597–98, 629–30; Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–77 (1969)).

104. *Id*. at 144, 235 (citing Buckley v. Valeo, 424 U.S. 1, 15, 18 (1976)); Nationwide News Pty. Ltd. v. Wills (1992) 177 C.L.R. 1, 77 (citing *Miller*, 161 C.L.R. at 567, 591, 597–98, 629–30; *Red Lion*, 395 U.S. at 375–77).

105. *Australian Capital Television*, 177 C.L.R. at 144 (citing Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971); *Buckley*, 424 U.S. at 15); *id*. at 241 (citing Mills v. Alabama, 384 U.S. 214, 219 (1966)); *cf*. *id*. at 150 (a different and more restrictive formulation by Justice Brennan ultimately formed the basis of the present test, enunciated in *Lange v. Australian Broad. Corp*. (1997) 189 C.L.R. 520, 567).

Brennan argued for a "margin of appreciation" for the Parliament, adapting a familiar analytical tool of the European Court of Human Rights.[106]

Foreign law played a different role again in the resolution of the last two of the issues that were identified above: the relationship between the Constitution and the common law and the contours of any new, constitutionally inspired defense to an action in defamation. In relation to each of these, foreign law was used largely, although not exclusively, to assist in shaping Australian doctrine by reference to what it was not. Thus, while foreign solutions were, for the most part, rejected, they nevertheless had an influence on the outcome.

The question of the relationship between the Constitution and the common law was raised squarely[107] for the first time by the defamation proceedings in *Theophanous* and was confronted anew by the proceedings in *Lange*. By this stage, courts elsewhere in the common law world had already dealt with analogous questions. In the United States, it was clear that constitutional rights could affect the common law through the medium of the state action doctrine, the application of which in the context of defamation law had been popularized in common law discourse through *New York Times v. Sullivan*.[108] In Canada, the Supreme Court had held that the Charter did not apply in private litigation, but that the Court would "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."[109] The application of this doctrine in the context of defamation was already wending its way through the Canadian courts when *Theophanous* was argued, and the decision of the Supreme Court of Canada in *Hill v. Church of Scientology*[110] was handed down in 1995, although it does not seem to have been cited in *Lange*.[111] In the United Kingdom, the common law of defamation was converging with the requirements of the European Convention on Human Rights.[112] The freedom of political communication implied by the institutional structure of the Australian Constitution

106. *Id*. at 159 (citing The Observer & The Guardian v. U.K., App. No. 13585/8, 14 Eur. H.R. Rep. 153, 178 (1991) (Eur. Ct. H.R.)).

107. *But see Nationwide News*, 177 C.L.R. at 50–52; *Australian Capital Television*, 177 C.L.R. at 150. In both cases, Justice Brennan anticipates the issue.

108. 376 U.S. 254 (1964).

109. Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd., [1986] D.L.R 174, 198.

110. [1995] D.L.R 129. Justice Brennan noted the decision in *Theophanous* in a different context. Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, 162.

111. Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520. For a South African decision that was similarly overlooked, see *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC).

112. *E.g.*, Derbyshire County Council v. Times Newspapers, [1993] A.C. 534 (H.L.).

differed from its counterpart in all three countries, both in provenance and scope; however, comparison offers insights in different ways and at different levels, as the decisions in *Theophanous* and *Lange* would show.

The majority in *Theophanous* used the reasoning in U.S. case law[113] to support the view that the law of defamation, as applied, could inhibit freedom of political communication and that the constitutional freedom overrode the common law to that extent.[114] In *Lange*, the unanimous Court accepted the first part of this conclusion[115] but reversed, or at least blurred, the outcome on the second,[116] relying instead on its own authority as a general appellate court to keep the common law in conformity with the Constitution.[117] The approach taken in the United States toward the relationship between the Constitution and the common law of defamation was distinguished from that of Australia on two distinct levels. First, the analytical device of state action was not necessary in Australia given the High Court's control over the single Australian common law.[118] More important still, however, was the juridical difference perceived by the Court in *Lange*[119] between the Australian freedom and the First Amendment guarantee. The former was characterized as a limitation on power[120] and the latter as a "free-standing right."[121] This distinction has its roots in Australian case law on the free trade provisions of the Constitution.[122] It was elaborated upon in *Lange*[123] and in dissenting judgments of Justice Brennan in cases that preceded *Lange*, in reaction against the U.S. experience.[124] Unconvincing though the

113. *Theophanous*, 182 C.L.R. at 130–31; *id.* at 177 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)); *id*. at 181 (citing Hector v. Attorney-General (1990) 2 A.C. 312 (P.C.) (appeal taken from Antigua); *Derbyshire County Council*, [1993] A.C. at 548).

114. *Id*. at 130–33, 166.

115. *Lange*, 189 C.L.R. at 556.

116. *Id*. at 556, 560, 562, 564, 566.

117. *Id*. at 566.

118. *Id*. at 563. The Court has continued to rely on its capacity to shape the common law to avoid a constitutional resolution of cases that raise issues at the interface of the Constitution and the common law. *See* John Pfeiffer Pty. Ltd. v. Rogerson (2000) 203 C.L.R 503.

119. *Lange* (following the dissent of Justice Brennan in *Theophanous*, 182 C.L.R. at 157.).

120. *Id*. at 560.

121. *Id*. at 563 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)).

122. *Theophanous*, 182 C.L.R. at 148 (Brennan, J.).

123. *Lange*, 189 C.L.R. at 563.

124. Nationwide News v. Wills (1992) 177 C.L.R. 1, 77 (Austl.); Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R. 106, 150; *Theophanous*, 182 C.L.R. at 147–50; Cunliffe v. Commonwealth (1994) 182 CLR 272, 326–28.

Lange conclusion is on this point, it fits well with at least one account of the Australian constitutional tradition, framed by a written but thin Constitution, which structures power but confers no rights.

If there was a relationship of some kind between the constitutional freedom and the law of defamation, as the Court consistently found, despite the differences in its reasoning,[125] the defenses to defamation required examination by reference to constitutional norms. Foreign law was used, directly[126] and indirectly,[127] to survey the current law of defamation, in an unwitting demonstration of the interdependence of the various national bodies of common law. And once the current law was found wanting, U.S. law was used, again negatively, to assist in crafting the new Australian defense of "extended . . . qualified privilege."[128] The *Sullivan* test itself was rejected, on grounds that Justice Brennan characterized in *Theophanous* as "a radical difference in the legal culture of our two countries."[129] As in other countries,[130] the test that eventually emerged from Australian deliberation on the question accorded greater weight to the value of reputation.[131] Significantly for present purposes, however, it was developed in *Theophanous* in explicit contrast to *Sullivan*. After a lengthy analysis, the joint judgment in *Theophanous*, which with the support of Justice Deane constituted the shaky majority in the Court, explained its understanding of *Sullivan* as requiring the plaintiff to establish "with convincing clarity" that the publication was made "with knowledge of falsity or with reckless regard for . . . truth or falsity."[132] The test thus preferred by Chief Justice Mason and Justices Toohey and Gaudron shifted the onus onto the defendant and added an extra requirement of reasonableness.[133] The *Theophanous* test was further modified in *Lange*, but

125. *Lange*, 189 C.L.R. at 556.

126. *Id*. at 570, 572.

127. *Theophanous*, 182 C.L.R. at 135 (citing NEW S. WALES LAW REFORM COMM'N, DISCUSSION PAPER NO. 32, DEFAMATION para. 10.36 (1993)).

128. *Lange*, 189 C.L.R. at 572. *See also Theophanous*, 182 C.L.R. at 182 (using U.S. cases to support Justice Deane's view of the issues at stake in striking a balance between high-quality public advice and free speech in defamation law).

129. *Id*. at 160; *see also id*. at 136 (drawing the same distinction, in somewhat more moderate terms), 185 (rejecting the U.S. approach, but for the different reason that it did not go far enough).

130. *See* Hill v. Church of Scientology of Toronto, [1995] D.L.R.4th 129; Khumalo v. Holomisa 2002 (5) SA 401 (CC) (S. Afr.).

131. *Theophanous*, 182 C.L.R. at 134–35.

132. *Id*. at 134.

133. *Id*. at 140–41.

without explicit reference to *Sullivan*.[134] The influence of *Sullivan* thus was attenuated, but it had influence, nevertheless.

These cases were unusual in the sense that, because the doctrine developed through them was relatively new to Australian constitutionalism, they offered fertile ground for the use of comparative experience. While the extent of use may differ with the nature of the issues before the courts, the confident use of foreign experience in these decisions is a feature of Australian constitutional adjudication in other, less striking, contexts.[135] Nor is Australia unusual in this regard, by comparison with the rest of the common law world; if anything, the limited range of the Australian Constitution diminishes the potential for reference to foreign law.

The dialogical use of foreign law in the manner illustrated by the Australian case study is broadly representative of practice elsewhere. In Canada, for example, a survey in 1985, shortly after the introduction of the Charter, identified 175 citations of foreign judgments by the Supreme Court of Canada and seventy-one citations of foreign scholarship.[136] While the proportion may subsequently have declined, as Charter jurisprudence has become more settled, it remains significant nevertheless.[137] In South Africa, the practice was formalized in the 1996 Constitution, which expressly authorizes the courts to take foreign law into account in interpreting the bill of rights.[138] In England, a Practice Direction issued in 2001 recognizes that foreign law "can, if properly used, be a valuable source of law . . . ."[139] While a principal purpose of the Direction is to require advocates to justify their citation of foreign authorities in lower courts, whereas previously no justification was formally required beyond that which applies to reference to any legal authority, the change is directed to methodology, rather

134. Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520, 573–75.

135. *See, e.g.*, Austin v. Commonwealth (2003) 215 C.L.R. 185 (citing legal authority from Canada, India, New Zealand, the United Kingdom, and the United States in dealing with questions ranging from federal immunities to judicial independence Justices).

136. H. Patrick Glenn, *Persuasive Authority*, 32 McGILL L.J. 261, 296–97 (1987).

137. Bijon Roy, *An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation*, 62 U. TORONTO FAC. L. REV. 99, 123–25 (2004) (estimating that in the years 1998–2003, sixty references to foreign jurisprudence were made in thirty-four of the 402 Charter decisions of the Supreme Court of Canada).

138. S. AFR. CONST. 1996 § 39(1)(c).

139. Practice Direction, *supra* note 27.

than use, and is driven by the practicalities of case management,[140] rather than by concern about legitimacy.

C. Why the Difference?: Some Hypotheses

The difference between the United States and other common law countries with regard to the use of comparative constitutional law is itself a subject for comparative inquiry of a reflective nature. It may be that the explanation is, in part, pragmatic. The debate in the United States on the use of comparative constitutional law has come at a time of a vigorous contest over the correct approach to constitutional interpretation, with originalism as a strong contender. To further complicate analysis of the source of the objection to comparative constitutional law in the United States, many of the cases in which comparative material has been used have required the court, in effect, to resolve divisive moral issues. In other common law countries, more ready recourse to comparative experience might be argued to be born of habit, developed during the time of empire and never quite lost, thanks to the evolutionary process by which the empire itself disappeared and the continuation of appeals to the Privy Council from many countries well into the later twentieth century.

It is a mistake to dismiss this phenomenon in common law adjudication as nothing more than the residue of history, however, because it has a contemporary life of its own. There is no longer any hierarchical relationship between the courts of different, independent common law countries, and foreign decisions are clearly never a binding source of law.[141] Each country has long since had its own body of national common law, formally binding the nation's courts through the operation of the doctrine of precedent.[142] Legislation, enacted by local legislatures, is by far the most important source of law in all countries. Each country's constitutional arrangements are distinctive, are regarded as peculiarly respon-

140. The *Practice Direction* also places similar controls on the citation of domestic sources. *Compare id.* para. 9.2(ii) (requiring that the authority from another jurisdiction add that which cannot be found in the local jurisdiction), *with id.* para. 6.1 (requiring that, within the local jurisdiction, certain cases not be cited unless they establish a new principle or extend the present law).

141. The final avenue of appeal to the Privy Council from Australian courts was closed by the Australia Acts in 1986. Australia Act, 1986, § 11. Appeals from New Zealand ended in 2004. For a survey of the position in 2003, see Robin Cooke, *Final Appeal Courts: Some Comparisons*, COMMONWEALTH LAW., April 2003, at 43, 47–49.

142. Sir Anthony Mason, *The Break with the Privy Council and the Internationalisation of the Common Law*, *in* CENTENARY ESSAYS FOR THE HIGH COURT OF AUSTRALIA, *supra* note 71, at 66, 69.

sive to national needs, and are considered, in some fashion, to draw their authority from the will of their respective peoples.[143] And yet the practice of referring to legal ideas, arguments, and solutions sourced outside as well as within the country, with effect on the procedure and substance of the common law, the principles of statutory interpretation, and the interpretation of constitutional norms, remains deeply ingrained and broadly accepted. If anything, recourse to foreign sources is increasing, in both extent and sophistication, as a byproduct of information technology and under the influence of shared commitments in international law. And the range of jurisdictions to which reference is made is widening through the influence of civilian legal ideas on the United Kingdom as a member of the European Union and an adherent to the European Convention on Human Rights. The increasingly familiar use of the principle of proportionality is one example of this influence at work.[144]

It may be that the explanation lies in attitudes toward the nature of law, rather than the nature of constitutional law. The distinction corresponds to what Patrick Glenn has described as "law as enquiry"[145] rather than, at least solely,

143. Popular sovereignty is most difficult to establish in relation to the former British colonies that gradually became independent over the course of the 20th century: Australia, Canada, and New Zealand. The variety of understandings and explanations of what has occurred are usefully collected and analyzed in Peter C. Oliver, The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand (2005). Explicit endorsement of a form of popular sovereignty as authority for the Constitution can be found in judicial decisions in both Australia and Canada. In relation to Australia, see Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 171 C.L.R. 106, 138. *But see id.* at 180–81. For somewhat weaker statements, to similar effect for present purposes, see *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 41–42, *McGinty v. W. Australia* (1996) 186 CLR 140, 230, 275. *But cf.* Levy v. Victoria (1997) 189 C.L.R. 579, 634 (describing the "opinion that the people of Australia are the ultimate repository of sovereignty" as "not without conceptual and historical difficulties"). In relation to Canada, see, e.g., Reference re Secession of Quebec (Secession Reference case) [1998] 2 S.C.R. 217, 264 ("The Constitution is the expression of the sovereignty of the people of Canada."). In countries where there was an explicit break with the United Kingdom the position is more straightforward: the preamble to the Constitution of South Africa thus says that "We the people of South Africa . . . adopt this Constitution as the supreme law . . . ." S. Afr. Const. 1996 pmbl. Whatever the analytical contortions required, each country now accepts and assumes that sovereignty is sourced within itself, whether accepted as vested in the people or not.

144. The evolution of the doctrine in the United Kingdom is described in Stanley de Smith, Lord Woolf & Jeffrey Jowell, Judicial Review of Administrative Action 593–607 (5th ed. 1995).

145. Glenn, *supra* note 136, at 288.

"law as national response."[146] Law as enquiry is facilitated by the methodology of the common law. Courts administering the common law both before and during the heyday of the nation-state have always drawn on a wide range of sources to inform their decisions, including judicial decisions that are not binding but are regarded as persuasive in some way. The practice proved to have value and to be unobjectionable if used properly, with due regard to the formally binding sources of law and subject to the usual mechanisms of appeal and review, public deliberation in an adversarial context, and public delivery of reasons. Its extension to constitutional law may perhaps be regarded as more remarkable, but in a sense was natural. Some countries do not have formal written constitutions.[147] Others, of which Australia is an example, supplement a written constitution substantially by reference to the principles of the common law. And the constitutional instruments themselves typically are cast in terms that enshrine systems and principles at a level of some generality, suitable to the technique of law as enquiry.[148] The influence on constitutional law of the methods of common law reasoning is encouraged by the interdependence between these two sources of law in most common law constitutional systems, both historically and in contemporary adjudication.

The U.S. experience is different in several key respects. The Constitution is, or at least was, distinctive. It is possible to argue, although not very persuasively, that any urge to comparison can be satisfied by reference to the fifty jurisdictions in the United States itself. The Constitution is not systemically intertwined with the common law, a consequence of the duality of federal and state court structures. Two hundred years of constitutional interpretation have resulted in a rich body of domestic constitutional law and in what Harold Koh has described as a "distinctive rights culture."[149] The utility of law as enquiry is not so evident, and its legitimacy is an easy prey for critics.

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146. *Id.* at 284. As the terms suggest, the former is open-ended, seeking legal ideas (although not binding law) from other useful sources, while the latter treats legal ideas as bounded by the nation-state.

147. New Zealand, the United Kingdom, and Israel are the principal examples.

148. M. H. McHugh, *The Judicial Method*, 73 AUSTRALIAN L.J. 37 (1999).

149. Koh, *supra* note 7, at 1483.

III. Misuse of Comparative Constitutional Law

A. The Challenges

The second principal ground of opposition to the use of comparative sources in constitutional adjudication concerns methodology. This is potentially a more serious issue for those common law countries in which the practice is readily employed. The debate in the United States has had the effect of focusing attention on two distinct dimensions of the methodology of the use of comparative constitutional law by courts: the process of judicial reasoning and the methodology of comparative law. Each intersects with and may be further fueled by other intense contemporary controversies over, respectively, judicial activism and what has been described as "critical comparative law"[150] reflecting a new "appreciation of diversity."[151] Significant defects in either judicial or comparative method have the potential to undermine the legitimacy of recourse to foreign law in constitutional adjudication on grounds of misuse, rather than use.

In the rest of this section, I examine the question of methodology more closely to identify some of the principal difficulties that arise. In Part B, I return, one last time, to the case study to show how these difficulties emerged in that context and how the High Court of Australia responded to them. In Part C, I draw from the case study some tentative conclusions about the nature and significance of the methodological challenges in common law countries that use foreign law as a resource in constitutional adjudication. In that context, I note that the English Practice Direction on the Citation of Authorities (Practice Direction) is, in a sense, a response to a challenge of yet another kind to the use of foreign law in courts below the level of the House of Lords, namely, the potential of additional, unnecessary citations to add to cost and delay in litigation. While the response is understandable in a jurisdiction now deriving external influences on its law from both common law and European sources, I suggest that it does not sufficiently allow for the complex ways in which foreign law in fact is used in a system that accepts law as enquiry.

The manner in which foreign law is employed by judges is one dimension of the methodological challenge presented by the use of foreign law in constitutional adjudication. In dealing with it here, I want to define the field of enquiry nar-

150. Örücü, *supra* note 25, at 215
151. *Id.* at 213.

rowly, in order to isolate the particular, additional challenges for judicial method from the use of foreign sources in constitutional adjudication, other than the question of the legitimacy of using them at all, which was the subject of the earlier part. I thus want to avoid as far as I can the host of questions about general judicial method that notoriously arise in the course of constitutional litigation in relation to, for example, interpretative method and the balance that a constitutional judge should strike between stability and change. I note that the answers to these questions themselves vary between jurisdictions, and thus are both a subject for comparative enquiry and part of the context to be taken into account in the course of comparative enquiry. I acknowledge also that it is not possible entirely to disentangle interpretative method from the use of foreign legal sources, particularly where foreign sources are used as a guide, or even a stimulus, to change.[152] For the purposes of the present exercise, I therefore identify as a baseline a jurisdiction in which the courts are cautious about their interpretative role, but recognize some potential for constitutional evolution and, critically, accept that foreign experience may sometimes assist them with their task. Conveniently, Australia represents such a jurisdiction and did so even in the heyday (by Australian standards) of judicial creativity during the period of the Mason Court.[153]

On this limited basis, at least two questions of judicial method arise. The first concerns the proper relationship between national law and any foreign legal experience that seems relevant to an issue before a court. However open a court may be to the influence of foreign law, the primary source of law by which it necessarily is guided is the law of the jurisdiction of which it is part, for reasons ranging from the imperatives of democratic government to the rule of law. The role of foreign law is of a different order from that of domestic law. In the words of President Chaskalson in *State v. T. Makwanyane*: "We can derive assistance from . . . foreign case law, but we are in no way bound to follow it."[154]

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152. *See, e.g.*, Soulos v. Korkontzilas [1997] 146 D.L.R. 214, 239–40 ("Because of the clear statement of the law recently set out by this Court, in my view . . . foreign cases are only useful insofar as the policy they set out suggests that the law in Canada should be modified."). This was not, however, a constitutional matter.

153. Sir Anthony Mason was Chief Justice of Australia from 1987–95. His tenure thus coincided with the first sustained period during which the High Court of Australia was free from the possibility of appeal to the Privy Council. A series of landmark cases was decided during this period, including the early cases dealing with the freedom of political communication but also including, for example, *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1, in which the Court held for the first time that the common law of Australia could recognize Aboriginal title to land.

154. State v. Makwanyane 1995 (3) SA 391 (CC) at 415 (S. Afr.).

A second question for judicial method concerns the greater potential for manipulative use of foreign legal sources. Most obviously, this might take the form of unjustifiable selectivity in the choice of sources, by jurisdiction or by item, deliberately or by inadvertence. Justice Scalia identified the problem in typically colorful terms in his opinion in *Roper*: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."[155] The phenomenon of "cherry-picking"[156] is well-recognized. Yash Ghai, for example, described the approach of Hong Kong courts to foreign cases in the early years of the Hong Kong Bill of Rights as "not very consistent; they are invoked when they support the position preferred by the court, otherwise they are dismissed as irrelevant."[157] Of course, selection of sources emanating from a home jurisdiction can be manipulated as well, but the practice can be more readily detected and the principles of selection are more settled, if often difficult to apply.

A second, distinct dimension of the methodological challenges presented by the use of foreign law in constitutional adjudication is inherent in the very activity of comparative law. First, and most obviously, there are threshold problems of obtaining access to foreign sources and being able to use and understand them, in terms both of language and the legal concepts used. But the central challenge of comparative method is to understand the legal experience of other jurisdictions in sufficient depth to be able to properly determine its relevance and to include it in the reasoning process. This is a complication that, by and large, is not present when a court relies on a variety of sources from within the home jurisdiction. Notoriously, it demands understanding of the relevant context from which a foreign comparative source derives, requiring consideration of political, social, economic, historical, or other cultural factors. Arguably the problem is exacerbated by the particular difficulty of acquiring contextual understanding of a constitution, which to a greater extent than other laws, is likely to be embedded in the life of its national community and may have evolved over an extended period of time.

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155. Roper v. Simmons, 125 S. Ct. 1183, 1228 (2005) (Scalia, J., dissenting).

156. *See generally* Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 Oxford J. Legal Stud. 499 (2000).

157. Yash Ghai, *Sentinels of Liberty or Sheep in Wolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights*, 60 Mod. L. Rev. 459, 479 (1997).

B. The Case Study

Three issues in particular are raised by the use of foreign law in the course of constitutional adjudication: the need for foreign law to be used appropriately to inform, support, and supplement national legal sources; the greater potential for manipulation of the use of foreign law by, for example, unjustifiable selection of sources or jurisdictions; and the difficulty of adequately understanding foreign legal experience in context. The first two issues are associated with judicial method and the third issue with comparative method.

In *Australian Capital Television* and the cases that followed it, the High Court of Australia dealt adroitly with the relationship between national and foreign law, defusing potential controversy on this ground.

The question first raised starkly in *Australian Capital Television* about whether the Australian Constitution protects political communication was not driven, at least overtly, by consideration of foreign constitutional experience. Rather, it can be seen as a question suggested by the convergence of several strands of earlier Australian constitutional doctrine. The most important of these strands included: a series of cases in which the Court had given weight to the value of freedom of speech,[158] most recently in resolving a question about the federal division of power;[159] two other long lines of cases in which the Court had implied limits on power from other parts of the Constitution establishing other institutional structures;[160] and an earlier attempt, which had not been entirely unsuccessful, to persuade the Court to attach some further significance to the sections of the Constitution providing for an elected legislature, to limit the discretion of Parliament in drawing electoral boundaries.[161] Having suggested the question, however, in the face of a somewhat ill-considered law, these doctrinal sources were not sufficiently on point to resolve it. This was, then, an instance of a question that was

158. *See* Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R. 106, 211–12 (stating that in these cases the High Court had recognized "[t]he cruciality of the free discussion of matters of public importance," especially "in relation to elections . . . .").

159. Davis v. Commonwealth (1988) 166 CLR 79.

160. These include federalism and the separation of judicial power. The line of federalism cases, as they stood in 1992, are examined in *Australian Capital Television*, 177 C.L.R. at 133–35. The foundation case in which "negative implications" for the allocation of judicial power are drawn from chapter III of the Constitution are *The Queen v. Kirby* (1956) 94 C.L.R. 254 and *Attorney-General of Australia v. The Queen* (*Boilermaker's Case*) (1957) 95 C.L.R. 529 (P.C.).

161. Attorney-General *ex rel.* McKinlay v. Commonwealth (1975) 135 C.L.R. 1; see also the cases cited in *Australian Capital Television*, 177 C.L.R. at 210.

novel in Australian law, on which there was foreign legal experience that could assist in its resolution. And once an implied freedom had been drawn from the constitutional provision for representative democracy, an attempt to extend it to other contexts, including defamation suits by members of Parliament, was inevitable.

Even so, the Court was cautious in the role that it accorded foreign law. It cited Australian law where possible,[162] either alone or followed by foreign sources.[163] Foreign law almost always was used in support, rather than as direct authority, for a step in judicial reasoning.[164] In some instances, foreign law was used indirectly, by citing the use of particular sources by earlier Australian courts.[165] And reliance on foreign law diminished steadily through the cases as the new doctrine became established in Australian law, providing a body of Australian doctrine to which the Court could turn, if only, as in the case of the defamation defense, in order to disagree with it.[166]

Equally important, however, was the overall influence of foreign law and the manner in which it was exercised. In an earlier part of the article I sought to identify different specific uses of foreign law in application to different issues. Collectively, however, the usage typically was mixed and dialogical in character. Through these three cases, the High Court developed a doctrine of Australian constitutional law in a manner that was informed by foreign, as well as Australian, experience in a wide variety of ways. And as the doctrine evolved, it became increasingly distinctive by contrast with foreign comparators in relation to, for example, the rationale for the implication; its limitation to political communication; the tests for determining whether it is infringed; its juridical nature; its relationship with the common law; and the requirements of the constitutional defense to an action in defamation. While views within Australia differ about

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162. *See, e.g.*, *Australian Capital Television*, 177 C.L.R. at 142–43, 208, 210–11, 218, 229–30 (citing Australian cases interpreting and applying the free trade provision, section 92, in support for the concept of a limited freedom, and also developing a proportionality analysis derived again from the "different context" of section 92).

163. *See, e.g.*, *Australian Capital Television*, 177 C.L.R. at 140, 169, 212.

164. *See, e.g.*, *id.* at 140 ("much the same view was taken in Canada"); *id.* at 144 n.27, ("[T]he comment applies to our situation."); Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, 130 ("The correctness of that proposition has repeatedly been affirmed."); *id.* at 182 ("The point well made by . . . .").

165. *Theophanous*, 182 C.L.R. at 169 (quoting Crandall v. Nevada, 73 US (6 Wall.) 35, 44 (1867), as applied in the earlier High Court decision of *The King v. Smithers* (1912) 16 C.L.R. 99, 108–09).

166. *See* Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520, 573–75 (referring only to Australian case law in analyzing the required elements for an act of defamation).

each of these aspects of the doctrine, their connection with both Australian law and legal culture is unmistakable.

The approach of the High Court to the selection of the jurisdictions from which it drew authority and, equally importantly, declined to draw authority is more vulnerable to criticism. First, the range of jurisdictions on which most members of the Court relied is narrow, confined principally to Canada, the United Kingdom, and the United States, with some reference to the European Court of Human Rights. No attempt is made to justify the selection, beyond the rhetorical reference by Justice Gaudron to "other great democratic societies,"[167] which is both too superficial and too sweeping to be useful. The selection is not neutral (if neutrality is important). Nor was it adequate to sustain at least some claims by members of the Court.[168]

On the other hand, the selection is entirely unsurprising, and the likely criterion for selection seems obvious, although it was not articulated, possibly because the justices did not consciously turn their minds to the question. These are the jurisdictions with which Australia typically regards itself as having most in common, generally, and in relation to questions of democracy and liberty, in particular. It may be noted in passing that, for this reason, these are also the jurisdictions with which Australian courts and lawyers are most familiar, thus diminishing the problems of contextual understanding, to which I return below. Given the issues before the Court, a criterion for selection broadly along these lines is defensible as long, at least, as the perception of similarity can be sustained.

But, on the assumption that the perception of broad community in constitutional principle and practice, or something like it, was the applicable criterion, it was not consistently applied. It was clearly satisfied by at least one other jurisdiction, New Zealand, to which no reference was made and also, arguably, by South Africa under the new constitutional regime that was established from 1993 following the fall of apartheid.[169] Had the courts of a relevant but excluded country reached a different conclusion on key steps in the majority argument (which does not in fact seem to have been the case), the comparative exercise would have been significantly flawed. And the converse also is true, although

167. *Australian Capital Television*, 177 C.L.R. at 211.

168. *See id.* at 142 ("In most jurisdictions in which there is a guarantee of freedom of communication . . . it has been recognised that the freedom is but one element . . . in the constitution of an 'ordered society' . . . .").

169. An Interim Constitution was put in place in 1993 and the final Constitution for the Republic of South Africa came into effect in 1996.

less serious from a methodological perspective. Failure to refer to a relevant supporting authority that offers fresh insight does not constitute abuse, but may represent an opportunity lost. The Court in *Lange* overlooked cases in both Canada[170] and South Africa,[171] which bore on the question of the relationship between the Constitution and the general law in the context of defamation and which, as I argue below, might have considerably assisted its reasoning.

Also questionable was the manner in which the Court in *Australian Capital Television* treated the exclusion of particular jurisdictions. During its passage through Parliament, the challenged legislation[172] had been referred to several parliamentary committees, which had examined the regulation of paid political broadcasts in a wide range of countries in Europe, Asia, and North America. The Commonwealth pointed to these, in argument, as examples of countries that, in various ways, restricted paid political advertising, despite having constitutional regimes that protected freedom of expression.[173] The majority justices rejected the comparison, explicitly or implicitly,[174] while both Justice Brennan and Justice Dawson, in dissent, referred to it favorably, if cautiously.[175] The two justices who rejected the comparison, Chief Justice Mason and Justice McHugh, did so for somewhat different reasons, driven by their different conclusions about the scope of the freedom. Justice McHugh distinguished the countries to which the Commonwealth referred on the basis of the difference in their constitutional instruments, which specifically authorized restrictions, whereas the Australian freedom was a "paramount right" for a "limited purpose."[176] Chief Justice Mason, for whom the freedom had a broader reach and who recognized some limits on it, had a more difficult task, but dismissed the relevance of the comparison in passing.[177] It may well be that a convincing case for its dismissal could have been made out by reference either to the characteristics of the Aus-

170. *See* Hill v. Church of Scientology of Toronto, [1995] 126 D.L.R.4th 129.

171. *See* Du Plessis v. De Klerk 1996 (3) SA 850 (CC).

172. Political Broadcasts and Political Disclosures Act 1991. For an outline of the act's legislative history, see *Australian Capital Television*, 177 C.L.R. at 129–31.

173. *Australian Capital Television*, 177 C.L.R. at 240.

174. Chief Justice Mason and Justice McHugh did so explicitly. *See id.* at 131, 240. Justices Deane, Toohey, and Gaudron did not refer to it, but may be taken to have dismissed it as irrelevant to their argument.

175. *See id.* at 154–55, 190.

176. *Id.* at 240.

177. *See id.* at 131.

tralian freedom or to unacceptable flaws in the Australian legislation.[178] Failure to make the case more clearly was careless, however, from the standpoint of comparative method and exposes the reasoning of the majority to criticism in this respect.

The third and final methodological issue is the adequacy of the understanding of a foreign source on the part of a court to justify the use that is made of it. The case study shows that the High Court was conscious of this difficulty at one level. Some contextual complications had been diminished, in any event, by the choice of comparator jurisdictions. In relation even to these broadly comparable jurisdictions, individual justices made allowance for differences in constitutional and legal context,[179] for structural differences in court systems,[180] and, occasionally, for cultural difference[181] or the impact of practical considerations.[182] They did not always do so when context may have been relevant,[183] however, and some of the comparative analysis was perfunctory.[184] The significance of such failings depends, however, once again, on use. Had a particular foreign solution been borrowed for Australian purposes on the basis of a functionalist analysis, precision and depth of understanding would have been more important than it was for the generally reflective, sometimes negative, mixed use to which foreign law, for the most part, was put.

There is one respect in which the Court may have been led significantly astray by comparative method. It is arguable that, in considering the relationship between the constitutional freedom and the common law of defamation, the Court in *Lange* was too preoccupied by the position in the United States—which it sought, quite properly, to distinguish—to pause to consider the logic of the

178. It seems that this is the basis for dismissal of the comparison that Chief Justice Mason had in mind but did not fully articulate. *See id.* at 131–32. *See also id.* at 190 (noting that "most countries which allocate broadcasting time have adopted a system which gives a clear advantage to the parties represented in the outgoing parliament") (citing HCJ 246/81, 260/81 "Agudat Derakh Eretz" v. Broad. Auth. [1981] IsrSC 35(4) 1, *reprinted in* 8 Selected Judgments of the Supreme Court of Israel 21, 45–47 (1992)).

179. *See Australian Capital Television*, 177 C.L.R. at 131, 240–41; Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104, 125.

180. *See* Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520, 563.

181. *See Theophanous*, 182 C.L.R. at 160; *cf id.* at 185 (Deane, J.).

182. *See id.* at 135.

183. The reliance placed by Justice Brennan on the European "margin of appreciation" is an obvious example. *Australian Capital Television*, 177 C.L.R. at 159.

184. The treatment of U.S. authority on the important point of the relationship between the Constitution and the common law in *Lange* is an example. *Lange*, 189 C.L.R. at 563.

new Australian doctrine, which might have led the Court to find that the Australian Constitution overrode the common law but by another route. The Court repudiated the relevance of a state action doctrine, without explaining why, given its understanding of the Australian freedom, the common law should not be regarded as directly inconsistent with it. Had the recent decisions of *Hill*[185] and *Du Plessis v. De Klerk*[186] been drawn to the attention of the Court, they might have alerted it to other alternatives that, while not necessarily applicable in Australia, offered a corrective to an exclusive focus on U.S. experience. From this perspective, the problem here was too little foreign experience, rather than too much.[187]

C. The Challenges of Methodology: Tentative Conclusions

The experience of the case study suggests the following five, tentative conclusions about some of the questions of methodology that arise in connection with the use of foreign law in constitutional adjudication.

First, the nature and significance of the methodological challenge depends on the purpose for which foreign law is used. In particular, where a court is using foreign law in a dialogical manner, the demands of context will be less and will vary from instance to instance. Thus, in his study of the multifaceted impact of *Lochner v. New York*[188] on Canadian constitutional jurisprudence, Sujit Choudhry noted that foreign sources were analyzed "not with a primary goal of apprehending all their details with exacting accuracy,"[189] but with a view to extracting from them whatever would assist with a better understanding of the issue before the court. This observation is borne out by the Australian case study. Methodology remains important, but its requirements in each case depend on whether the foreign source will be distinguished or applied; whether it will be used constructively or reflectively; whether it offers a philosophical insight or legal doctrine; and whether it assists the court to identify the problem or to find the solution.

Second, the challenge of methodology is both more important and more difficult where foreign law is used constructively by a court, on the basis of function-

185. Hill v. Church of Scientology of Toronto, [1995] 126 D.L.R.4th 129.
186. Du Plessis v. De Klerk 1996 (3) SA 850 (CC) (S. Afr.).
187. Also there was a problem of selection, caused by too narrow a perception of the issue.
188. 198 U.S. 45 (1905).
189. Choudhry, *The* Lochner *Era*, *supra* note 26, at 52.

alist assumptions, resulting at its extreme in the transfer of a legal solution from one country to another. This is relatively rare, at least in isolation from other supporting legal arguments. There is almost no use of functionalism in this sense in the Australian case study, beyond a degree of reliance on it for the conclusion that the freedom is limited and, more significantly perhaps, for early indications of where the limits might be drawn.[190] In this regard, the Australian case study is consistent with a recent analysis of Canadian Charter cases for the years 1998–2003,[191] which shows that most of the sixty references to foreign jurisprudence were either of a "survey" nature or supported the Supreme Court's own conclusions,[192] while only one represented a direct adoption of a foreign solution to a Canadian question.[193] Even where a functionalist analysis is used, the degree of methodological difficulty will depend on the subject matter of the comparison.

The case study suggests that common law courts deal instinctively with the methodological questions that arise in connection with the use of foreign law, employing the same tools with which they select, analyze, and apply other legal sources. Where the methodological demands are broadly similar, judicial instinct may well be equally reliable. Courts are accustomed to assessing the weight to be accorded to a range of persuasive legal and nonlegal sources and to reasoning by analogy, distinguishing relevant from irrelevant difference. Thus, in all three of the Australian cases, the High Court dealt capably with the competing demands of national and foreign law and, generally, with the analysis of foreign law in legal and quasi-legal context. It was less comfortable, however, with other demands of comparative law: deeper contextual analysis, where required, and examination of the rationale for the selection of particular foreign sources. It may be that in cases where foreign law is used extensively, a more explicit rationale for selection would be helpful, not only to expose to critical examination the criterion that is used and to identify inconsistencies in its application, in order to preclude misuse, but also to secure a more complete measure of the benefit of foreign experience.

Fourth, the use of foreign law in constitutional adjudication in common law countries interacts, in various ways, with common law procedure. In common law adjudication: advocates for the parties have certain obligations to the court

190. Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R. 106, 143.

191. Roy, *supra* note 137.

192. *Id.* at 130–31.

193. *See* United Food & Commercial Workers, Local 1218 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083, 1121 (adopting the U.S. distinction between leafleting and picketing in freedom of expression cases).

to cite relevant authorities; errors and omissions in the case presented by one party can be identified and exploited by others; and flaws in the reasoning of majority justices can be exposed by a dissent, or criticized by commentators, aided by the typically detailed public reasoning of a common law judgment. These systemic safeguards apply in relation to any aspect of legal reasoning, including the use of foreign law. In relation to foreign law, however, while their effect is not negligible, it necessarily is less reliable, necessitating greater caution in the manner in which conclusions are drawn from foreign law.

Finally, it is possible that the English Practice Direction will have some effect on the nature and extent of reliance on the law of other common law jurisdictions[194] in the courts of England and Wales, other than courts exercising a criminal jurisdiction and excepting the House of Lords itself. The Practice Direction requires advocates who "seek to cite authority from another jurisdiction" to "state . . . the proposition of law that the authority demonstrates"; to indicate what the authority adds that is not already found in the law of England and Wales; and to certify that there is no domestic authority that precludes acceptance of this new proposition by the court.[195] The several requirements in the Practice Direction thus serve to reinforce an appropriate relationship between national and foreign law, to pinpoint with greater accuracy the purpose of reliance on foreign law, to ensure "proper consideration of whether it does indeed add to the existing body of law,"[196] and, in that sense, to manage unnecessary use. Ostensibly at least, these are rational demands, which could encourage the emergence of more rigorous comparative method. However, consideration of how they might work in practice, by reference to the complex, less easily categorized use of foreign law for dialogical purposes, exemplified by the case study, suggests that something of value may be lost as well.

IV. Final Reflections

Despite a burgeoning literature and generations of use in practice, the discipline of comparative constitutional law is still in its infancy. In part this is because, until recently, it was not considered an appropriate subject of serious

194. The rules for the citation of foreign authorities do not apply in relation to the citation of decisions of the European Court of Justice or organs of the European Convention on Human Rights. Practice Direction, *supra* note 27, para. 9.3.

195. *Id.* at para. 9.

196. *Id.* at para. 9.1.

comparative study in the face of the prevailing assumptions within the discipline of comparative law itself. As far as comparative constitutional law in the courts is concerned, it is also in part because, where the practice has been freely employed in common law jurisdictions, it has not been considered a distinctive phenomenon in its own right. And in part it is because, more recently, and in particular in the United States, it has become intertwined with other, divisive debates about the nature of a constitution and the role of judges in constitutional interpretation, with which it is connected but from which it also is distinct, which have obscured discrete analysis of it.

This article has examined, and drawn some tentative conclusions from, one case study from one jurisdiction, Australia, in which foreign experience is used in constitutional adjudication, when it is regarded as likely to be useful to an issue before the court. The article raises as many questions as it answers: about the relationship between developing trends in comparative private and public law; about the significance of the use of foreign law for particular theories of legal reasoning and judicial behavior in different countries; and about the accommodation of the use of foreign law by the rules of common law procedure and the assumptions on which they are based. These and other questions await further scholarship, of both a theoretical and an empirical kind.