The Migration of Constitutional Ideas

Edited by **Sujit Choudhry**

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THE MIGRATION OF CONSTITUTIONAL IDEAS

The migration of constitutional ideas across jurisdictions is rapidly emerging as one of the central features of contemporary constitutional practice. The increasing use of comparative jurisprudence in interpreting constitutions is one example of this. In this book, leading figures in the study of comparative constitutionalism and comparative constitutional politics from North America, Europe, and Australia discuss the dynamic processes whereby constitutional systems influence each other. They explore basic methodological questions which have thus far received little attention, and examine the complex relationship between national and supranational constitutionalism – an issue of considerable contemporary interest in Europe. The migration of constitutional ideas is discussed from a variety of methodological perspectives – comparative law, comparative politics, and cultural studies of law – and contributors draw on case studies from a wide variety of jurisdictions: Australia, Hungary, India, South Africa, the United Kingdom, the United States, and Canada.

SUJIT CHOUDHRY is Associate Professor in the Faculty of Law and Department of Political Science at the University of Toronto. He has written widely on comparative constitutional law, and in constitutional law and theory more generally.

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This idea for this book emerged in the way that the best ideas do – in scholarly conversation. The migration of constitutional ideas has emerged as one of the dominant features of contemporary constitutionalism. For my colleagues at the University of Toronto, this shift in constitutional practice has meant that sustained and deep comparative engagement increasingly permeates our research and teaching. However, we have all come to realize that the practice of comparative constitutional law has outgrown the conceptual apparatus that legal actors and scholars use to make sense of it. The need for a reconceptualization of the discipline is urgent. This volume marks an important contribution to that task.

The papers for this volume were initially presented at an international conference held at the University of Toronto in October 2004. Jennifer Tam worked her usual organizational wizardry to make the conference a success. Richard Simeon, Alan Brudner, Karen Knop, and my former Dean Ron Daniels served as panel chairs, and helped to stimulate a lively discussion.

As the conference papers became an edited collection, I accumulated more debts. David Dyzenhaus provided valuable advice on tying the papers together into an integrated volume. Saad Ahmad, Bernadette Mount, and Robert Leckey provided superb editorial assistance. Finola O'Sullivan and Jane O'Regan at Cambridge University Press have been extremely professional and collegial, and have been a model of patience as this project neared completion.

I owe particular thanks to three close friends and colleagues. David Schneiderman is a sounding-board for most of my ideas, and paid me an enormous intellectual complement by agreeing to contribute to this volume. Dean Mayo Moran, also a contributor, has been unwavering in her support for this project from the outset, and was pivotal in

shaping my understanding of this volume as a coherent whole. Finally, my former Dean Ron Daniels (now Provost at the University of Pennsylvania), through his inspirational academic leadership, is the individual who made this volume possible. I dedicate this volume to him.

1

Migration as a new metaphor in comparative constitutional law

SUJIT CHOUDHRY

The politics of comparative constitutional law

Usually judges ask the questions, but on this night the roles were reversed. The occasion was a public conversation between United States Supreme Court Justices Breyer and Scalia, answering questions posed by constitutional scholar Norman Dorsen.[1] The topic was the 'Constitutional Relevance of Foreign Court Decisions' to the Court's constitutional case law. For a court routinely called upon to address the most divisive issues in US public life, judicial citation practices hardly seem worthy of a rare evening with two of its most distinguished members. Yet the auditorium was packed, with hundreds more watching over a live video feed.

Court observers knew that the event merited close attention. The backdrop was the Court's increasing use of comparative and international law – both described as 'foreign' to the US constitutional order – in its constitutional decisions over the previous decade. This practice – which I term the migration of constitutional ideas – has deeply divided an already divided Court, along the same ideological lines which have polarized its jurisprudence. Breyer and Scalia are the leading figures in this ongoing jurisprudential drama, although other Justices have joined the debate. Their initial skirmish, in *Printz*,[2] arose in a challenge to federal attempts to 'commandeer' state officials to deliver federal

Thanks to Norman Dorsen, Mayo Moran, Ira Parghi, and David Schneiderman.

[1] There are two transcripts of this conversation, a verbatim record from American University and an edited version in the *International Journal of Constitutional Law* – I cite both as appropriate. A conversation between U.S. Supreme Court justices (2005) 3 *International Journal of Constitutional Law* 519; Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law, available at http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument.

[2] *Printz* v. *United States*, 521 US 898 (1997).

programmes. Breyer suggested that the constitutionality of this practice in European federations was relevant to the Court's analysis, while Scalia, delivering the opinion of the Court, declared 'comparative analysis inappropriate to the task of interpreting a constitution'.[3] The battle quickly moved to the interpretation of the Bill of Rights, principally in cases involving the death penalty. In dissenting judgments in denials of *certiorari* to challenges to the 'death row phenomenon' (*Knight*,[4] *Foster*[5]), Breyer invoked the unconstitutionality of lengthy waits on death row in other jurisdictions as 'relevant and informative',[6] 'useful even though not binding',[7] and as material that 'can help guide this Court'.[8] Justice Thomas, speaking for the majority, suggested that the citation of foreign jurisprudence indicated a lack of *legal* support in domestic materials,[9] and equated it with the imposition of 'foreign moods, fads or fashions on Americans'.[10]

Advocates of the migration of constitutional ideas, however, appear to have gained the upper hand. In *Lawrence* v. *Texas*,[11] where the Court struck down the criminal prohibition of sodomy and departed from its earlier holding in *Bowers* v. *Hardwick*,[12] Justice Kennedy's majority judgment cited decisions of the European Court of Human Rights to illustrate 'that the reasoning and holding in *Bowers* have been rejected elsewhere'.[13] Although it is possible to read *Lawrence*'s citation of European jurisprudence narrowly as a refutation of *Bowers*' claim that the prohibition of sodomy was universal in Western civilization, the better interpretation is Michael Ramsey's, who argues that the citation 'suggests that constitutional courts are all engaged in a common interpretive enterprise'.[14] Scalia, now in dissent, stated that the discussion of European case law was 'meaningless dicta'[15] and 'dangerous dicta'[16] because 'foreign views'[17] were not relevant to the interpretation of the US Constitution. And last spring in *Roper*,[18] the debate over the migration of

[3] *Ibid.*, at 2377. [4] *Knight* v. *Florida*, 528 US 990 (1990).

[5] *Foster* v. *Florida*, 537 US 990 (2002). [6] *Knight*, at 463. [7] *Ibid.*, at 528.

[8] *Foster*, at 472. [9] *Knight*, at 459. [10] *Foster*, at 470. [11] 539 US 558 (2003).

[12] 478 US 186 (1986). [13] *Lawrence*, at 2483.

[14] Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing before the Subcommittee on the Constitution, of the House Committee on the Judiciary, 108th Cong., 2d Sess. 568 (2004) (statement of Michael Ramsey); see also M. Ramsey, International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence* (2004) 98 *American Journal of International Law* 69.

[15] *Ibid.*, at 2495. [16] *Ibid.* [17] *Ibid.* [18] *Roper* v. *Simmons*, 543 US 551 (2005).

constitutional ideas was joined again. In finding the juvenile death penalty unconstitutional, Justice Kennedy (for the majority) reviewed a range of foreign sources and declared that they, 'while not controlling our outcome, ... provide respected and significant confirmation for our own conclusions'.[19] Scalia's dissent continued his series of escalating attacks on the Court's comparative turn. He accused the majority of holding the view 'that American law should conform to the laws of the rest of the world' – a view which 'ought to be rejected out of hand'.[20]

The Court's increasingly acrimonious exchanges over the citation of foreign sources had shed more heat than light. Justices advocating the migration of constitutional ideas had failed fully to justify this emergent interpretive practice – that is, to explain why foreign law should count. The evening (after oral argument in *Roper*, but before it was handed down) presented a rare opportunity for clarification. Although Breyer and Scalia both referred to foreign law, their focus appeared to be on comparative materials – that is, either judgments of other national courts, or international courts interpreting treaties not binding on the United States (e.g. the European Court of Human Rights, interpreting the European Convention on Human Rights) – as opposed to international legal materials which do bind the United States. Dorsen raised this issue at the outset, and Scalia rightly responded that the burden of justification squarely rested on the proponents of its use. As he noted, proponents and opponents of the use of comparative law agree that it is not 'authoritative' – i.e., that it is not binding as precedent. But as Scalia noted, the question then is what work foreign law *is* doing: 'What's going on here? ... if you don't want it to be authoritative, then what is the criterion for citing it? ... Why is it that foreign law would be relevant to what an American judge does when he interprets [the US Constitution]?'[21]

Scalia's retort shifted the persuasive onus to Breyer, and highlighted that his colleagues on the Court had offered casual and under-theorized responses to this fundamental question. Breyer did little that evening to advance his case. He began strongly, stating that he 'was taken rather by surprise, frankly, at the controversy that this matter has generated, because I thought it so obvious'.[22] The reason for comparative

[19] *Ibid.*, at 1200. [20] *Ibid.*, at 1226. [21] A conversation, 522–5.
[22] Transcript of Discussion.

engagement was that these materials were cited by advocates before the Court, and 'what's cited is what the lawyers tend to think is useful'. Now this begs the question of *why* these materials are useful. Breyer offered a pragamatic rationale, suggesting that foreign courts:

> . . . have problems that often, more and more, are similar to our own. They're dealing with . . . certain texts, texts that more and more protect basic human rights. Their societies more and more have become democratic, and they're faced not with things that should be obvious – should we stop torture or whatever – they're faced with some of the really difficult ones where there's a lot to be said on both sides . . . If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something . . . [23]

So foreign judgments are a source of practical wisdom to the tough business of deciding hard cases where the positive legal materials run out. As Breyer put it, he was 'curious' about how other courts tackled similar problems.[24] Scalia pushed back, asking why judges should cite such cases, according normative status to their reasoning. Read the cases, 'indulge your curiosity! Just don't put it in your opinions', he said.[25] When faced with this argument on an earlier occasion, Breyer's response was simply to think 'All right'.[26] Having failed to explain why the Court should cite comparative case law, Breyer, by his own admission, became 'defensive' and opined that comparative engagement was about 'opening your eyes to things that are going on elsewhere'.[27] To cite comparative jurisprudence is to demonstrate an educated, cosmopolitan sensibility, as opposed to a narrow, inward-looking, and illiterate parochialism. However, demonstrating worldliness is hardly adequate justification for a major shift in the Court's constitutional practice.

A lot is at stake in Breyer's failure to respond to Scalia's challenge. As Alexander Bickel explained over forty years ago, in liberal democracies which have opted for written constitutions enforced by unelected courts, the power of judicial review is a form of political power which cannot be legitimized through democratic accountability and control.[28] So courts

[23] *Ibid.* [24] A conversation, 534. [25] *Ibid.* [26] Transcript of Discussion.
[27] *Ibid.*
[28] *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press, New Haven, CT, 1986).

must legitimize their power through both the processes whereby they determine whether issues come before the courts and the reasons for their judgments, somehow distinguishing adjudication from other forms of political decision-making. The various features of legal reasoning – *stare decisis*, for example – are more than just the means through which courts arrive at decisions. They define and constitute the courts' unique institutional identity. The very legitimacy of judicial institutions hinges on interpretive methodology. So courts *must* explain why comparative law should count. And if courts do not, judicial review is open to the charge of simply being politics by other means, cloaked in legal language, and subject to attenuated democratic control.

This is not a problem unique to the United States. As Alan Brudner wrote recently:

> . . . those who interpret local constitutional traditions take a lively interest in how their counterparts in other jurisdictions interpret their own traditions and in how international tribunals interpret human-rights instruments whose language is similar to that of their own texts. This interest, moreover, is a professional one. Comparative constitutional studies are valued, not as a leisurely after-hours pastime, but for the aid they give to judicial . . . interpreters of a national constitution.[29]

In each and every country where the migration of constitutional ideas is on the rise, the demands of justification must be met. This is true even for countries such as South Africa, whose Constitution provides that courts 'must consider international law' and 'may consider foreign law' in interpreting its Bill of Rights.[30] Although international law asserts its supremacy over the South African legal order, the South African Constitution only directs courts to 'consider' it, raising the question of *how* exactly it should be considered. And with 'foreign law' (i.e., comparative law), the additional question is why and under what circumstances courts should engage with it at all.

To be sure, the charge that comparative engagement is somehow undemocratic has gained widespread currency in US legal circles, albeit for an entirely different set of reasons with particular resonance in that

[29] *Constitutional Goods* (Oxford University Press, Oxford, 2004), p. viii.

[30] Constitution of the Republic of South Africa, s. 39(1).

country.[31] Contra Bickel, the argument made is that judicial review *is* a democratic practice in the United States. The constitutional text was popularly ratified, and so as Paul Kahn puts it:[32]

> ... the primary work of the Supreme Court is to construct and maintain an understanding of our polity as the expression of the rule of law ... our own Supreme Court ... [is] engaged in the unique enterprise of maintaining the belief in American citizenship as participation in a popular sovereign that expresses itself in and through the rule of law ...

To Americans, judicial review is legitimate because they view 'the Court as the voice of the Sovereign People'. Chief Justice John Marshall made this point brilliantly in *Marbury* v. *Madison*.[33] Moreover, federal judges, as Chief Justice Roberts pointed out in his confirmation hearings, 'are appointed through a process that allows for participation of the electorate' since both 'the President who nominates judges' and 'Senators who confirm judges are accountable to the people'.[34] For its opponents, the migration of constitutional ideas poses two threats to the democratic character of judicial review, from within and without the US constitutional order.

First, comparative engagement feeds into fears regarding judicial activism. For Scalia, the democratic character of judicial review not only justifies it, but sets limits on its content and scope. In particular, it counsels originalism, with courts serving as modern-day agents of the constitutional framers. Foreign law – whether comparative or international – on the originalist view, 'is irrelevant with one exception: old English law', which served as the backdrop for the framing of the constitutional text.[35] Now Scalia quickly concedes that originalism is no longer the exclusive method of US constitutional interpretation. The Eighth Amendment, for example, has been interpreted as incorporating 'evolving standards of decency that mark the progress of a maturing

[31] R. Posner, No Thanks, We Already Have Our Own Laws, *Legal Affairs*, July/August 2004.

[32] P. Kahn, Comparative Constitutionalism in a New Key (2003) 101 *Michigan Law Review* 2677 at 2685–6; see also K. Kersch, The New Legal Transnationalism, The Globalized Judiciary, and the Rule of Law (2005) 4 *Washington University Global Studies Law Review* 345.

[33] 5 US 137 (1803).

[34] Confirmation Hearing on the Nomination of John G. Roberts, Jr to be Chief Justice of the United States: Hearing before the Senate Committee on the Judiciary, 109th Cong., 1st Sess. 158 (13 September 2005) (statement of John Roberts).

[35] A conversation, 525.

society'.[36] Even here, though, Scalia argues that to maintain the democratic character of judicial review, the Court must rely on '[t]he standards of decency of American society – not the standards of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views'.[37] To retain its democratic legitimacy, the US practice of judicial review must fix its gaze firmly inward, not outward, taking cues from US political institutions and values.

The only theory of constitutional interpretation which permits comparative engagement, for Scalia, is one where the judge looks 'for what is the best answer to this social question in my judgment as an intelligent person', based on the 'moral perceptions of the justices'.[38] For Scalia, this would mean that constitutional adjudication is no more than the imposition of judicial policy preferences. Scalia sharpened this objection by suggesting that judges working with this theory cite comparative law selectively, such that '[w]hen it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it'.[39] In his confirmation hearings, Chief Justice Roberts made the same point, testifying that 'looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there'.[40] Citing comparative law permits courts to achieve desired results while pretending they are engaged in a legal enterprise. For example, Scalia suggested that while the Court cited foreign law in *Lawrence* to expand the scope of liberty, it failed to cite comparative materials in its abortion jurisprudence *because* foreign courts have construed reproductive rights more narrowly than have US courts. In sum, the citation of comparative case law 'lends itself to manipulation',[41] or what Judge Posner has referred to as 'judicial fig-leafing',[42] designed to obscure the reality of judicial choice. And although he clearly disagrees with Scalia on the propriety of comparative citation, Breyer accepts that it is wrong for judges to 'substitute their own subjective views for that of a legislature'.[43]

The second objection to the migration of constitutional ideas is that it facilitates the erosion of US sovereignty by the forces of globalization.

[36] *Ibid.* [37] *Ibid.*, 526. [38] *Ibid.* [39] *Ibid.*, 521.
[40] Confirmation Hearing on the Nomination of John G. Roberts, Jr (13 September 2005).
[41] A conversation, 531. [42] Posner, No Thanks. [43] A conversation, 539.

The concern is not about the imposition of the elite social, political, and economic views of the judiciary on the US people. Rather, the fear is that comparative citation turns courts into agents of outside powers – international public opinion, international organizations, and even foreign governments – to thwart the will of the US public. Roger Alford has coined the term 'international countermajoritarian difficulty' to capture this idea.[44] As Alford writes, '[u]sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing the one vehicle – constitutional supremacy – that can trump the democratic will'.[45] By contrast, constitutional adjudication which relies on sources internal to US constitutional culture is for that reason legitimate. As one questioner from the floor at the Breyer and Scalia session put it, 'these [i.e., non-US] legal materials have no democratic provenance, they have no democratic connection to this legal system, to this constitutional system, and thus lack democratic accountability as legal materials'.[46]

An important part of this argument is the elision of the distinction between international law binding on the United States and comparative materials which are not. Although their claims to authority in domestic legal orders are totally different, the two are nonetheless referred to together in the literature as 'international norms', 'international values', or 'international sources'.[47] As Breyer said on an earlier occasion, 'my description blurs the differences between what my law professors used to call comparative law and public international law. That refusal to distinguish (at least for present purposes) may simply reflect reality'.[48] Harold Koh uses the term 'transnational law' to conjoin the international and the comparative.[49] What binds these hitherto distinct bodies of law together is that they are from outside the United States and are viewed as threats to US sovereignty. Into this broad category fall the decisions of United Nations bodies, international treaties (including those to which

[44] R. Alford, Misusing International Sources to Interpret the Constitution (2004) 98 *American Journal of International Law* 57 at 59.
[45] *Ibid.*, 58. [46] A conversation, 540–1.
[47] See e.g. Alford, Misusing International Sources.
[48] S. Breyer, The Supreme Court and The New International Law, speech, 97th annual meeting of the American Society of International Law, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04–04–03.html.
[49] The Globalization of Freedom (2001) 26 *Yale Journal of International Law* 305 at 306.

the United States is a signatory), the decisions of international human rights bodies and tribunals, and the judgments of foreign courts.

Although not part of Scalia's talk, this criticism is central to popular criticism of the Court's turn to comparative sources. Quin Hillyer wrote in the *National Review* that the reference to European case law in *Lawrence* was 'subversive', because it would lead to a loss of US sovereignty.[50] In criticizing this position, Tim Wu describes this fear as the Court '*obeying* foreign commands'.[51] Chief Justice Roberts has picked up on this criticism as well, testifying that '[i]f we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed'.[52]

Opponents of the migration of constitutional ideas have confronted Breyer and his colleagues with a dilemma. They have defined the terms of debate: on one horn of the dilemma, comparative jurisprudence is legally binding. On the other horn, it is not. But either use is illegitimate. If comparative materials are binding, the Court is acting as an agent of foreign authorities. If it is not, comparative citation is window-dressing for judicial legislation. These arguments were the case to meet that evening. Breyer desperately needed to avoid the dilemma by challenging this way of framing the problem, but failed miserably. Even worse, faced with Scalia's objection that the comparative engagement is part of a political agenda, Breyer effectively agreed. One reason for citing the case law of other national courts, said Breyer, was to consolidate judicial review in transitional democracies:[53]

> ... in some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying to protect human rights, they are trying to protect democracy ... And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then

[50] Q. Hillyer, Constitutional Irrelevance: Forfeiting sovereignty for sodomy, *National Review Online*, 7 July 2003.

[51] T. Wu, Foreign Exchange: Should the Supreme Court care what other countries think?, *Slate*, 9 April 2004.

[52] Confirmation Hearing on the Nomination of John G. Roberts, Jr (13 September 2005).

[53] Transcript of Discussion.

> go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up ...

Other members of the Court have joined Breyer in offering this crude, over-blown, realpolitik justification. Justice O'Connor thus remarked that citing the case law of other national courts 'will create that all-important good impression. When US Courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced'.[54] Justice Ginsburg pushed this line of thinking even further, suggesting that this interpretive practice promotes comity on other fronts, which is valuable 'because projects vital to our well being – combating international terrorism is a prime example – require trust and cooperation of nations the world over'.[55]

The retreat into realism and the failure of US judges fully to articulate and justify their participation in the migration of constitutional ideas are linked. Judicial realism is fueled by the poor fit between traditional legal categories and the emerging phenomenology of comparative constitutional argument. This is reflected in the difficulty that judges and scholars have faced in simply trying to describe what is taking place. Proponents assert that foreign case law is not 'binding' or 'controlling'[56] but then cannot explain how or why it is used instead. To say that courts 'rely upon' or 'use' foreign jurisprudence because it is 'useful' or 'helpful', or that US courts should 'construe [the US Constitution] with decent respect'[57] for comparative jurisprudence, does not explain why or how such jurisprudence is helpful. Nor, on a deeper level, does it seek to justify the appropriateness of seeking that kind of help.

In short, the practice of comparative constitutional law has outgrown the conceptual apparatus that legal actors use to make sense of it. It is the responsibility of the bench, the bar, and the academy to respond. The failure to do so until now has had severe costs. In a remarkable series of resolutions in the US House of Representatives and Senate, US legislators from the Republican Party have begun to challenge the Court's

[54] S. O'Connor, remarks, Southern Center for International Studies, available at http://www.southerncenter.org/OConnor_transcript.pdf.

[55] R. Ginsburg, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (2004) 22 *Yale Law and Policy Review* 329 at 337.

[56] A conversation, 524, 528 (words of J. Breyer).

[57] H. Koh, International Law as Part of Our Law (2004) 98 *American Journal of International Law* 43 at 56.

cosmopolitan turn.[58] The proximate cause for the political reaction is identified in every legal text as *Lawrence* v. *Texas*, which struck a political nerve. But in contrast to Scalia's criticisms in that case, which alleged judicial activism, the dominant concern voiced in Congressional resolutions has been the perceived threat to US sovereignty. This argument was made most clearly in a 2005 Senate resolution, which states that the 'inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States'. Such reliance is inappropriate because it contradicts the Court's institutional role in the US constitutional scheme: 'to faithfully interpret the expression of the popular will through the Constitution.' As a consequence, the resolution states that 'judicial interpretations regarding the meaning of the Constitution . . . should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States'.[59]

Hearings on the 2004 House resolution provide a window into the political fallout from the Court's inarticulate comparative turn.[60] Representatives sounded the alarm in the language of popular sovereignty. The use of foreign law was described by Republican legislators as an 'alarming new trend',[61] a 'disturbing line of precedents'[62] which 'undermines our democracy'[63] and is 'quietly undermining the sovereignty of our nation'.[64] Representative Chabot, opening the hearings, argued that that US constitutional interpretation relied on popular consensus, and 'the relevant consensus behind American law is

[58] The three leading resolutions are the Reaffirmation of American Independence Resolution, H. Res. 568, 108th Cong., 2d Sess. (2004) which died in the Judiciary Committee in 2004, and H. Res. 97 and S. Res. 92, which were introduced in the 1st session of the 109th Congress in 2005. Indeed, legislators have gone so far as to propose legislation to prohibit the Court from citing foreign materials. See e.g. Constitution Restoration Act of 2004, H. R. 3799, 108th Cong., 2d Sess. (2004) and Constitution Restoration Act of 2005, S. 520, 109th Cong., 1st Sess. (2005).

[59] S. Res. 92, 109th Cong., 1st Sess. (2005).

[60] Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing before the Subcommittee on the Constitution, of the House Committee on the Judiciary, 108th Cong., 2d Sess. 568 (March 25, 2004).

[61] *Ibid*., words of Representative Steve Chabot (R-OH). [62] *Ibid.*

[63] *Ibid*., words of Representative Stanley Bachus (R-AL).

[64] *Ibid*., prepared statement of Representative J. Randy Forbes (R-VA).

not a world consensus, but rather the consensus of those in the United States on the meaning of the words used in the Constitution and legislation when originally enacted'.[65] The problem with recent 'decisions of the United States Supreme Court that are based, at least in part, on selectively cited decisions drawn by a variety of foreign bodies'[66] is that '[t]he American people have had no opportunity to vote on any of these laws'.[67]

Indeed, Representative Ryun went one step further, equating the citation of foreign materials with foreign interference in the United States' internal affairs. He suggested that 'the Supreme Court, in using the laws passed by these countries to interpret and rewrite American laws, are achieving ... foreign interference in our government'.[68] The next, absurd move in this line of argument is the truly paranoiac fear that foreign courts could draft their judgments maliciously to harm the United States, in the hope that a US court would cite that judgment. Asked Representative Forbes, 'My big concern is that there could very well be countries out there who are hostile to this country ... How will our justices know who our enemies are today; will they be our enemies today; will they be tomorrow? When the decision was decided in that country, were they hostile or not?'[69] Jeremy Rabkin, testifying as an academic expert in the hearings, stoked these fears in his answer: 'This is not hypothetical. It is not remote. It's not implausible. This is where we are right now ... I think they are absolutely trying to infiltrate into our judicial system this idea that our judges need to listen to what their judges say, and we should say no to that.'[70]

Democratic representatives did little to respond effectively. They described the resolution as a threat to judicial independence and the separation of powers. Thus, Representative Schiff said that the resolution was part of 'a trend that concerns me, and that is the deterioration of the relationship between the Congress and the courts', and 'a shot across the bough [*sic*] of the judiciary'.[71] The resolution, because it purported to pass judgment on the Court's decisions, was 'a violation of the separation

[65] *Ibid.*, words of Representative Steve Chabot (R-OH). [66] *Ibid.*
[67] *Ibid.*, prepared statement of Representative Jim Ryun (R-KS). [68] *Ibid.*
[69] *Ibid.*, words of Representative J. Randy Forbes (R-VA).
[70] *Ibid.*, testimony of Jeremy Rabkin, Professor of Government, Cornell Unversity.
[71] *Ibid.*, words of Representative Adam Schiff (D-CA).

of powers, and at worst, an attempt at intimidation'.[72] Entirely absent from Democratic defences of the Court was a *substantive* response to the Court's comparative turn. To a large extent, the failure of the Democrats is a function of an underlying judicial failure. Since the Court had not equipped them with the intellectual resources and argumentative framework to respond, Democrats were forced back to a formal, institutional defence of the Court. The unfortunate effect of standing on constitutional structure was to elevate the stakes and to shut down public discussion of the Court's reasoning, when in fact the legitimacy of the Court's judgments requires an active public discussion on precisely the issue of interpretive methodology.

Situating the migration of constitutional ideas in the discipline of comparative constitutional law

The gap between the intellectual architecture of constitutional law and the increasing speed of the migration of constitutional ideas poses a challenge not only to courts engaged in this practice, but also to the academics who study it. The migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice. The migration of constitutional ideas occurs at various stages in the life-cycle of modern constitutions. The use of foreign law in constitutional interpretation is but one example. Another is the use of foreign constitutions as models in the process of constitution-making. Moreover, the migration of constitutional ideas occurs not only across national jurisdictions, but also between the national and the supranational level. The most prominent example of the latter is the process surrounding the drafting of the European Union's Draft Constitutional Treaty, which drew heavily upon the constitutional traditions of member states both for specific institutional prescriptions and, indeed, for the very idea of constitutionalism itself as a way to understand and describe the character and content of that project.

The migration of constitutional ideas has been identified to a limited extent at a descriptive level. But many basic conceptual issues have received almost no attention in the large and growing critical literature

[72] *Ibid.*, words of Representative Jerrold Nadler (D-NY).

on comparative constitutional law. For example, the existing literature has not addressed systematically the methodology of constitutional migration, nor the normative underpinnings of this enterprise. This lack of attention is all the more surprising given that comparative constitutional law is rapidly emerging as a major field within legal scholarship, as evidenced by two new case books,[73] and a dedicated journal.[74]

A brief review of some recent book-length studies on the cutting-edge of comparative constitutional scholarship quickly illustrates how the migration of constitutional ideas is not yet a central concern of the discipline. These important works fall into two broad categories. The first set, which includes Mitchel Lasser's *Judicial Deliberations*[75] and Peter Oliver's *The Constitution of Independence*,[76] consist of in-depth case studies of a handful of carefully selected constitutional systems in order to compare and contrast how they respond to common problems. The second set, which includes Trevor Allan's *Constitutional Justice*[77] and David Beatty's *The Ultimate Rule of Law*,[78] sets out universalist theories of constitutional law which direct constitutional courts to converge on common interpretations. Although they raise and address important questions, neither set explores the migration of constitutional ideas.

Consider the first body of work. In *The Constitution of Independence*, Oliver asks how the former British colonies of Australia, Canada, and New Zealand achieved constitutional independence from the United Kingdom through entirely legal means, via enactments of the Westminster Parliament. The difficulty is that under the doctrine of parliamentary sovereignty, the Westminster Parliament could theoretically repeal the enactments whereby independence was granted. Achieving total constitutional independence while respecting constitutional continuity seemed impossible. The doctrine of parliamentary

[73] V. Jackson and M. Tushnet, *Comparative Constitutional Law* (Foundation Press, New York, 1999); N. Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (Thomson/West, St Paul, MN, 2003).

[74] The *International Journal of Constitutional Law*.

[75] *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, Oxford, 2004).

[76] *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, Oxford, 2005).

[77] *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001).

[78] (Oxford University Press, Oxford, 2004).

sovereignty accordingly pushed colonies toward legal revolution, in order to establish an autochthonous source of constitutional title.

Oliver's richly documented and insightful analysis suggests that the answers offered by constitutional actors in the former colonies point to a reconceptualization of parliamentary sovereignty. What is of salience is how Oliver frames his subject of inquiry and his method of analysis. Oliver seeks to untangle and explain differences and similarities, observed and unobserved, between three constitutional orders, in order to interrogate basic assumptions about the relationship between parliamentary sovereignty, constitutional independence, and legality. Oliver engages in the *static* comparison of different legal orders, examining them as separate legal entities in isolation from one another. What Oliver is not interested in, and hence does not study, is whether these legal orders interact and influence one another, if at all. Thus, Oliver in effect describes four related but separate sets of conversations – amongst respective constitutional actors within Australia, Canada, and New Zealand over how to reconcile constitutional continuity with constitutional independence and amongst British legal actors over the same question. What Oliver chose to not explore is the additional question of how constitutional ideas regarding these fundamental constitutional questions migrated across the three former colonies.

Now let us move to the second body of work. In *Constitutional Justice*, Allan is explicitly universalist, setting out a constitutional theory framed around 'the basic principles of liberal constitutionalism', which is 'broadly applicable to *every* liberal democracy of the familiar Western type'.[79] His analysis shuttles back and forth between theoretical discussions of abstract principles of justice which, on Allan's account, inhere in the very idea of liberal democratic constitutional order, and judicial decisions drawn from a range of actual liberal democratic regimes in the common law world. The link between the two is intimate, since constitutional interpretation within particular jurisdictions 'is inevitably dependent' on 'more abstract principles of legitimate governance'.[80] Because of the tie between universal constitutional theory and adjudication within particular constitutional orders, Allan offers a narrative of legal convergence. As he writes, '[a] general commitment to certain foundational values that underlie and inform the purpose and

[79] Allan, *Constitutional Justice*, preface. [80] *Ibid.*

character of constitutional government ... imposes a natural unity on the relevant [common law] jurisdictions'.[81] Accordingly, 'these (common law) jurisdictions should, to that extent, be understood to *share* a common constitution'.[82]

Because of its extensive reliance on comparative materials, Allan's work counts as an important piece of comparative constitutional scholarship. What are worth dwelling on are the mechanisms of constitutional convergence in Allan's account. One obvious mechanism is constitutional theory itself, which sets a benchmark against which the particular decisions of specific common law jurisdictions can be assessed. If, as Allan suggests, deviations from this model are 'legal errors, reflecting failures to understand the full implications of the rule of law',[83] then the common constitutional theory can serve as a reason for courts to *correct* those legal errors. But Allan's account would also suggest that comparative materials which correctly apply his constitutional theory could also serve this role. Indeed, given that jurisdictions are engaged in a shared constitutional project, there is no reason against the citation of foreign cases. Allan is clearly receptive to the migration of constitutional ideas. But since *Constitutional Justice* is primarily a work of normative constitutional theory, Allan does not squarely address this question.

So where does this leave us? The migration of constitutional ideas still remains relatively unexplored in the vast and growing literature on comparative constitutional law. Detailed case studies of common issues across a small set of legal orders have consisted of static comparisons of different constitutional systems, but have not examined how and why constitutional ideas have migrated across systems. Normative constitutional theorists have set out universal accounts of liberal democratic constitutionalism, have called for those accounts to inform constitutional interpretation across jurisdictions, and are open to comparative engagement. They have not, however, examined how the migration of constitutional ideas figures into their narratives of convergence. To be sure, the existing literature addresses important questions. But the premise of this volume is that the field should go in new directions, and that the migration of constitutional ideas is desperately in need of serious academic attention.

[81] *Ibid.*, p. 4. [82] *Ibid.*, p. 5. [83] *Ibid.*

Comparative law and legal transplants

This volume also intervenes in a recent debate among comparative law theorists over legal transplants, sparked by Alan Watson's famous argument.[84] Boiled down to its essentials, Watson claimed that (a) legal transplants consist of transferring rules between legal systems, (b) such transfers are the primary engine of legal change, (c) the fact of widespread transfer suggests there is no close relationship between law and the broader society, and finally, (d) the discipline of comparative law should be oriented toward the study of transplants. In his well-known response, Pierre Legrand suggests that Watson's claims all rest on an underlying error – his reliance on an incorrect concept of a legal rule. For Legrand, laws are not merely 'bare propositional statement[s]', as Watson assumes, but rather 'an incorporative cultural form ... buttressed by important historical and ideological formations',[85] 'the frameworks of intangibles within which interpretive communities operate and which have normative force for these communities'.[86] Consequently, 'interpretation is ... the result of a particular understanding of the rule that is influenced by a series of factors ... which would differ if the interpretation had occurred in another place or in another era'.[87] Thus, a legal rule consists of 'both the propositional statement as such and its invested meaning – which jointly constitute the rule'.[88] Legal transplants could only occur if both the rule and its context could be transferred between legal systems, an exceedingly unlikely prospect. In its new context, a legal rule 'is understood differently by the host culture and is, therefore, invested with a culture-specific meaning at variance with the earlier one'.[89] In other words, it becomes a different rule. Legrand concludes that ' "legal transplants" are impossible'[90] and that 'at best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words'.[91]

Legrand's critique of Watson is nested in a larger theory of the purpose of comparative law.[92] It is an explicit response to the functionalist

[84] *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, Edinburgh, 1974).

[85] P. Legrand, What 'Legal Transplants' in D. Nelken and J. Feest (eds.), *Adapting Legal Cultures* (Hart Publishing, Oxford, 2001), p. 55 at p. 59.

[86] *Ibid.*, p. 65. [87] *Ibid.*, p. 58. [88] *Ibid.*, p. 60. [89] *Ibid.* [90] *Ibid.*, p. 57.

[91] *Ibid.* p. 63.

[92] P. Legrand, The Same and the Different in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge, 2003), p. 240.

impulse, embodied most explicitly in the work of Zwiegert and Kötz, to identify sameness across legal systems. In their famous formulation, 'legal systems give the same or very similar solutions, even as to detail, to the same problems of life' and 'the comparativist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results'. By contrast, they contend, 'if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed his original questions were ... purely functional, and whether he has spread the net of his researches quite wide enough'.[93] Basil Markesinis has expressed similar views.[94] The point of these scholars is to explain away diversity, 'to be *above* diversity, to be intrinsically diversity-free'.[95] Instead, Legrand calls for difference in response to the urge for convergence. In his view, comparative lawyers should:

> ... resign themselves to the fact that law is a cultural phenomenon and that, therefore, differences across legal cultures can only ever be overcome imperfectly ... [T]hey must purposefully privilege the identification of differences across the laws they compare lest they fail to address singularity with scrupulous authenticity. They must make themselves into *difference engineers*.[96]

If comparative law is about difference, to Legrand, it would appear that legal transplants are not worthy of serious study. But as James Q. Whitman perceptively notes, it is possible to separate the study of transplants from the call for convergence. As he writes in direct response to Legrand:

> ... we must be careful not to slip into the error of believing that legal practices can be so rooted in their 'cultures' that they can never be transplanted ... [I]n raising doubts about the 'transplantation' of legal institutions, we run the risk of neglecting what is unquestionably a fundamentally important issue: legal systems *do* permit

[93] K. Zweigert and H. Kötz, *Introduction to Comparative Law*, T. Weir translator (3rd rev. edn, Oxford University Press, Oxford, 1988), pp. 39–40.
[94] *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Hart Publishing, Oxford, 1997), p. 6.
[95] Legrand, The Same and the Different, p. 248. [96] *Ibid.*, p. 288.

> transcultural discussion and transcultural change. Indeed, they undergo transcultural change all the time.[97]

A case in point is the law of sexual harassment, which has been borrowed by Western European legal orders from the United States. The result has been 'a sexual harassment law that is strikingly different from its US model', since 'the new European sexual harassment law focuses on *dignitary* interests in a way that its US model does not'.[98] To be sure, legal rules are 'being more deeply transformed than the metaphor is capable of conveying'.[99] But to acknowledge that legal rules change as they migrate is far from Legrand's assertion that legal transplants are logically impossible. As Whitman concludes, '*some* kind of borrowing is surely taking place and we need *some* account of what is going on'.[100]

David Nelken's response to Legrand likewise accepts that his views on legal transplants are 'incontrovertible, but also unhelpful', for baldly to state that legal transplants cannot 'reproduce identical meanings and effects in different cultures'[101] directs the field away from the facts on the ground – i.e., 'that legal transfers are possible, are taking place, have taken place and will take place'.[102] Indeed, legal transplants are often deliberately sought after by the receiving legal order. Constitutional transitions, for example, have often looked to comparative constitutional materials as the engines of domestic constitutional change, as 'geared to fitting an imagined future'.[103] And so if Legrand wants comparative law 'to concentrate here mainly on how best to preserve existing differences, we would surely be missing the point'.[104]

The migration of constitutional ideas and dialogical interpretation

What Legrand has accomplished is to illustrate the inaptness of the legal transplant metaphor. But the shortcoming of a single metaphor is not a good reason to abandon metaphors altogether. As Kim Lane Scheppele

[97] The Neo-Romantic Turn in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge, 2003), p. 312, pp. 341–2.
[98] *Ibid.*, p. 342. [99] *Ibid.* [100] *Ibid.*
[101] D. Nelken, Comparatists and Transferability in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge, 2003), p. 437 at p. 442.
[102] *Ibid.*, p. 443. [103] *Ibid.* [104] *Ibid.*, p. 444.

notes in her contribution to this volume, '[m]etaphors matter in shaping thought, and so it is crucial to get the metaphors right for highlighting key features of the matter under discussion'. Metaphors highlight some features of phenomena, while casting shadow on others. So the challenge is to locate the right metaphor.

Unfortunately, the inadequacies of the idea of legal transplants in the world of comparative law are matched by its counterpart in comparative constitutional law, 'constitutional borrowing'. The dominance of this metaphor was confirmed by the devotion of a symposium to constitutional borrowing in the leading journal in the field, the *International Journal of Constitutional Law*.[105] Yet at the same time, the fact that only one article squarely endorsed constitutional borrowing (in South Africa), while the other contributions described the failures of constitutional borrowing in specific contexts, argued for the impossibility and illegitimacy of constitutional borrowing as a general matter, and advanced the claim that borrowing does not capture the full range of uses to which comparative constitutional materials are used, inadvertently highlights that the metaphor may have outlived its usefulness.

Scheppele catalogues the deficiencies of constitutional borrowing, each of which is redressed by the metaphor of migration. Ideas which are borrowed carry no implicit promise of return, although the idea of borrowing seems to require it. Migration does not carry the implication that constitutional ideas will necessarily be returned by the recipient jurisdiction. Moreover, it grants equal prominence to the fact of movement of constitutional ideas across legal orders, as well as to the actual ideas which are migrating.

[105] (2003) 1 *International Journal of Constitutional Law* 177–324, the relevant articles are: B. Friedman and C. Saunders, Editors' Introduction, p. 177; D. Davis, Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience, p. 181; L. Epstein and J. Knight, Constitutional Borrowing and Nonborrowing, p. 196; Y. Hasebe, Constitutional Borrowing and Political Theory, p. 224; W. Osiatynski, Paradoxes of Constitutional Borrowing, p. 244; C. Rosenkrantz, Against Borrowings and Other Nonauthoritative Uses of Foreign Law, p. 269; K. Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence Through Negative Models, p. 296. For other related discussions see V. Jackson, Comparative Constitutional Federalism and Transnational Judicial Discourse (2004) 2 *International Journal of Constitutional Law* 91; W. Eskridge, United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism (2004) 2 *International Journal of Constitutional Law* 555; D. Law, Generic Constitutional Law (2005) 89 *Minnesota Law Review* 652.

Borrowing inaccurately connotes ownership on the part of the lender and hence ongoing control on the part of the source constitutional order over use by the recipient jurisdiction of that which has been borrowed. In contrast, the migration of constitutional ideas does not necessarily connote control on the part of the originating constitutional order. Indeed, the migration of constitutional ideas may occur without the knowledge or permission of the source jurisdiction. Migration is often covert and illicit.

Moreover, borrowing implies both that ideas are a positive influence and that they must be used 'as is', without significant modification or adaptation. But the metaphor of migration explicitly opens the door to a wider range of uses for constitutional ideas, and for the outcomes of the process of comparative engagement. Although the metaphor of borrowing does not preclude the possibility of adaptation and adjustment, the metaphor of migration is more amenable to this turn of events. Constitutional ideas may change in the process of migration. It is understood that the process of migrating changes that which migrates. Indeed, given the centrality of migration to the contemporary practice of constitutionalism, the truly interesting question is why and how such changes take place.

Finally, while borrowing shares the functionalist impulse of legal transplants, the migration of constitutional ideas encompasses a much broader range of relationships between the recipient jurisdiction and constitutional ideas. Neil Walker aptly summarizes the benefits of the migration metaphor in his contribution to this volume:

> Migration ... is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike other terms current in the comparativist literature such as 'borrowing', or 'transplant' or 'cross-fertilization', it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather, as we shall develop in due course, it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.

Now to be sure, transplants or borrowings as traditionally understood are possible. However, the actual place of comparative materials often

does not fit well within a narrow functionalist account of constitutional convergence. Indeed, it is possible to take both constitutional difference and comparative engagement seriously. Difference is an inherently relative concept – one constitution is only unique by comparison with other constitutions that lack some characteristic which this constitution possesses. The Notwithstanding Clause in the Canadian Charter of Rights and Freedoms, for example, was a unique innovation in constitutional design because other bills of rights did not contain such a provision.[106] Since difference is defined in comparative terms, a keener awareness of the particular can be sharpened through a process of comparison. Comparative engagement, far from necessarily directing courts and legal actors toward constitutional convergence, can instead reinforce moments of constitutional difference.

Elsewhere, I have termed this use of comparative materials as 'dialogical'.[107] Dialogical interpretation in constitutional adjudication is an example of the type of comparative engagement that lies outside the framework of constitutional borrowing, but which falls within the scope of the migration of constitutional ideas. The goal is to use comparative materials as an interpretive foil, to expose the factual and normative assumptions underlying the court's *own* constitutional order. First, comparative materials are engaged to identify the assumptions embedded in positive legal materials. But in the process of articulating the assumptions underlying foreign jurisprudence, a court will inevitably uncover its own. By asking *why* foreign courts have reasoned a certain way, a court engaged in process of discursive justification asks itself why *it* reasons the way *it* does. And so the next move is to engage in a process of justification. If the assumptions are different, the question becomes

[106] S. 33 of the Constitution Act 1982.

[107] Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation (1999) 74 *Indiana Law Journal* 819 at 835; The Lochner Era and Comparative Constitutionalism (2004) 2 *International Journal of Constitutional Law* 1 at 52. My dialogical model of comparative constitutional interpretation is similar to Vicki Jackson's 'Engagement Model'. See V. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement (2005) 119 *Harvard Law Review* 109. As Ernie Young suggests, however, the actual reasoning in *Roper* is far from a model of comparative engagement: E. Young, Foreign Law and the Denominator Problem (2005) 119 *Harvard Law Review* 148. Similarly, Jeremy Waldron observes that '[o]ne of the most frustrating things about Roper, however, is that no one on the Court bothered to articulate a general theory of the citation and authority of foreign law'. J. Waldron, Foreign Law and the Modern Jus Gentium (2005) 119 *Harvard Law Review* 129 at 129.

why they are different. Comparative engagement highlights the contingency of legal and constitutional order, and opens for discussion and contestation those characteristics which had remained invisible to domestic eyes. Conversely, if the assumptions are similar, one can still ask whether those assumptions ought to be shared. The types of reasons offered will vary depending on the culture of constitutional argument in the jurisdiction of the interpreting court, and may encompass constitutional text, structure, history, precedent, and normative considerations.

Finally, the court is faced with a set of interpretive choices. A court may be able to justify the similarity with, or the difference between, the assumptions underlying its own constitutional order and a foreign one. Comparative engagement, then, leads to a heightened sense of legal awareness through interpretive clarification and confrontation. But the identification and attempted justification of constitutional assumptions through comparison may lead a court to challenge and reject those assumptions and search for new ones. In cases of constitutional similarity, a court may reject shared assumptions and may strike out in a new direction based on radically different premises. In cases of constitutional difference, a court may determine a difference to be unfounded, and may rely on comparative jurisprudence as the engine of legal change.

Frank Michelman has recently applied the dialogical method in an insightful comparison of the US and South African jurisprudence on affirmative action on the basis of race. US constitutional doctrine treats racial affirmative action as deserving of the highest constitutional scrutiny, and has rendered it unconstitutional in all but a narrow range of circumstances. The benign motivation underlying such racial classifications does not operate to save them. South African constitutional doctrine, by contrast, would appear to be open to treating racial affirmative action with considerably less suspicion, relying precisely on a notion of objective dignity which replicates the distinction between benign and invidious classifications which the US courts have rejected. Michelman asks: 'Is there a lesson for us? Might American jurists do well to take heed of the South African way and follow suit?'[108] Michelman

[108] Reflection (Symposium: Comparative Avenues in Constitutional Law Borrowing) (2004) 82 *Texas Law Review* 1737 at 1758. For another example of the application of the dialogical method of interpretation, see G. Jacobsohn, The Permeability of Constitutional Borders (2004) 82 *Texas Law Review* 1763.

traces South African constitutional doctrine to a 'consensually ascribed constitutional project ... of racially redistributive social transformation.'[109] US doctrine sounds in a different key, because of 'the tenacious streak of self-reliant individualism in our ideological soul'.[110] Against that backdrop, the South African jurisprudence should not be applied by US courts, because it is not 'compatible with American self-understanding'.[111] However, comparative engagement is fruitful, since '[b]y our comparative encounter with the emergent South African doctrine ... we ... clarify our picture of ourselves'.[112]

The dialogical method of comparative engagement may equip US courts to respond to Scalia's challenge. It may help the leaders of the US Supreme Court's comparative turn to reject the dichotomy between binding and non-binding uses of comparative materials, opening up the space for a third option which accords comparative materials a distinctive legal significance without raising the fears of judicial activism or threats to US sovereignty. The Court may itself be heading toward this understanding. Consider the following passage from *Roper*:

> *These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.* Not the least of reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply *underscores the centrality of those same rights within our own heritage of freedom.*[113]

Viewed through the lens of dialogical interpretation, the Court's recourse to comparative materials can be understood as forcing the Court to identify and challenge the assumptions underlying US constitutional doctrine. The argument made by the majority was that the taking of a life of a juvenile is a disproportionate punishment for a capital offence because juveniles have diminished culpability owing to their vulnerability to influence and their susceptibility to immature and irresponsible behaviour. Until *Roper*, US constitutional law had reached the opposite conclusion. But comparative law opened up *US* legal doctrine to an alternative way of understanding *US* constitutional commitments – by

[109] *Ibid.*, 1760. [110] *Ibid.*, 1761. [111] *Ibid.*, 1758. [112] *Ibid.*
[113] *Roper*, at 1200 (emphasis added).

articulating a different viewpoint of the appropriate theory of punishment in a constitutional democracy. The question for the Court was whether this viewpoint resonated within US constitutional culture and was coherent with an intelligible and persuasive interpretation of constitutional doctrine and a textual guarantee which is 'central to the American experience and . . . to our present-day self-definition and national identity'. Hence comparative law simply 'underscored the centrality of those same rights within *our* [i.e., US] heritage of freedom'.

This volume: exploring the migration of constitutional ideas

The dialogical approach to the use of comparative materials is but one way of understanding the migration of constitutional ideas. The chapters in this volume tackle this phenomenon from a diverse range of methodological perspectives. Moreover, they draw on a rich range of constitutional practice. Together, the chapters fill a major gap in the critical literature. The focus on case studies was a conscious choice. A major impetus for the volume is that the practice of the migration of constitutional ideas has outpaced the theoretical frameworks through which scholars have hitherto approached the study of comparative constitutionalism. To recast our theories of comparative constitutional law, we must therefore turn to a detailed study of constitutional practice. As a consequence, many of the chapters draw on detailed examples from a wide variety of jurisdictions (e.g. Hungary, India, Canada, South Africa, Hong Kong, the European Union) on a diverse range of subject-matters (e.g. same sex marriage, freedom of expression, anti-terrorism legislation, judicial independence). A richer account of constitutional practice will serve as fodder for the theoretical reconceptualization of the discipline.

The volume is divided into four parts: The methodology of comparativism; Convergence toward a liberal democratic model?; Comparative constitutional law, international law and transnational governance; and Comparative constitutional law in action – constitutionalism post 9/11.

Part I: The methodology of comparativism

The globalization of the practice of modern constitutionalism has had a dramatic impact on the legal academy, by reinvigorating the study of

comparative constitutional law. The first part of the volume will address basic issues such as what the point of comparative inquiry is, and how that enterprise is to be undertaken, by bringing to bear the differing disciplinary perspectives of comparative law and comparative politics. These two disciplines take different approaches and offer different conceptual tools to explain the migration of constitutional ideas.

For students of comparative politics, as Ran Hirschl argues (On the blurred methodological matrix of comparative constitutional law), the goal of academic inquiry is both to describe observed patterns of constitutional phenomena and to explain their causes. Against this benchmark, Hirschl carefully reviews the legal literature on comparative constitutionalism, suggesting that it comes up short. The principal difficulty is that legal studies of comparative constitutionalism lack methodological rigour because they have failed to deploy the social scientific research methods of controlled comparison, research design, and case selection that are necessary to draw causal inferences. By contrast, Hirschl argues, scholars of comparative politics have successfully used a variety of case selection methodologies to explain the political origins and consequences of the recent spread of written constitutions and bills of rights. Hirschl concludes by suggesting that inference-oriented principles of case selection may likewise help scholars to explain why, when and how the migration of constitutional ideas occurs.

Mark Tushnet (Some reflections on method in comparative constitutional law) provides a striking contrast to Hirschl. Whereas Hirschl argues that legal studies of comparative constitutionalism have been methodologically deficient, Tushnet defends the existing literature and the methods it has employed, and situates the academic study of comparative constitutional law firmly within the mainstream of legal scholarship. Tushnet observes that the academic study of comparative constitutional law has not been methodologically innovative because it has relied on a series of well-established methods used in the study of comparative law. Tushnet suggests that despite its lack of methodological originality, the existing literature has nonetheless yielded intellectual dividends. There are three principal comparative law methodologies: normative universalism, functionalism, and contextualism. He then instructively distinguishes simple contextualism from expressivism. Tushnet provides a conceptual map of these methodologies with concrete illustrations from the academic literature on comparative constitutional

law. For each example, he explains what useful insights these studies have revealed. Rather than arguing for the superiority of one methodology over another, he suggests that each approach has its benefits and limitations.

If Tushnet's chapter provides a taxonomy of the distinctively legal approaches to comparative constitutional law found in the academic literature, Lorraine Weinrib (The postwar paradigm and American exceptionalism) also works from within a legal perspective, but proceeds from the practice of courts. Her target, however, is American exceptionalism – i.e., the refusal of many US courts and justices to engage in comparative analysis. American exceptionalism flows from the premise that constitutional judicial review is undemocratic and illegitimate, and views the migration of constitutional ideas as a form of judicial activism that further undermines the legitimacy of judicial review. Weinrib contrasts American exceptionalism with the 'postwar juridical paradigm' of rights protection, a common constitutional model she claims is found in a wide variety of liberal democracies (e.g. Israel, Canada, and Germany). This model views judicially enforced constitutional rights as crystallizations of inherent human dignity and comparative constitutional analysis as a natural by-product of the shared constitutional template that transcends jurisdictional boundaries. In other words, Weinrib provides an empirical account to back up Allan's narrative of constitutional convergence. While the dominant view is that the postwar model is totally foreign to the US experience, Weinrib argues that the rights-based conception has a pedigree in the decisions of the Warren Court, which themselves influenced constitutional courts in other countries. Recent debates over reference to comparative materials have been unnecessarily acrimonious as a result of the view that there are two competing conceptions of constitutionalism, only one with roots in US legal and political experience.

Part II: Convergence toward a liberal democratic model?

Lorraine Weinrib has offered a powerful model of comparative constitutional law that makes three controversial claims. First, the migration of constitutional ideas through judicial borrowings has facilitated the emergence of a common constitutional model for constitutions in a variety of jurisdictions. Second, the adoption of the

post-Second World War constitutional model has precipitated the convergence of constitutional analysis across both common law and civil law jurisdictions. Third, this emerging constitutional conversation has not, for the most part, involved the United States. The chapters in this section engage with each of these points.

Jeff Goldsworthy (Questioning the migration of constitutional ideas: rights, constitutionalism and the limits of convergence) challenges Weinrib's descriptive and normative accounts of constitutional convergence. He asks two questions: whether convergence toward a common constitutional model is a good thing, and whether judicial interpretation should serve as a vehicle for convergence. Goldsworthy answers both questions in the negative. Pointing to the diversity of institutional arrangements surrounding judicial review in England, New Zealand, and Canada, Goldsworthy suggests that significant variations continue to distinguish different liberal democratic constitutions. He also suggests that diversity and experimentation in constitutional design enable adaptation to differing political and cultural circumstances. Finally, Goldsworthy argues against convergence through constitutional interpretation. He asserts that such an interpretive stance fails to take seriously the constraints that text imposes on the legitimate role of the courts in elaborating constitutional meaning.

Michel Rosenfeld and András Sajó (Spreading liberal constitutionalism: an inquiry into the fate of free speech rights in new democracies) also argue against the existence of convergence, focusing on the case of free speech in Hungary. Free speech makes for an interesting case study because it is valued by many versions of liberal constitutionalism. Rosenfeld and Sajó use the Hungarian case to explore the contribution of the transplantation of liberal constitutional norms to the spread and consolidation of liberal constitutionalism. They pose a series of questions. Is the importation of such norms sufficient to pave the way to liberal constitutionalism, or must certain preconditions prevail or become developed prior to any successful transplantation? Can the importation of liberal constitutional norms have a significant impact notwithstanding the concurrent importation of non-liberal constitutional norms? Does the outcome of transplantation depend more on the nature of the rights and/or the approach to these imported rights, or more on contextual issues relating to conditions in the importing countries? The Hungarian case suggests two conclusions: that the importation of liberal free speech

norms can be linked to the implantation of liberalism to some degree, but also that historical, cultural, political, and institutional factors play an important part in determining the viability, scope, and possible depth of any possible adaptation of imported constitutional norms, which speaks to Whitman's concerns. It also suggests the need to take a longer-term view of the project of liberalism, as the authors argue that apparently illiberal influences can be co-opted into the service of liberalism.

Jean-François Gaudreault-DesBiens (Underlying principles and the migration of reasoning templates: a trans-systemic reading of the *Quebec Secession Reference*) addresses the possibility of constitutional convergence across the divide between the common law and civil law worlds, as Weinrib suggests has occurred. He argues that most students of comparative constitutionalism have assumed this divide to be an insurmountable barrier to the migration of constitutional ideas. In particular, while it is often supposed that unwritten legal principles can migrate freely among common law jurisdictions, it is also presumed that the centrality of text to legal reasoning in civilian systems makes them impervious to such arguments. Gaudreault-DesBiens argues, however, that this view is based on a caricature of the civil law tradition. Properly understood, the civil law tradition holds that legal texts are always based on underlying and unwritten legal principles on which courts may rely to supplement textual provisions. Indeed, unwritten principles may even provide courts a justification for refusing to follow explicit textual provisions in a given case. He argues, counter-intuitively, that this interpretive methodology has in fact migrated from the civil law into the common law world of Canadian public law. His principal example is the judgment of the Supreme Court of Canada in the *Quebec Secession Reference*, often offered as the leading example of unwritten, *common law* constitutionalism.

Finally, Brenda Cossman (Migrating marriages and comparative constitutionalism) takes up the claim that the US constitutional system is impervious to comparative influence. As a case study, she examines the impact of the Canadian jurisprudence on same sex marriage in the United States. Cossman agrees with Weinrib that the judgments will have little or no direct impact on US legal developments because of US exceptionalism. She argues, however, that the denial by US courts of the validity of Canadian marriages on US soil constitutes itself a form, albeit a thin one, of recognition: if same sex marriage is valid in Canada, it is no

longer *unthinkable* in the United States. She suggests, further, that a narrow focus on the migration of constitutional doctrine misses out on the important role that cultural representations of foreign constitutional developments play in US constitutional debates. Cultural representations of same sex marriages of Americans that have taken place in Canada are significant interventions in US constitutional debates around same sex marriage because they reconstitute the very nature of the gay and lesbian subject, and the very nature of marriage. Cossman's conclusion is that comparative constitutionalism needs to broaden its methods beyond formal sources of constitutional law to encompass a cultural studies dimension.

Part III: Comparative constitutional law, international law and transnational governance

Whereas many of the chapters explore the migration of constitutional ideas across national jurisdictions, Mayo Moran and Mattias Kumm enter this debate from a different angle. International law (especially international human rights law) increasingly serves as a source of constitutional ideas for domestic legal orders through judicial interpretation. Moran and Kumm accordingly address the question of constitutional migration through the lens of traditional models for the reception of international law into domestic law.

Mayo Moran (Inimical to constitutional values: complex migrations of constitutional rights) approaches this issue by linking two hitherto unconnected debates. The first is the use of international and comparative law in domestic constitutional adjudication, and the second is the use of domestic constitutional law in private law adjudication. Both phenomena tend to occur in the same jurisdictions, such as South Africa. Moran suggests that this is not surprising, since both rely on a conception of legal sources that rejects the traditional fixation with the presence or absence of binding sources of law. Constitutional practice points to a more nuanced and complex theory of legal sources – one where the *values* of international and comparative law exert some kind of mandatory effect upon domestic constitutional law, and where the *values* of constitutional law exert a comparable effect on domestic private law, even when international and constitutional legal rules do not apply directly. She terms this effect 'influential authority'.

Mattias Kumm (Democratic constitutionalism encounters international law: terms of engagement) makes a similar point, albeit by focusing exclusively on the migration of constitutional ideas from international law. Kumm suggests that debates over the place of 'binding' international law in domestic constitutional adjudication have proceeded, unhelpfully, on an all-or-nothing basis. As an alternative, he suggests a differentiated approach within domestic constitutional doctrine directly to engage with the reasons offered by proponents and opponents of the use of international law in domestic adjudication. These are formal concerns relating to the idea of international legality, jurisdictional concerns relating to subsidiarity, procedural concerns relating to participation and accountability, and substantive concerns relating to individual rights. Different treaties would be treated differently. Moreover, constitutional doctrine would shift from rules of conflict to rules of engagement. Kumm finds these elements in the jurisprudence of the European Court of Human Rights and the European Court of Justice. He then applies this framework to suggest that UN Security Council anti-terrorism resolutions do not have a strong claim to be applied in domestic courts, because of procedural concerns regarding UN Security Council decision-making.

Moran and Kumm assess the legitimacy of importing constitutional ideas from international law from within the standpoint of domestic constitutional law. David Schneiderman and Neil Walker address a slightly different question of legitimacy, asking whether the conceptual lens of constitutionalism has migrated and should migrate to the international legal realm to serve as a normative standard for transnational governance. Schneiderman (Constitution or model treaty? Struggling over the interpretive authority of NAFTA) explores this issue in the context of the North American Free Trade Agreement (NAFTA), where the very idea of referring to NAFTA as a constitution has been a source of political controversy. Commentators writing in the vein of political economy have invoked the language of constitutionalism because NAFTA's protections for investors replicate and expand upon protections for property rights typically found in domestic constitutions. International lawyers have resisted the application of a constitutional framework of analysis to NAFTA, emphasizing NAFTA's continuity with existing international treaties. Schneiderman argues that the language of constitutionalism should migrate to NAFTA, because it provides a

normative framework through which to assess the legitimacy of restrictions that NAFTA imposes on democratic decision-making.

Neil Walker (The migration of constitutional ideas and the migration of *the* constitutional idea: the case of the EU), by contrast, suggests that the use of the language of constitutionalism at the transnational level in the European Union (EU) raises problems of legitimacy, instead of resolving them. At the domestic level, Walker suggests that the migration of constitutional ideas has been challenged on the grounds of democratic legitimacy and cultural specificity. He argues that in the EU context, the challenge of democratic legitimacy, although on its face a challenge even more profound than in the national context, is on reflection still significant but not decisive against the legitimacy of constitutional migration. But he also argues that the question of the specificity of the EU legal culture, though superficially *less* of a problem than in the traditional intra-state context because it owes its legal pedigree to national systems, actually presents a more fundamental and resilient set of problems whose resolution remains a matter of deep and long-term uncertainty. The migration of constitutional ideas to the EU carries with it the migration of *the* constitutional idea to the EU as a fully constitutional polity. This would challenge the view that the EU is a partial and relational supranational polity.

Part IV: Comparative constitutional law in action – constitutionalism post 9/11

The final set of chapters examines the migration of constitutional ideas in the wake of 9/11, as a lens through which to explore the themes developed in the earlier chapters. Constitutionalism post 9/11 raises acute dilemmas for liberal democratic constitutions. The challenge posed by mass terrorism arguably threatens the survival of liberal democratic constitutional orders. Legal responses to terrorism accordingly can be viewed as acts of constitutional protection and preservation. But those very same responses often put considerable strain on the rule of law. The problem is that compliance with the rule of law may impede the effectiveness of responses to terror, arguably jeopardizing the very existence of the constitutional order itself. This shared dilemma has fuelled the migration of constitutional ideas, as jurisdictions search for the right balance between the promotion of security and respect for

legalism. Accordingly, 9/11 has forced the development and elaboration of Weinrib's shared constitutional model in the context of the 'war on terrorism'. It illustrates how this shared model is developing, quite literally, through comparative conversation, and is therefore a test-case for her empirical claims of constitutional convergence. Constitutionalism post 9/11 is worth examining closely for another reason. As Kim Lane Scheppele and Kent Roach demonstrate, post 9/11, the constitutional ideas which have migrated are often actually anti-constitutional ideas. And so, whereas the migration of constitutional ideas has typically been associated with enhanced respect for human rights and the rule of law, post 9/11 it has arguably resulted in their dilution. Constitutionalism post 9/11 therefore raises the question of whether constitutional convergence is an unqualified good – with strong suggestions from this volume for the persuasiveness of negative responses.

Kim Lane Scheppele (The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency) opens this section by exploring the tension between the requirements of international law and domestic constitutional law in the war on terror. Typically, international law is viewed as a source of constitutional ideas to enhance domestic constitutional protections, as is the case with the law of international human rights. But Scheppele argues that in the war on terror, international law has been a source of anti-constitutional ideas. In particular, UN Security Resolution 1373 obliged member states to criminalize terrorism, without defining it or requiring that states comply with human rights norms. This gap has been filled by the enforcement practices of the Security Council's Counter-Terrorism Committee, which has pushed states to adopt measures raising serious questions about the repression of political dissent, the arbitrariness of executive power, and the bypassing of judicial determinations of fact that have become characteristic of terrorism prosecutions around the world. Scheppele also argues that one should not mistake convergence for constitutional borrowing in the traditional, horizontal sense of one state borrowing from an equal other, since the adoption of common legal frameworks in her case study has resulted from international pressure exerted vertically by the Counter-Terrorism Committee of the UN Security Council.

In contrast, Kent Roach (The post-9/11 migration of Britain's Terrorism Act 2000) argues that the migration of constitutional ideas

in the anti-terrorism field has been marked by the surprising resilience of national jurisdictions against anti-constitutional ideas from other jurisdictions. Roach's principal focus is the impact of the United Kingdom's Terrorism Act 2000 on the drafting of anti-terrorism legislation in the former colonies of Australia, Canada, Hong Kong, Indonesia, South Africa, and the United States. The Act's definition of terrorism reflects one view of the correct balance between anti-terrorism policies and the constitutional value of free speech. Roach's argument is that precisely because of the United Kingdom's status as a former colonial power, the constitutional ideas contained in the British statute had a much greater impact on these jurisdictions than corresponding US legislation. But the constitutional politics of each jurisdiction had the effect of significantly narrowing the scope of the definition of terrorism. The lesson is that even in the anti-terrorism context, domestic law, politics, and history collaborate to ensure that the migration of constitutional ideas does not necessarily produce convergence.

The final chapter is from Oren Gross ('Control systems' and the migration of anomalies), who explores the history of 'control systems', whereby imperial powers such as the United Kingdom and France applied an emergency regime to a dependent territory, while purporting to maintain a state of legal normalcy in the controlling territory itself. The hope is that the situation of legal exception would not migrate across territorial boundaries and contaminate the normal legal order in the controlling territory. However, history has taught us that emergency mechanisms have had a tendency to migrate across territorial boundaries. For example, the curtailment of the right to silence in Northern Ireland eventually found its way into ordinary criminal legislation, and the use of torture in Algeria by French forces made its way into France. And so the stern lesson for constitutionalism post 9/11 is the inability to restrain the migration of constitutional (or anti-constitutional) ideas across territorial boundaries within a single control system – a cautionary tale for the United States, in light of the interrogation techniques it has employed in Guantanamo Bay and Iraq.

Conclusion

Roger Alford has recently written that 'there is a remarkable absence of any serious attempt to square' the migration of constitutional ideas with

constitutional theory.[114] Our discipline is out of step with the phenomenology of a rapidly developing constitutional practice, and so has lost its ability to describe and make sense of a shift in the culture of constitutional argument. The goal of this volume is to tackle that task.

What is distinctive is how we address this challenge. Alford proceeds from established theories of constitutional interpretation in the US constitutional order, and attempts fit the increasing comparative engagement by the US Supreme Court within those theories. This is a top-down approach which takes existing ways of thinking about constitutional practice as a given. By contrast, we begin from the bottom up. The task of the constitutional theorist is to identify the reasons offered by courts and other legal actors for the recourse to comparative materials, and to weave those justifications into coherent accounts. Constitutional theories emerge from and seek to justify our interpretive practice. By working from the ground up through case studies drawn from a broad variety of jurisdictions, this volume is a preliminary step in recasting the conceptual apparatus of comparative constitutional law. And so the next step is for scholars to build upon this work, and further to enrich both our accounts of the migration of constitutional ideas and the theories we develop to explain and justify it.

[114] R. Alford, In Search of a Theory for Constitutional Comparativism (2005) 52 *UCLA Law Review* 639 at 641. Also see R. Alford, Roper v. Simmons and Our Constitution in International Equipoise (2005) 53 *UCLA Law Review* 1.