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# Constitutional Transplants, Borrowing, and Migrations

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# CONSTITUTIONAL TRANSPLANTS, BORROWING, AND MIGRATIONS

VLAD PERJU\*

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## I. Introduction

All fields of knowledge are shaped by ideas that travel in time and space. From history to economics to the natural sciences, the circulation of ideas is both ‘a fact of life and a usefully enabling condition of intellectual activity’.<sup>1</sup> Law is no exception. As Roscoe Pound remarked in

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*The Formative Era of American Law* (1938), the ‘history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law.’<sup>2</sup> The development of the English common law, the Roman-Canonic *jus commune*, and the advent of constitutionalism in the second half of the twentieth century are examples of phenomena in which the circulation of legal norms and ideas changed not only legal systems but also the course of history.

The study of legal transplants in comparative law aims to understand how the complex dynamic of cross-jurisdictional legal transfers brings legal systems into contact and eventually causes them to change.<sup>3</sup> For most of the twentieth century, comparative legal studies focused almost exclusively on rules of private law. Constitutional norms, and public law generally,<sup>4</sup> were perceived as too enmeshed with politics to allow for the same rigorous and systematic treatment that could be applied to the study of contract or property law.

And yet, instances of constitutional borrowing are now everywhere. Not only has the idea of a (written) constitution spread to virtually every corner of the world but also constitutions are gaining recognition as enforceable legal documents, rather than mere declarations. The

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<sup>1</sup> Edward Said, *The World, the Text, and the Critic* (1983), 226.

<sup>2</sup> Roscoe Pound, *The Formative Era of American Law* (1938), 94.

<sup>3</sup> See Alan Watson, *Legal Transplants* (1974).

<sup>4</sup> This chapter discusses exclusively comparative constitutional law; it does not integrate other forms of comparative public law, such as comparative administrative law. For a recent overview of that field, see Susan Rose-Ackerman and Peter L. Lindseth, *Comparative Administrative Law* (2010). For a discussion of cross-jurisdictional influence, see Tim Koopmans, ‘Globalization of Administrative Law—The European Experience’ in Gordon Anthony et al, *Values in Global Administrative Law* (2011), 400ff.

institution of judicial review, the principle of the separation of powers, and the enactment of a bill of rights have become fixtures on the world constitutional map. As one scholar noted, ‘Reading across any large set of constitutional texts, it is striking how similar their language is; reading the history of any nation’s constitution making, it is striking how much self-conscious borrowing goes on.’<sup>5</sup> Much the same can be said about borrowing at the subsequent stages of constitutional application and interpretation. Courts around the world, from Israel to Brazil and from South Korea to Canada and Hungary often consult the work of their foreign peers in interpreting similarly worded constitutional provisions. Faster means of communication, the ease of travel, and the globalization of legal education contribute to the intensification of constitutional borrowing. As Sujit Choudhry has recently noted, ‘the migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice.’<sup>6</sup>

These developments make it all the more surprising that constitutional borrowing as a standalone topic has been rather marginal in comparative constitutional law. While scholars in the field study various aspects of how constitutional systems interact, the mechanics of cross-constitutional interaction rarely receive comprehensive treatment. As late as 1990, a bibliographical study concluded that the literature on cross-border influence was ‘virtually

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<sup>5</sup> Robert Goodwin, ‘Designing Constitutions: The Political Constitution of a Mixed Commonwealth’ in Richard Bellamy and Dario Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (1996), 223.

<sup>6</sup> Sujit Choudhry, ‘Migration as a New Metaphor in Comparative Constitutional Law’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006), 16.

inexistent'.<sup>7</sup> More recently, Ran Hirschl noted that 'from a methodological standpoint, we have yet to encounter a coherent theory of inter-court constitutional borrowing.'<sup>8</sup> Nothing resembling the transplants debate in comparative private law can yet be found in the field of comparative constitutional law.

At one level, this should not necessarily cause concern. The transplants debate in comparative private law became deadlocked in a polarized contest between scholars arguing that transplants can be found everywhere and other scholars who proclaimed legal transplants impossible because law is embedded in culture and cultures cannot be transplanted. That debate obscured as much as it illuminated the relationship between law and its broader cultural environment. Moreover, as we will see, the field of comparative constitutional law is already developing on its own rich ways of conceptualizing the interplay between (constitutional) law and (constitutional) culture.

Nevertheless, comparative constitutional law *is* comparative law. And comparative legal studies have much to offer, at both conceptual and normative levels, for thinking about legal borrowing in general. Understanding the many dangers associated with borrowing in the constitutional context—dangers involving misunderstanding, exclusion, or limitations of self-government and democratic experimentalism—is enhanced by recourse to the traditions and formative debates of comparative law. Perhaps more than anything else, such recourse can help

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<sup>7</sup> Andrzej Rapaczynski, 'Bibliographical Essay: The Influence of US Constitutionalism Abroad' in Louis Henkin and Albert Rosenthal (eds), *Constitutionalism and Rights* (1990), 406.

<sup>8</sup> Ran Hirschl, 'On the Blurred Methodological Matrix of Comparative Constitutional Law' in Choudhry (n 6), 43.

to infuse the field of comparative constitutional law with a much-tested comparative sensibility—that ‘usefully enabling condition of intellectual activity’.

This chapter is structured as follows. Section II discusses terminology. The choice of metaphors is central to comparative private and constitutional law and should be the starting point for an overview of the topic. Section III introduces the transplants debate in comparative private law and discusses the distinction between private and public, specifically constitutional, law. Section IV is a prolegomena to an anatomy of constitutional transplants that draws, whenever possible, on the resources of comparative private law. It includes an analysis of the object of constitutional transplants, their timing, motivations, and patterns. The justification of constitutional patterns is discussed in Section V, in the context of the use of foreign law in constitutional adjudication as a specific form of constitutional borrowing. The chapter concludes with a brief meditation on the topic of constitutional convergence.

## **II. Terminology: The Battle of Metaphors**

A survey of the literature reveals great concern about the choice of metaphors to capture cross-constitutional interactions.<sup>9</sup> Available options include ‘transplants’, ‘diffusion’, ‘borrowing’, ‘circulation’, ‘cross-fertilization’, ‘migration’, ‘engagement’, ‘influence’, ‘transmission’, ‘transfer’, and ‘reception’. Four of these metaphors have had greater staying power: ‘transplants’ and its ‘borrowing’ equivalent in comparative constitutional law; ‘circulation’ and its ‘migration’ equivalent in comparative constitutional law.

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<sup>9</sup> See also Michele Graziadei, ‘Comparative Law and the Study of Transplants and Receptions’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 443ff.

Alan Watson's *Legal Transplants* (1974) brought this concept to the center of comparative legal studies.<sup>10</sup> A scholar of legal history, Watson's study of the English common law and of the reception of Roman law in continental Europe led him to conclude that foreign transplants are the main mechanism by which private law evolves. Because legal rules are largely autonomous from the larger social and cultural surroundings, their transplant across jurisdictions is 'socially easy'.<sup>11</sup> Comparative law properly so called should therefore study the interaction between legal systems through the mechanism of legal transplants.

As we will see in the next section, the mechanistic overtones of 'transplants' have not traveled well to comparative constitutional law. 'Borrowing' is the analogous metaphor used to capture the phenomena of constitutional transplants. The inaugural symposium of the premier peer-review journal in the field, the *International Journal of Constitutional Law*, was dedicated to constitutional borrowing.<sup>12</sup> However, critics have argued that 'borrowing' is a deceiving metaphor. Leading the charge, Kim Lane Scheppele has pointed out that borrowing signifies a voluntary exchange among equals whereby the borrowed good will be returned unmodified, after a determined period, to the lender who remains its owner. That description does not apply to constitutional transfers. Unlike consumer goods, constitutional norms are not owned by particular legal system. They can be modified in the process of transfer and are not to be

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<sup>10</sup> It took comparative law as an academic discipline a little over seven decades, counting from the 1900 Congress of Paris, to turn to the question of transplants. See Michele Graziadei, 'Comparative Law and the Study of Transplants and Receptions' in Reimann and Zimmermann (n 9), 442ff.

<sup>11</sup> Watson (n 3), 95.

<sup>12</sup> 'Symposium on Constitutional Borrowing' (2003) 1 *International Journal of Constitutional Law* 177.

‘returned’ at term. Finally, borrowing implies consent when in fact not all instances of constitutional transfer are voluntary.<sup>13</sup>

The proposed alternative to constitutional borrowing is constitutional ‘migration’.<sup>14</sup> The fluidity of this new metaphor is said to capture more accurately the complex dynamic of cross-constitutional exchanges. By contrast to the misleading linearity of borrowing, migrations describe

all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by the 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.<sup>15</sup>

Interestingly, the shift from borrowing to migration mirrors a similar shift in comparative law from transplant to ‘circulation’.<sup>16</sup>

The battle of metaphors is not ‘transcendental nonsense’. Only a sufficiently transparent and capacious lens can capture the complexity of cross-constitutional interactions.<sup>17</sup> Consider,

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<sup>13</sup> Kim Lane Scheppele, ‘Aspirational and Adversative Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models’ (2003) 1 *International Journal of Constitutional Law* 296, 296ff; Kim Lane Scheppele, ‘The Migration of Anti-constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency’ in Choudhry (n 6), 347ff.

<sup>14</sup> See generally Choudhry (n 6).

<sup>15</sup> Neil Walker, ‘The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU’ in Choudhry (n 6), 320–1.

<sup>16</sup> Edward M. Wise, ‘The Transplant of Legal Patterns’ (1990) 38 *American Journal of Comparative Law Supplement* 1.



for example, the *rejection* of foreign models. If comparative law aims to understand the interaction between constitutional systems, then instances of rejection of foreign norms are presumably just as relevant as instances when such norms are incorporated.<sup>18</sup> One learns as much about Poland from its rejection of an American-style structure of government model in 1919 as one does from Poland's adoption of a French-inspired constitution two years later.<sup>19</sup> Proponents of the migration metaphor worry that these sorts of constitutional interactions are less visible when one looks for instances of borrowing: 'the traditional focus of cross-constitutional influence only on 'constitutional borrowings' tends to highlight the positive models and hide negative ones.'<sup>20</sup>

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<sup>17</sup> See also Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 *International Journal of Constitutional Law* 563, 566:

These [metaphors] . . . are not 'only words' but signifiers of rather different theoretical approaches and interpretations, at times deployed casually, at others defended with religious zeal.

<sup>18</sup> It has been argued that type and intensity of rejection is also relevant. Kim Lane Scheppele has distinguished situations when foreign options are considered and rejected in favor of alternatives must be differentiated from cases where the foreign models are perceived as so abhorrent as to endanger the very identity of the receiving system. See Kim Lane Scheppele, 'Aspirational and Adversative Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296, 303ff. See also Heinz Klug, 'Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism"' (2000) *Wisconsin Law Review* 597.

<sup>19</sup> Wiktor Osiatynski, 'Paradoxes of Constitutional Borrowing' (2003) 1 *International Journal of Constitutional Law* 244, 250.

<sup>20</sup> Kim Lane Scheppele, 'Aspirational and Adversative Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296.

At one level, this is an odd claim since nothing prevents scholars from researching, as some have,<sup>21</sup> instances of non-borrowing. But it is true that such projects are few and far between. So a deeper shift is at work here, and it has to do with the comparative agenda itself. The exclusive focus on borrowing, just like a focus on transplants, is primarily concerned with the mechanics of constitutional transfer and the interaction among constitutional systems. By contrast, non-borrowing reveals as much about a given constitutional order as it does about the dynamic between systems. The shift from borrowing to migration, or circulation, takes some of the emphasis away from the interaction itself and toward the deeper causes that lead systems to interact or to refuse interaction. As one author put it, interaction becomes an ‘interpretative foil’<sup>22</sup> for exposing a constitutional system’s deeper normative structures.

Nevertheless, the significance of the choice of metaphors should not be exaggerated. First, constitutional phenomena are so diverse that no single metaphor can aptly capture them all. For all its advantages, migration is too amorphous a metaphor for the political scientist who sees cross-jurisdictional borrowing as choices of institutional design.<sup>23</sup> Secondly, the shaping role of metaphors is limited. It is true that using the wrong lens can mislead the comparativist’s audience and maybe confuse the comparativist himself. But that danger is limited. Metaphors are important, as all words and images are, but they are just metaphors. Moreover, their meanings often overlap. Far from describing constitutional borrowing in mechanistic terms, its proponents see it as a ‘complex and somewhat open-ended phenomenon that, at its greatest reach, embraces

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<sup>21</sup> Lee Epstein and Jack Knight, ‘Constitutional Borrowing and Nonborrowing’ (2003) 1 *International Journal of Constitutional Law* 196.

<sup>22</sup> Sujit Choudhry, ‘Migration as a New Metaphor in Comparative Constitutional Law’ in Choudhry (n 6), 22.

<sup>23</sup> Epstein and Knight (n 21).

influences of various kinds that cross constitutional borders.’<sup>24</sup> This definition is strikingly similar to that of constitutional migrations. The same is true for legal transplants. Alan Watson defined the object of transplants as legal rules, but by rules he meant ideas.<sup>25</sup> ‘What is borrowed’—or, what migrates, we may add—‘is very often the idea’.<sup>26</sup> This is hardly a linear or mechanistic process.

Since disagreement about words does not suspend the need to use them, in the rest of this chapter I use the metaphors of borrowing and transplants, interchangeably. When that lens is too limiting, as it will be at times, I switch to the migration lens. The section headings refer to transplants, for consistency purposes. I do not use the migration metaphor as the default in order to emphasize the continuity between the study of interactions in private and public law. The next section turns to this topic.

### **III. The Missing Legacy of Comparative Law**

#### **1. The Transplants Debate in Comparative Law**

Alan Watson argued that, in Western private law, jurist-initiated legal transplants have been ‘the most fertile source of development’.<sup>27</sup> Their success is partly explained by the fact that the transplant of legal rules is ‘socially easy’ so that ‘the recipient system does not require any real

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<sup>24</sup> Berry Friedman and Cheryl Saunders, ‘Editors’ Introduction to the Symposium on Constitutional Borrowing’ (2003) 1 *International Journal of Constitutional Law* 177.

<sup>25</sup> Alan Watson, ‘Legal Transplants and Legal Reform’ (1976) 92 *Law Quarterly Review* 79.

<sup>26</sup> Alan Watson, ‘Comparative Law and Legal Change’ (1978) 37 *Cambridge Law Journal* 313, 315.

<sup>27</sup> Watson (n 3), 95.

knowledge of the social, economic, geographical and political context of the origin and growth of the original rule.’<sup>28</sup> Longevity is a salient feature of legal rules, which is understandable since rules remain largely unaffected by changes in their surroundings.<sup>29</sup> Jurists transplant foreign rules whenever the(ir) need for coherence and consistency demands it.<sup>30</sup> In Watson’s view, comparative law is the study of the interaction of legal systems through the voluntary transplant of private law rules.

The transplant approach to comparative legal studies clashes with the ‘mirror theory of law’<sup>31</sup> which, from Montesquieu to Hegel and Savigny, understood the legal system to reflect in its letter the spirit of the community—‘each society reveals through its law the innermost secrets of the manner in which it holds men together’.<sup>32</sup> Drawing on the hermeneutics of legal meaning, Watson’s most outspoken critic, Pierre Legrand, linked the existence of a rule to its intersubjective meaning in the community of interpreters: ‘the meaning of a rule is . . . a

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<sup>28</sup> Watson (n 25), 81.

<sup>29</sup> As Watson later put it (ibid), upon reflection on

the main point [he] was trying to make in *Legal Transplants*, his point is that ‘however historically conditioned in their origins might be, rules of private law in their continuing lifetime have no inherent close relationship with a particular people, time or place.

<sup>30</sup> There are different ways of understanding the nature of that need. It can be understood as the jurists’ own need for authority, see Watson (n 3), 57ff, 88ff, and Wise (n 16), 5. Alternatively, the need can be understood as having deeper roots in the ‘normative self-reference and recursivity [that] creates a preference for the internal transfer within the global legal system’, in Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies’ (1998) 61 *Modern Law Review* 11, 18.

<sup>31</sup> William Ewald, ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’ (1995) 43 *American Journal of Comparative Law* 489.

<sup>32</sup> Roberto Unger, *Law in Modern Society* (1976), 47.

function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned.<sup>33</sup> Since meaning is an essential part of a legal rule and because meaning cannot travel, it follows in Legrand's view that rules—and legal norms more generally—do not travel. Meaning changes between the points of origin and destination on a scale of magnitude that radically transforms the so-called transplant. While Watson acknowledged that rules are altered in the process of transmission,<sup>34</sup> Legrand argued that Watson's formalistic, rule-centered approach led him to downplay the scale of transformation. Law's rich 'nomos'<sup>35</sup> makes convergence impossible.<sup>36</sup>

So this spectrum has at one end Watson's account of convergence based on the ubiquity of legal transplants and, at the opposite end, Legrand claim that transplants are flat-out

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<sup>33</sup> Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, 114. See also Pierre Legrand, *Le Droit comparé* (3rd edn, 2009).

<sup>34</sup> Watson acknowledged that 'with transmission or the passing of time modifications may well occur, but frequently the alternations in the rules have only limited significance', Watson (n 26). But by drawing attention to the direction of change, Legrand makes clear the political stakes of comparative method. See generally David Kennedy, 'The Method and Politics' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 312ff.

<sup>35</sup> See Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4. See also, in this context, William P. Alford, 'On the Limits of "Grand Theory" in Comparative Law' (1986) 61 *Washington Law Review* 945.

<sup>36</sup> Pierre Legrand, 'European Legal Systems are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52 .

‘impossible’.<sup>37</sup> But framing the choice as between convergence through transplants or divergence through fidelity to culture is, to use Rodolfo Sacco’s measured but stern warning, ‘too simple’.<sup>38</sup> Much of the value of the transplants debate and its relevance to comparative constitutional law derives from subsequent qualifications that present a more nuanced and multilayered relationship between law and the broader culture. For instance, scholars have (re)interpreted Watson to argue for a ‘weak isolation thesis’<sup>39</sup> that the relationship between law and society is complex, not inexistent. Understanding legal transplants requires case-by-case study.<sup>40</sup> Similarly, the binary choice between general culture and legal rules can be enriched by intermediary terms such as ‘legal formants’<sup>41</sup> that capture some of law’s institutional dimension. At the other end of the spectrum, James Whitman has praised Legrand’s emphasis on law’s larger cultural context while also calling for a dynamic approach to legal culture.<sup>42</sup> Cultures change and law’s role in those

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<sup>37</sup> This debate replicated in substance an earlier debate between diffusionists and evolutionists in anthropology. See Wise (n 16), 16.

<sup>38</sup> Rodolfo Sacco, ‘Diversity and Uniformity in the Law’ (2011) 49 *American Journal of Comparative Law* 171, 172.

<sup>39</sup> Ewald (n 31), 500ff.

<sup>40</sup> Similarly, Edward Wise shares the ‘weak’ reading of Watson’s claim. In Wise (n 16), 3:

To deny that law merely reflects its social context is not to say that exogenous factors are entirely irrelevant. But social and economic factors have a much more limited and attenuated effect than is indicated by the a priori assertion that law mirrors society.

<sup>41</sup> Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’ (1991) 39 *American Journal of Comparative Law* 1.

<sup>42</sup> James Q. Whitman, ‘The Neo-Romantic Turn’ in Legrand and Munday (n 34), 312ff. See also John H. Langbein, ‘Cultural Chauvinism in Comparative Law’ (1997) 5 *Cardozo Journal of International and Comparative Law* 41, 46ff. On the same topic, see the essays in the collection by David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001).

processes of change must be on the comparativist's agenda.<sup>43</sup>

The relationship between law and its outside environment or culture is central to the transplants debate in comparative law. One of its most interesting aspects has been how homogeneity—cultural or otherwise—breaks down under the pressures of social differentiation. The same year as Watson's publication of *Legal Transplants*, Otto Kahn-Freund noted the differential impact of developments such as industrialization, urbanization, and the development of communication on political as compared to non-political factors (environmental, cultural, or social). Departing from an approach that clusters together all these factors, he argued that rules organizing political power are 'organic' and resistant to transplantation, whereas other rules are 'mechanical' and can be transplanted. Would-be reformers must thus ask, 'How far does this rule or institution owe its continued existence to a distribution of power in the foreign country which we do not share?'<sup>44</sup>

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<sup>43</sup> See also Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Choudhry (n 6), 21: 'given the centrality of migration to the contemporary practice of constitutionalism, the truly interesting question is why and how such changes take place'.

<sup>44</sup> Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 34 *Modern Law Review* 1. This assumes that it possible to tell how entrenched a given rule is in the power structure. In his answer to Kahn-Freund, Watson voices doubt on that score. See Watson (n 25), 82. Constitutional rules are closest to the most 'organic', non-transplantable end of the spectrum, but even areas closer to 'private law' might be too. For such an argument in the context of company law, see Eric Stein, 'Uses, Misuses—And Nonuses of Comparative Law' (1978) 72 *Northwestern University Law Review* 198, 204ff. On the idea of transferability of political institutions, specifically in the East European context, by reference to Kahn-Freund, see also Eric Stein, 'Post-Communist Constitution-Making: Confessions of a Comparativist' (1993) 1 *New European Law Review* 421, 438ff.

Kahn-Freund's framework can be helpful for thinking about constitutional borrowing and perhaps also about the related but distinct issue of convergence. Factors such as globalization have arguably brought about political assimilation and have facilitated constitutional borrowing.<sup>45</sup> Finally, the transplants debate offers a further twist on Kahn-Freund's framework. Gunther Teubner has argued that a study of legal transplants must go beyond political differentiation to consider a greater 'fragmented multiplicity of discourses' in areas such as health, science, or technology. Legal transplants are 'irritants'<sup>46</sup> that trigger reactions from within each social subsystem, not only from within legal culture. The norm transplanted changes in that process just as it changes the culture(s) of the host system. Mutual irritation is the name for 'assimilatory modification' of traveling legal norms in advanced industrialized societies.<sup>47</sup>

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<sup>45</sup> See eg David Law, 'Globalization and the Future of Constitutional Rights' (2008) 102 *Northwestern University Law Review* 1277. For a study of globalization on constitutional law, see Horatia Muir Watt, 'Globalization and Comparative Law' in Reimann and Reinhard (n 9), 579ff.

<sup>46</sup> Teubner (n 30).

<sup>47</sup> Wise (n 16), 17: 'modifications are so common in cultural borrowing that authorities like Malinovski have regarded the process as scarcely less creative than other forms of innovation'. See also Horacio Spector, 'Constitutional Transplants and the Mutation Effect' (2008) 83 *Chicago-Kent Law Review* 129; Stephen Holmes and Cass Sunstein, 'The Politics of Constitutional Revision in Eastern Europe' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995), 275ff.



## 2. Transplants in Private and Public Law

Since the transplants debate is limited to Western private law, its relevance to comparative constitutional law is uncertain.<sup>48</sup> Even authors sympathetic to Watson's approach have found his claims about private law not defensible in a public law context. William Ewald has contrasted the American Revolution's dramatic impact on public law with its 'very little direct effect'<sup>49</sup> on the system of courts and on private law generally, concluding that 'the private law . . . displays the inertness and stability predicted by Watson's theory—a stability that persisted even in the face of volatile changes elsewhere in the legal order.'<sup>50</sup> A similar conclusion could be reached about the survival in Eastern Europe of nineteenth-century civil law codes in altered but recognizable form throughout the Communist regimes which had profoundly changed the constitutional and administrative structure of the state.

However, this distinction between private and public norms is not universally embraced.<sup>51</sup> Montesquieu himself did not distinguish, at least not in this context, '*les lois civiles*' and '*les lois politiques*'. In his view, rules of contract and property are just as embedded in the

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<sup>48</sup> It has been argued that the transplants debate can no more apply to public law than it can apply beyond the ambit of European legal systems. See Ewald (n 31), 503.

<sup>49</sup> William B. Ewald, 'The American Revolution and the Evolution of Law' (1994) 42 *American Journal of Comparative Law Supplement* 1, 9 (1994).

<sup>50</sup> *Ibid* 13.

<sup>51</sup> The question of the transplantability of private versus public law rules is related but not identical to the question whether there is a substantive difference between private and public law. Whatever the answer to the latter question, it remains possible that the rules of contracts or property are different—in a way that affects their transplantability—from norms of administrative or constitutional law.

spirit and soil of a place—and therefore unmovable across space—as rules about political power.<sup>52</sup> Contemporary scholars sometimes make no distinction between private and public and public norms.<sup>53</sup> On what grounds can such a distinction rest?

There is, first, a widespread perception that rules of private law are more technical than constitutional rules. The latter structure and channel political power, whereas private law rules are politically neutral and regulate the interaction among individuals in their private capacity. As Watson argued, the ‘indifference’<sup>54</sup> of political rulers gives jurists leeway to transplant rules of private law that do not affect their office. In this view, constitutional transplants remain possible but they depend on the alignment of the rulers’ interests. Their study is highly contextual and varies case by case. It follows that transplanting private law rules is ‘socially easy’ whereas the transplant of public law rules is less common, albeit not impossible, and, in any event, not easy.

Now, it is true that some property and contract rules are more technical than, for instance, notoriously open-ended bill of rights provisions. But their technical nature should not obscure

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<sup>52</sup> The equal treatment of all laws was, as Kahn-Freund put it, ‘decisive for Montesquieu’s entire political and jurisprudential thinking and determining his place in the history of ideas’, Kahn-Freund (n 44), 7. Unsurprisingly, Alan Watson argued that ‘Montesquieu badly—very badly—underestimated the amount of successful borrowing which had been going on, and was going on, in his day’, in Watson (n 25), 80.

<sup>53</sup> See Jonathan Miller, ‘A Typology of Legal Transplants Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process’ (2003) 51 *American Journal of Comparative Law* 839.

<sup>54</sup> Alan Watson, cited in Ewald (n 31), 501.

their political stakes.<sup>55</sup> Conversely, even open-ended constitutional provisions are not self-evidently at the mercy of political factors, lest they should not be recognized as ‘law’.<sup>56</sup> Secondly, the above explanation ignores the existence of periods of intensive constitutional borrowing when the ideological and/or reputational interests of political elites are sufficiently stable to make the transplant of public rules predictable and ‘socially easy’.

Another interpretation of the distinction between private and public rules underscores their different radiating ranges. In this view, ‘contract and tort law, for instance, only determine the way in which we should behave in some sort of bracketed interactions. But constitutional law has a deeper impact.’<sup>57</sup> This ‘deeper impact’ can be interpreted as a reference to the expressive function of constitutional norms. Constitutional norms are more complex signifiers than private norms, which regulate the transactional or non-transactional relations among individuals.<sup>58</sup> Constitutional norms represent the will of the ultimate sovereign: the people. In some historical circumstances, ‘the people’ may want to borrow from a foreign system precisely for expressive reasons. But self-determination and the expressive nature of constitutional norms do explain why

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<sup>55</sup> See eg Duncan Kennedy, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’ (2001) 1 *European Review of Private Law* 7.

<sup>56</sup> The classic is Herbert Wechsler, ‘Toward Neutral Principles in Constitutional Law’ (1959) 73 *Harvard Law Review* 1.

<sup>57</sup> Carlos F. Rosenkrantz, ‘Against Borrowing and Other Nonauthoritative Uses of Foreign Law’ (2003) 1 *International Journal of Constitutional Law* 269, 295.

<sup>58</sup> For instance, Brenda Crossman has studied how cultural representations travel in the in the context of constitutional interpretations of equality striking down the ban on same-sex marriage. Brenda Crossman, ‘Migrating Marriages and Comparative Constitutionalism’ in Choudhry (n 6), 209ff.

constitutional transplants can be more onerous than the transplant of more technical rules, such as, for example, legal rules regarding bankruptcy.<sup>59</sup> The problem with this interpretation lies elsewhere. In many legal systems, the expressive dimension of constitutional norms is much less poignant than in the United States, for instance because their constitutions are easily amendable and/or their endurance is nowhere near that of the US Constitution. Furthermore, in some legal systems rules of private law can have as much if not greater expressive value. It is a well-known saying that the *Code civil* is France's 'real' Constitution.

Finally, private and public law norms can be distinguished as to their transplantability by reference to legal history of the kind on which Watson relies. But such arguments will likely leave unexplained the post-Second World War worldwide spread of constitutionalism. Another ground for distinction refers to disparities in the ease of implementation. The literature on the 'transplant effect'<sup>60</sup> emphasizes the need for institutional structures to ensure the interpretation of a norm. Since institutional structures themselves do not migrate, the effects of the transplanted rule in the receiving system will be different from those in the system of origin. While such a conclusion requires empirical support, it might be the case that the support system that constitutions require is more extensive than that of private law rules.<sup>61</sup>

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<sup>59</sup> See Frederick Schauer, 'The Politics and Incentives of Legal Transplantation' in Joseph Nye Jr and John Donahue (eds), *Governance in a Globalizing World* (2000), 259.

<sup>60</sup> Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163.

<sup>61</sup> See Frederick Schauer, 'On the Migration of Constitutional Ideas' (2005) 37 *Connecticut Law Review* 907, 912.

My aim in questioning the distinction between private and public law norms in this context is not to imply that claims about the transplantability of private rules apply equally in the context of public, and specifically constitutional, norms. Rather, it is to suggest that the transplants debate in comparative law could be of use, heuristically and beyond, in the context of comparative constitutional law.

#### **IV. The Anatomy of Constitutional Transplants**

##### **1. Object**

The study of the object of constitutional transplants begins with constitutional text. The smallest unit of transplant can be a rule of constitutional structure—for instance the ‘constructive no confidence’ procedure borrowed from the German Basic Law into the 1992 amendments to the post-Communist Polish constitutional arrangement<sup>62</sup>—or an institution, such as the Ombudsman.<sup>63</sup> Fundamental rights provisions can also be the result of borrowing—or non-borrowing. Sujit Choudhry has documented the decision not to include in the Canadian Charter of Rights a US-style due process clause for fear that the judiciary might use it to usher in *Lochner*-like laissez-faire constitutional doctrines.<sup>64</sup>

But an exclusive textual focus on discrete and insular constitutional provisions is problematic. Like legal formants in comparative law, discreet constitutional norms are often

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<sup>62</sup> Andrzej Rapaczynski, ‘Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament’ (1991) 58 *University of Chicago Law Review* 595, 629.

<sup>63</sup> Gabriele Kucsko-Stadlmayer, *European Ombudsman-Institutions* (2008).

<sup>64</sup> Sujit Choudhry, ‘The *Lochner* Era and Comparative Constitutionalism’ (2004) 2 *International Journal of Constitutional Law* 1, 16ff.

interrelated—in obvious or less than obvious ways—with other provisions, doctrines, or larger institutional structures. Mark Tushnet refers to this characteristic as ‘modularity’.<sup>65</sup> He gives as example how legislative standing in the United States is related to provisions which authorize judicial review, and generally to the overall structure of the separation of powers.<sup>66</sup> The overall structure of implementation can also be part of modularity, broadly understood. In the case of hate speech, the choice between a US-style protection and a system that does not extend such protection is at least partly correlated with the degree to which the enforcement of criminal law is centralized. Centralization affects the possibility of abusive restrictions on speech and thus the level of constitutional protection for speech.<sup>67</sup>

An even larger unit of migration can be the regime itself. Examples include the borrowing of US presidentialism in Latin America and the borrowing of mixed, or semi-

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<sup>65</sup> Mark Tushnet, ‘Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law’ (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 325, 330. See also Mark Tushnet, ‘Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action’ (2004) 36 *Connecticut Law Review* 649.

<sup>66</sup> Tushnet, ‘Returning with Interest’ (n 65), 330ff.

<sup>67</sup> See Mark Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ in Choudhry (n 6), 76ff. For another discussion of the importance of institutional structure, specifically the centralized versus decentralized judicial review, see Michel Rosenfeld and András Sajó, ‘Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech in New Democracies’ in Choudhry (n 6), 174ff. On the migration of centralized judicial review, see Victor Ferreres Comella, *Constitutional Courts and Democratic Values* (2009), 3ff. On the question of free speech, see Michel Rosenfeld, ‘Constitutional Migration and the Bounds of Comparative Analysis’ (2001) 58 *NYU Annual Survey of American Law* 67, 76ff.

presidential, systems in Eastern Europe from the French Fifth Republic.<sup>68</sup> Large structure borrowing is almost always subject to assimilatory modifications such that the final results are often a pastiche. For instance, the 1991 Romanian Constitution borrowed the French mixed regime of the Fifth Republic but, for historical reasons having to do with its recent period of dictatorship, it limited the powers of the president by not borrowing the powers of the French president to dissolve the legislature.<sup>69</sup>

In addition to overlooking modularity, an exclusive focus on constitutional text glosses over the difference between constitutional text and constitutional practice. The necessity of looking behind text is perhaps greater with constitutional norms than with rules of private law.<sup>70</sup>

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<sup>68</sup> For a study showing the complexity of the East European constitutions, see generally Rett R. Ludwikowski, “‘Mixed’ Constitutions—Product of an East-Central European Constitutional Melting Pot” (1998) 16 *Boston University International Law Journal* 1. For a study of the similarities between the French model and the constitutional structure of the Weimar regime, see Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (2005).

<sup>69</sup> The substance of the assimilatory modification depends also on borrowing within a jurisdiction, so to speak. These are cases of borrowing over time. Eg many post-Communist constitutions in Eastern Europe borrowed from their own pre-war constitutions. See John Elster, ‘Constitutionalism in Eastern Europe: An Introduction’ (1991) 58 *University of Chicago Law Review* 447, 476.

<sup>70</sup> For a discussion of the difference between ‘law in the books’ and ‘law in action’ in the constitutional context and its implications for constitutional transplants, see Morton Horwitz, ‘Constitutional Transplants’ (2009) 10 *Theoretical Inquiries in Law* 353, 547ff. This is a topic much discussed in the context of African constitutionalism. For a study of the gap between Kenya’s postcolonial constitutional text and constitutional practice, see J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (1990),

The phenomenon of ‘constitutions without constitutionalism’<sup>71</sup>—constitutional text that lacks political and cultural traction—is known beyond the ambit of African post-colonial constitutions for which it was coined. Since the standard reference to the phantasmagoric generosity of the text of the 1936 Soviet Constitution is no longer available, we will have to settle for the ‘rights’ provision of the North Korean Constitution.<sup>72</sup> Now, of course, structural discrepancy between text and practice is also known, *mutatis mutandis*, to constitutional democracies, especially when there is a hierarchy within constitutional provisions whereby some norms—for instance, social and economic guarantees—are ‘under-enforced’.<sup>73</sup>

Constitutional method too can be the object of migration. The most notable contemporary example is the proportionality method which migrated from its origins in nineteenth-century Prussian administrative law to many national and supranational courts around the world. As Alec Stone Sweet and Jud Mathews have argued,

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mentioned in Heinz Klug, ‘Participating in the Design: Constitution-Making in South Africa’ (1996) 3 *Review of Constitutional Studies* 18, 30. In the same context, see also Charles Manga Fombad, ‘The Separation of Powers and Constitutionalism in Africa: The Case of Botswana’ (2005) 25 *Boston College Third World Law Journal* 301.

<sup>71</sup> H.W.O. Okoth-Ogendo, ‘Constitutions without Constitutionalism: Reflections on an African Political Paradox’ in Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993).

<sup>72</sup> To pick randomly, Art 65 of the North Korean Constitution provides that ‘citizens shall have equal rights in all spheres of the state and social life’.

<sup>73</sup> On the idea of underenforced norms, see Lawrence Sager, ‘Fair Measure: The Legal Status of Underenforced Constitutional Norms’ (1978) 91 *Harvard Law Review* 1212. For a discussion in the context of social and economic rights, see Katharine G. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale Journal of International Law* 113.



By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality analysis . . . [It has become] a foundational element of global constitutionalism.<sup>74</sup>

So fast and far has proportionality spread that one scholar has called it the ‘most successful legal transplant of the twentieth century’.<sup>75</sup>

Two final points are in order. First, connecting the dots of the smaller-scale units (rules, methods, regimes, institutions, doctrines, discourses), entire legal paradigms can be the object of constitutional migration. Lorraine Weinrib has described the post-war juridical/human rights paradigm that characterizes liberal democracies as including elements such as the proportionality method, fundamental rights, judicial review, and a certain understanding of constitutional values.<sup>76</sup> Secondly, the object of migration can also be a constitutional insight or a contrasting

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<sup>74</sup> Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 72, 74, 160. See also David Beatty, *The Ultimate Rule of Law* (2004). For a study of proportionality in the context of US law generally, see E. Thomas Sullivan and Richard S. Frase, *Proportionality Principles in American Law* (2008); Jed Matthews and Alec Stone Sweet, ‘All Things in Proportion? American Rights Review and the Problem of Balancing’ (2011) 60 *Emory Law Journal* 797; Moshe Cohen-Eliya and Iddo Porat, ‘The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law’ (2009) 46 *San Diego Law Review* 367; Moshe Cohen-Eliya and Iddo Porat, *American Balancing and German Proportionality: The Historical Origins* (2010) 8 *International Journal of Constitutional Law* 263.

<sup>75</sup> Mattias Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2003) 2 *International Journal of Constitutional Law* 574, 595.

<sup>76</sup> See Lorraine E. Weinrib, ‘The Postwar Paradigm and American Exceptionalism’ in Choudhry (n 6). Weinrib argues that US law does not partake in this paradigm, even though its origins go

image that shows foreign peer courts adopting solutions that the host legal system rejects as unfathomable. The South African constitutional equality jurisprudence has been invoked to such effect in US constitutional law.<sup>77</sup>

## 2. Timing

‘No one begins writing a constitution from scratch’<sup>78</sup>—at least, not anymore. But tracing the origins of the first draft, so to speak, is more important for a constitution than for rules of private law. Writing about the latter, Alan Watson noted that ‘however historically conditioned in their origins might be, rules of private law in their continuing lifetime have no inherent close relationship with a particular people, time or place.’<sup>79</sup> Not so with (written<sup>80</sup>) constitutions. The distinction between voluntary and involuntary transplants is especially important in this context. At one end of the spectrum, we find examples such as foreign inspiration of the American

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back to the Warren Court era. For a mention of the role of the Canadian legal elite in bringing the Warren Court model to Canada, see Morton Horwitz, ‘Constitutional Transplants’ (2009) 10 *Theoretical Inquiries in Law* 353, 547ff.

<sup>77</sup> See Frank Michelman, ‘Reasonable Umbrage: Race and Constitutional. Antidiscrimination Law in the United States and South Africa’ (2004) 111 *Harvard Law Review* 1378; Frank Michelman, ‘Reflection’ (2004) 82 *Texas Law Review* 1739.

<sup>78</sup> Osiatynski (n 19). One can go even further back and identify the global migration of the American Declaration of Independence of 1776. For a study, see David Armitage, *The Declaration of Independence: A Global History* (2007).

<sup>79</sup> Watson (n 25).

<sup>80</sup> For a discussion of the idea of a written constitution as a constitutional transplant, Horwitz (n 76), 540ff.

Founders or the borrowing between the states in the pre-revolutionary period in America.<sup>81</sup> At the other end are the post-war Japanese Constitution,<sup>82</sup> the German Basic Law, and the post-colonial constitutions of African nations.<sup>83</sup> External influence on the 1995 Bosnian Constitution, the 2005 Iraqi Constitution, and the 2004 Constitution of Afghanistan places them closer to the same end of the spectrum.<sup>84</sup> There are other situations wherein voluntariness is harder to ascertain. For instance, East European countries, which were in principle free to disregard, in the constitution-making process after the fall of Communism, the myriad recommendations of the

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<sup>81</sup> G. Alan Tarr, 'Models and Fashions in State Constitutionalism' (1998) *Wisconsin Law Review* 729. For a wonderful example of foreign inspiration in the context of the American Founding, see Thomas Jefferson's letter to James Madison dated August 28, 1789 (available at <[http://www.gutenberg.org/files/16783/16783-h/16783-h.htm#2H\\_4\\_0010](http://www.gutenberg.org/files/16783/16783-h/16783-h.htm#2H_4_0010)>). I am grateful to Mary Bilder for bringing this letter to my attention.

<sup>82</sup> See Sylvia Brown Hamano, 'Incomplete Revolutions and Not-So-Alien Transplants: The Japanese Constitution and Human Rights' (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 415; Dale M. Hellegers, *We the Japanese People: World War II and the Origins of the Japanese Constitution* (2002).

<sup>83</sup> Ruth Gordon, 'Growing Constitutions' (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 528, 530–1 (footnotes omitted):

Constitutions can flourish and succeed only if they are firmly planted in the cultural soil from which they gain legitimacy. Thus, growing constitutions embodies the not so novel idea that constitutions and laws should reflect and be derived from the cultural norms in which they must endure. Constitutions that are not firmly grounded in the cultural mores of the society in which they operate are destined to fail, become irrelevant, or be shaped and adapted to meet the needs of the culture and society in which they are situated. Indeed, most postcolonial constitutions in the Sub-Saharan Africa have largely succumbed to irrelevance and debacle.

<sup>84</sup> Zaid Al-Ali, 'Constitutional Drafting and External Influence' in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook in Comparative Constitutional Law* (2011), 77ff. See also Noah Feldman and Roman Martinez, 'Constitutional Politics and Text in the New Iraqi Constitution: An Experiment in Islamic Democracy' (2006) 75 *Fordham Law Review* 883.

Council of Europe and the European Community regarding the borrowing of specific constitutional institutions, but at the unpalatable price of being denied membership of these organizations.<sup>85</sup>

Constitutional borrowing can also occur at the interpretative stage in the life cycle of a constitution. Judges around the world are reading, citing, and generally ‘engaging’, as Vicki Jackson put it,<sup>86</sup> the decisions of their foreign peers. Over the past few decades, the dialogue of constitutional courts has become a major venue for the migration of constitutional ideas.<sup>87</sup>

It would be interesting to compare judges’ roles in this context with the roles that Watson argues jurists played in the legal transplants of private law rules. Among the factors contributing to the creation in the constitutional context of a ‘global community of courts’<sup>88</sup> are, in addition to domestic legal developments, external developments including the increased availability online of foreign materials, the globalization of legal education, and the ease of travel and

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<sup>85</sup> Osiatynski (n 19), 249.

<sup>86</sup> Vicki Jackson, *Constitutional Engagement in a Transnational Era* (2010); Vicki Jackson, ‘Federalism and the Uses and Limits of Law: Printz and Principle’ (1998) 111 *Harvard Law Review* 2180.

<sup>87</sup> See generally Gary Jeffrey Jacobson, ‘The Permeability of Constitutional Borders’ (2004) 82 *Texas Law Review* 1763; Basil Markesinis and Jorg Fedtke, *Engaging with Foreign Law* (2009); Basil Markesinis, ‘Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law’ (2006) 80 *Tulane Law Review* 1325.

<sup>88</sup> Anne-Marie Slaughter, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191.

communication which have set the conditions for an epistemic community of constitutional decision-makers.<sup>89</sup>

The frequency of foreign citations varies across space and even in time within the same jurisdiction. For instance, D.M. Davis has argued that, after an early period when the South African Constitutional Court drew heavily on foreign law, over time the number of references decreased.<sup>90</sup> This is noteworthy considering that section 39(c) of the South African Constitution provides that courts interpreting the Bill of Rights ‘may consider foreign law’.

The lack of similar authorization has made the legitimacy of judicial borrowing the subject of intense debate in US constitutional law and politics. Even though the number of cases wherein the Supreme Court has cited foreign law is small by comparison to other jurisdictions,<sup>91</sup> controversy has engulfed courts, the academy, and even Congress.<sup>92</sup> Critics such as Justice Antonin Scalia have acknowledged the legitimacy of drawing inspiration from foreign models at

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<sup>89</sup> Anne-Marie Slaughter, *A New World Order* (2004), 65ff.

<sup>90</sup> D.M. Davis, ‘Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstruction of Comparative Influence: The South African Experience’ (2003) 1 *International Journal of Constitutional Law* 181, 194.

<sup>91</sup> See eg *Atkins v Virginia* 536 US 304, 316 n 21 (2002) (Stevens J) (referring to the opinion of the world community that executing the mentally retarded is wrong), *Lawrence v Texas* 539 US 558, 571–3 (2003) (discussing the values of Western civilization regarding homosexual conduct), *Roper v Simmons* 543 US 551 (2004) (Kennedy J) (mentioning the ‘stark reality’ that the United States is the only country in the world that gives official sanction to juvenile death penalty).

<sup>92</sup> The latest legislative proposal introduced in the 112th Congress (2011–12) is HR 973 IH– Proposal To amend title 28, USC, to prevent the misuse of foreign law in federal courts, and for other purposes, available at <<http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.973>>.

the constitutional drafting stage, but have argued that the migration of foreign constitutional ideas at the interpretative stage erodes democratic self-government.<sup>93</sup> To some extent, this is a surprising position. The authority of foreign law in constitutional domestic interpretation is not content-independent. Rather, it depends on how persuasive a judge finds a particular legal idea.<sup>94</sup> Contrast this to the precedential authority of the US Supreme Court decisions in Argentina under the 1853 constitutional regime, which had largely copied the US Constitution. Judicial decisions interpreting the US Constitution received precedential authority as if they were the decisions of an Argentinian court.<sup>95</sup> But, as the next section shows in the broader context of the justification of transplants, no such argument has been advanced in the contemporary debate.<sup>96</sup>

### 3. Motivations

Voluntary constitutional borrowing has no single or simple motivation or set of motivations. One possible classification of the different motivations discussed in the literature mentions functionalist, reputational, normative, sociological, and, finally, ‘chance’ borrowing.

The first motivation is that the proposed ‘cost-saving’<sup>97</sup> transplant ‘works’ in the host system. Rather than reinventing the wheel, a particular system should, in this view, borrow

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<sup>93</sup> *Printz v US* 521 US 989, 921 n 11 (1995).

<sup>94</sup> See generally Patrick Glenn, ‘Persuasive Authority’ (1987) 32 *McGill Law Journal* 261. See also Vlad Perju, ‘The Puzzling Parameters of the Foreign Law Debate’ (2007) *Utah Law Review* 167.

<sup>95</sup> On the ‘borrowed statute doctrine’ in this context, see Rosenkrantz (n 57), 275.

<sup>96</sup> See Stanford Levinson, ‘Looking Abroad When Interpreting the US Constitution: Some Reflections’ (2004) 39 *Texas Journal of International Law* 353, 353 (arguing that it would be foolish to claim that foreign decisions have precedential authority).

<sup>97</sup> Miller (n 53), 854ff.

solutions that have already been tested in other systems. Similar functionalist motivations have been advanced in private law where the motivation for legal transplant has been ‘the quality of a given foreign solution’.<sup>98</sup> One difficulty with these accounts is how to define what ‘works’. Given the importance of constitutional modularity at institutional, doctrinal, and perhaps even professional levels, understanding constitutional function requires tools that functionalism itself cannot provide.<sup>99</sup>

A second motivation is reputational; borrowing has ‘legitimacy generating’<sup>100</sup> effects. For example, it can signal to the world community the breaking with an undemocratic past.<sup>101</sup> When courts are the agents of borrowing, they can import traditions that are lacking in their own

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<sup>98</sup> Jorg Fedtke, ‘Legal Transplants’ in J.M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (2006), 434: ‘The decision to draw on the ideas found in other legal systems is . . . often justified by the quality of a given foreign solution’.

<sup>99</sup> See Matthew D. Adler, ‘Can Constitutional Borrowing be Justified: A Comment on Tushnet’ (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 230.

<sup>100</sup> Miller (n 53).

<sup>101</sup> Frederick Schauer invokes this reputational dimension to explain the prominence of Canadian and German constitutional systems, in Frederick Schauer, ‘The Politics and Incentives of Legal Transplantation’, in Nye and Donahue (n 59), 260ff. For an interesting study of the German influence in Eastern Europe, see Luis Lopez Guerra, ‘The Application of the Spanish Model in the Constitutional Transitions in Central and Eastern Europe’ (1998) 19 *Cardozo Law Review* 1937. See also Gianmaria Ajani, ‘By Chance and Prestige: Legal Transplants in Russia and Eastern Europe’ (1995) 43 *American Journal of Comparative Law* 93; Victoria Schwartz, ‘The Influences of the West on the 1993 Russian Constitution’, (2009) 32 *Hastings International Comparative Law Review* 101.

systems and on which judges can then build ‘local’ doctrines over time.<sup>102</sup> Moreover, judicial borrowing helps courts to deliver decisions that appear objective and impartial, which is particularly valuable to newly establish constitution courts. Engagement with foreign peers can also boost the external prestige of courts even when it leads to the rejection of foreign approaches.<sup>103</sup>

Reputational effects also accrue on political actors and motivate borrowing at the constitutional drafting stage. Lee Epstein and Jack Knight have studied borrowing in the context of the choices of institutional design that constitutional drafters must make. They have argued that political actors seek to maximize their own preferences and reputation when exercising those choices. The authors

analyze borrowing—institutional choices, really—as a bargaining process among relevant political actors, with their decisions reflecting their relative influences, preferences, and beliefs at the moment when the new institution is introduced, along with (and critically so) their level of uncertainty about future political circumstances.<sup>104</sup>

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<sup>102</sup> See Herman Schwartz, ‘The New Courts: An Overview’ (1993) *East European Constitutional Review* 28. See also Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (2000).

<sup>103</sup> eg Hungarian and South African constitutional courts engaged—and rejected—the US Eighth Amendment doctrine in cases of the constitutionality of capital punishment. See *State v Makwanyane* SA 391 1195 (4) BCCR 605 (CC) (1995) (South Africa); 107 1990 MK, UT, 1, 1 (Hungary, 1990).

<sup>104</sup> Epstein and Knight (n 21), 200.



Similarly, Ran Hirschl has explained the worldwide migration of the idea of judicial review of legislation as a mechanism by which disadvantaged elites promote their political self-interest. Hirschl writes that

the current global trend toward judicial empowerment through constitutionalization is part of a broader process whereby self-interested political and economic elites, while they profess support for democracy and sustained development, attempt to insulate policy-making from the vagaries of democratic politics.<sup>105</sup>

Other authors interpret the interests of elites somewhat more broadly. For instance, David Law has identified among the forces of conversion toward what Hirschl calls ‘new constitutionalism’ the state’s competition for investment capital. Because capital is free to move wherever it sees fit, attracting it—and thus securing the basis for economic development—requires that constitutional systems offer investors property rights protected by an independent judiciary.<sup>106</sup>

At least two more kinds of motivations deserve mention at this stage. Normative universalist motivations see the spread of liberal constitutionalism—both constitutional structure (separation of powers, checks and balances, independent judiciary) and bill of rights—as the recognition of a universal set of principles for organizing political power in a way that protects individual freedom in the modern state. Writing in the context of the constitution-making in post-Communist Eastern Europe, Richard Epstein has argued that it is little surprising that virtually all

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<sup>105</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004), 217. But see David Erdos, ‘Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)’ (2007) 5 *International Journal of Constitutional Law* 343.

<sup>106</sup> Law (n 45).

new modern constitutions are slight variations on a common theme.<sup>107</sup> There are also sociological motivations, of the kind discussed above in the context of judicial dialogue.

Finally, it is an interesting question what role ‘chance’ borrowings, that is, borrowings that lack any motivation, play. The process of constitutional borrowing seems fraught with dangers of misunderstanding.<sup>108</sup> Consider the possibility of mistaken interpretation of foreign law. Watson intriguingly claimed that ‘foreign law can be influential even when it is totally misunderstood’.<sup>109</sup> How accidental are such mistakes? That answer turns on whether the comparativist’s approach to legal culture has any room for the possibility of accidents.<sup>110</sup>

#### 4. Patterns

Patterns of migration require an assessment of constitutional proximity. Rarely is such proximity a function of physical distance. More commonly, culture, history, reputation, politics, and

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<sup>107</sup> See Richard Epstein, ‘All Quiet on the Eastern Front’ (1991) 58 *University of Chicago Law Review* 555.

<sup>108</sup> One reason why avoiding mistakes can be difficult is that they it requires knowledge of how a particular constitutional mechanism functions in the host country. For a discussion of the transplant of constitutional complain guarantee in the German Basic Law, Art 93(1), as an (in)effective protection of fundamental rights, see Frankenberg (n 17), 572.

<sup>109</sup> Watson (n 3), 99.

<sup>110</sup> As Lawrence Friedman describes his approach in *A History of American Law*, the book presents the American system

not as a kingdom unto itself, not as a set of rules and concepts, not as a province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as modelled by economy and society.

Lawrence Friedman, *A History of American Law* (2nd edn, 1985), 12, cited in Wise (n 16).

ideology shape perceptions of constitutional space and determine the direction of constitutional migrations.

Let us first begin by distinguishing on the y-axis between vertical and horizontal constitutional migrations. Vertical migrations occur between different jurisdictional levels, for instance between national and subnational levels, such as the units comprising a federation. For example, the drafters of the Russian Constitution were reportedly inspired by state constitutions in the United States.<sup>111</sup> The most common vertical migrations originate from the supranational toward the national level, as when the state must implement at the constitutional level human rights obligations assumed under an international treaty.<sup>112</sup> But these can also be *complex migrations*. One example is the spread of the proportionality method from national to supranational jurisdictions such as the European Court of Justice, from which it travels to a national system that had not been on the receiving end of horizontal migrations from the initial source.<sup>113</sup>

Horizontal migrations occur between similarly situated jurisdictions. The United States, Germany, the United Kingdom, and France are models of constitutional structure and the source of most worldwide borrowing. An interesting phenomenon, related to the reputation of

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<sup>111</sup> Robert Sharlet, 'Legal Transplants and Political Mutations: the Reception of Constitutional Law in Russia and the Newly Independent States' (1998) 7 *East European Constitutional Review* 59.

<sup>112</sup> See generally Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in Choudhry (n 6), 256 ff.

<sup>113</sup> ECJ, C11/70 *Internationale Handelsgesellschaft*. See generally Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (1999).

constitutional models, occurs in situations of repeated borrowing which create ‘transplant biases’. As Alan Watson explains it, transplant bias refers to situations when

a system’s receptivity to a particular outside law, which is distinct from acceptance based on a thorough examination of possible alternatives. Thus, it means for instance a system’s readiness to accept Roman law rules *because* they are Roman law rules, or French rules *because* they are French rules.<sup>114</sup>

At first glance, it seems that constitutional borrowings are somewhat insulated from the dangers of transplant biases. To the extent such biases rely on ‘habits’,<sup>115</sup> their relevance is mitigated by the low frequency of opportunities for constitution-drafting. There are, however, opportunities for repeated borrowing at the interpretative stage.

The formation of transplant bias assumes accessibility, hence a process of socialization in which legal education and legal culture make particular foreign sources intelligible.<sup>116</sup>

Language plays an essential role, although the spread of English tends to obscure its importance. As we will see, the use of a lingua franca heightens the dangers of nominalism and creates an appearance of constitutional convergence that can be misleading. The contrast between comparative constitutional law and comparative law is particularly stark in this respect, in the sense that language and translation are among the grand topics of comparative law but are

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<sup>114</sup> Watson (n 26), 327.

<sup>115</sup> Wise (n 16), 7:

borrowing from a particular foreign system tends to become a habit: a bias develops in favor of treating that system as the primary quarry for legal rules whenever local law is silent.

<sup>116</sup> For a discussion of the shaping role of legal education on constitutional culture, see Pnina Lahav, ‘American Moment(s): When, How and Why Did Israeli Law Faculties Come to Resemble Elite US Law Schools?’ (2009) 10 *Theoretical Inquiries in Law* 653.

virtually inexistent in the constitutional field. A second aspect of intelligibility and accessibility involves the question whether ‘legal families’<sup>117</sup> have an impact on constitutional borrowing. Stephen Gardbaum’s work on the Commonwealth model of constitutionalism shows the shaping effect of legal traditions.<sup>118</sup> Similarly, Tom Ginsburg has shown that the 1992 Constitution of Mongolia rejected the American and Japanese-style systems to decentralized constitutional review partly because of Mongolia’s civil law origins in a Soviet-inspired legal system.<sup>119</sup> A comprehensive study of the impact of the civil law/common law legal traditions on constitutional borrowing remains to be conducted.

History is of course a central factor that shapes perceptions of constitutional proximity. Scholars have studied how English-speaking Africa used the Westminster model and bicameral legislatures, separation of powers, judicial review, and bill of rights; French-speaking Africa

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<sup>117</sup> On the concept of ‘legal families’, see René David, *Les grands systemes de droit contemporains* (1964). See also Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (2nd edn, 1987), 63ff. For a discussion in the East European context, see Zoltan Peteri, ‘The Reception of Soviet Law in Eastern Europe: Similarities and Differences between Soviet and East European Law’ (1987) 61 *Tulane Law Review* 1397. For a discussion about the possibilities of borrowing between Islamic and US law, see Azizah Y. al-Hibri, ‘Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?’ (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 492.

<sup>118</sup> Stephen Gardbaum, ‘The Commonwealth Model of Constitutionalism’ (2001) 49 *American Journal of Comparative Law* 707. See also Stephen Gardbaum, ‘Reassessing the New Commonwealth Model of Constitutionalism’ (2010) 8 *International Journal of Constitutional Law* 167.

<sup>119</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003), 165ff.

adapted a French model.<sup>120</sup> As far as geographical proximity is concerned, this factor plays a limited role in phenomena of voluntary constitutional migration. To take only one example, there are relatively few African influences in the South African Constitution.<sup>121</sup> By contrast, the post-Communist constitutional arrangement in Albania was influenced by neighbouring Greece and Italy.<sup>122</sup>

## **V. The Justification of Constitutional Transplants: The Case of Foreign Law**

Comparative law is law.<sup>123</sup> As law, it must address the normative justification for constitutional borrowing, and more broadly the conditions for its success. This section maps normative approaches to constitutional borrowing in the context of a particularly controversial type of borrowing, already introduced in the previous section, namely the use of foreign law by US courts in the process of constitutional interpretation. I use this debate not because it is representative of global trends—in fact, the opposite is true—but rather in order to exhibit the richness of the normative debate about constitutional borrowing, especially with regard to the

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<sup>120</sup> Isaac I. Dore, ‘Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach’ (1997) 41 *St Louis University Law Journal* 1301, 1304ff:

Having been designed abroad, there was a fundamental mismatch between the values of the people of Africa and the western values which inspired the drafters of the new constitutions.

<sup>121</sup> Davis (n 90), 194. See also Jeremy Sarkin, ‘The Effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions’ (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 176.

<sup>122</sup> Elster (n 69), 477.

<sup>123</sup> James Q. Whitman, ‘The Neo-Romantic Turn’ in Legrand and Munday (n 34), 343:

legal systems are normative systems. ‘Law’ is not best thought of as a rooted set of cultural facts that can be ‘understood’ only in cultural context. ‘Law’ is best thought of as an activity that aims at normative justification of certain human acts and of the exercise of the authority of some humans over others.

relationship between law and its outside cultural, social, and political environment.<sup>124</sup> We will find little trace of the transplants debate from comparative law in the constitutional realm.

Judicial references to foreign law in the constitutional context have been roundly criticized in the United States as being haphazard, lacking in method, and for being an unprincipled tool available for use whenever and however judges wish. Critics worry that fundamental methodological questions remain unanswered. For instance, to which jurisdictions should courts refer? How can judges be prevented from picking and choosing the jurisdictions that support their own choices? How does foreign law affect the integrity of the judicial process and how should the accuracy and relevance of foreign citations be checked? etc.<sup>125</sup> These are undoubtedly important questions. They are also questions which reflect the fact that constitutional borrowings are not perceived to occur within what comparativists call a ‘legal family’, that is, within a community of legal systems that share fundamental methods and

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<sup>124</sup> The central lesson is that the dynamic between constitutional text and constitutional culture is essential for understanding the success of constitutional borrowing. Michel Rosenfeld and András Sajó, ‘Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech in New Democracies’ in Choudhry (n 6), 174ff.

<sup>125</sup> See Joan L. Larsen, ‘Importing Constitutional Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation’ (2004) 65 *Ohio State Law Journal* 1283, 1327:

This ‘everyone’s doing it’ approach to constitutional interpretation requires explanation and justification. Yet, to date, neither the Court nor the academy has offered a justification that satisfies. Until they do, it seems we are better off to abandon this particular use of foreign and international law.

See also Diane Marie Amann, “‘Raise the Flag and Let It Talk’”: On the Use of External Norms in Constitutional Decision Making’ (2004) 2 *International Journal of Constitutional Law* 597.

assumptions.<sup>126</sup> But perhaps even belonging to a legal family would be insufficient given the special role of the constitution as a charter of self-government. In the context of constitutional borrowing, unprincipled means ‘undemocratic’.<sup>127</sup>

To understand what makes borrowing undemocratic, recall that in comparative private law transplants are considered the most fertile source of change. A similar claim in the constitutional context would be an overstatement (revolutions are more ‘fertile’ than legal transplants . . .), but at least it identifies the normative pedigree of opposition to change. Thus, changes must be resisted as undemocratic unless they originate organically from within the body politic and, according to the self-referential logic of the constitution, they follow the mechanisms provided for in the constitutional text.

This position allows for a number of variations. One variation, call it a normative universalist claim, is that change via judicial constitutional borrowing is undemocratic under any version of constitutional self-government, save when the sovereign people have authorized it. A different, more culturally specific, position singles out factors such as history, politics, and the environment which make constitutional self-government incompatible with the practice of judicial borrowing. For instance, Jed Rubenfeld has contrasted American democratic constitutionalism, which sees the constitution as ‘the product of a national participatory political

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<sup>126</sup> The reason is perhaps not the lack of a family as such (eg liberal constitutional democracies could be such a family) but rather the perception that US law belongs to a family of one—the old saga of US exceptionalism. See generally Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (2005).

<sup>127</sup> See generally John O. McGinnis, ‘Foreign to Our Constitution’ (2006) 100 *Northwestern University Law Review* 303; Eric Posner, *The Perils of Global Legalism* (2009).



process, though which people commit to writing the fundamental values or principles that will govern their society',<sup>128</sup> with European self-government where national participatory processes are less important than the protection of human rights, including the rights of minorities and the establishment of the rule of law.

On its face, this is a descriptive approach. It does not take a position on whether cultures can change, whether these particular constitutional cultures can change, or whether they should change.<sup>129</sup> Now, presumably change is possible. After all, these cultures have been shaped by history and history has not yet come to an end. So the critical question is how cultures change.

A strong culturalist approach to constitutional law argues that cultures cannot change *intentionally*. Paul Kahn has forcefully argued that 'the rule of law is a cultural practice', and thus 'a cultural approach begins by bracketing off the study of law from the practice of reforming the law'.<sup>130</sup> To try to change legal culture is to misunderstand legal culture. Hence, comparative

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<sup>128</sup> Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 *NYU Law Review* 1971, 1993.

<sup>129</sup> For Rubenfeld's answers to these questions, in the analogous context of the US approach to international law, see *ibid* 2020:

Democracy is not the only value in the world. International law could be worth supporting even if it is undemocratic. The point is a matter of candor. To support international law is to support fundamental constraints on democracy.

<sup>130</sup> Paul Kahn, 'Comparative Constitutionalism in a New Key' (2003) 101 *Michigan Law Review* 2677, 2678. On the definition of 'constitutional culture', see Robert Post, 'Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law' (2003) 117 *Harvard Law Review* 4, 6ff (defining constitutional culture as the beliefs and values of non-judicial actors, and discussing the dialectical relationship between it and constitutional law). For an earlier approach along similar

constitutionalism, when aiming at reform, including through but not limited to constitutional borrowing, misunderstands—or worse, it instrumentalizes<sup>131</sup>—constitutional culture. The point of comparative law is to understand, not to reform.<sup>132</sup> A particularly illuminating analogy comes from Alan Watson who compared the purported comprehensiveness of constitutional law with that of a religious faith. Just as one need not—indeed, may not—reach out for answers to other faiths, so here one should not reach beyond the ambit of the US Constitution, as the foundation of America’s civic religion.<sup>133</sup>

Culturalism’s emphasis on constitutional self-government coupled with its anti-functional methodology explain its appeal and relevance. In a different context, scholars of African constitutionalism have made the argument that constitutions must ‘grow’ organically.

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lines with particular application to legal rights, see Martha Minow, ‘Interpreting Rights’ (1987) 96 *Yale Law Journal* 1860, 1861ff:

efforts to create and give meaning to norms, through a language of rights, often and importantly occur outside formal legal institutions such as courts. ‘Legal interpretation’, in this sense, is an activity engaged in by nonlawyers as well as by lawyers and judges.

<sup>131</sup> This is what Günter Frankenberg calls the ‘IKEA’ theory of constitutional (and legal) transfer. According to this theory,

global constitutionalism is created by or rather emanates from processes of transfer and functions as a reservoir or, for that matter, a supermarket, where standardized constitutional items—grand design as well as elementary particles of information—are stored and available, prêt-à-porter, for purchase and reassemblage by constitution makers around the world

Frankenberg (n 17), 565. See also Günter Frankenberg, ‘Comparing Constitutions: Ideas, Ideals, and Ideology—Towards a Layered Narrative’ (2006) 4 *International Journal of Constitutional Law* 439.

<sup>132</sup> See also Sacco (n 41), 2: ‘the effort to justify comparative law by its practical uses sometimes verges on the ridiculous’.

<sup>133</sup> Alan Watson, ‘From Legal Transplants to Legal Formants’ (1995) 43 *American Journal of Comparative Law* 469, 472.

Invoked in this context is the survival of the ‘presidentialist character of Africa’s constitutional politics’<sup>134</sup> despite the textual provisions of many postcolonial constitutions in many Sub-Saharan constitutions.<sup>135</sup> The justification of transplants depends on how one conceptualizes that relationship between law and culture. How, then, is judicial borrowing defended?

In the context of foreign law, functionalism in comparative constitutional law can take the form of crude instrumentalism or more sophisticated pragmatism.<sup>136</sup> While crude instrumentalism has no defenders, as long as the use of foreign law lacks a methodology, judicial borrowing will be criticized as an inherently unprincipled tool that can be used strategically.<sup>137</sup> The pragmatist justification reverts to the ‘it works’ rationale.<sup>138</sup> Foreign law can shed an

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<sup>134</sup> H. Kwasi Prempeh, ‘Africa’s Constitutionalism Revival: False Start or New Dawn?’ (2007) 5 *International Journal of Constitutional Law* 469, 497, at 498:

The long absence in postcolonial Africa of a tradition of parliamentary autonomy has severely handicapped Africa’s legislature in defining or protecting their institutional interests and prerogatives. Despite new openings and opportunities to assert a meaningful role for parliaments in Africa’s post-authoritarian constitutional politics, contemporary legislature-executive relationships continue to be defined by conventions established under the executive-dominated ancient regime.

<sup>135</sup> See generally Ruth Gordon, ‘Growing Constitutions’ (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 528.

<sup>136</sup> For a discussion of functionalist explanations of constitutional transformation, see Ran Hirschl, *Towards Juristocracy* (2004), 34ff (discussing functionalist, evolutionary, and institutional economic theories of constitutional transformation); Mark Tushnet, ‘Some Reflections on Method in Comparative Constitutional Law’ in Choudhry (n 6), 76ff (discussing functionalism in the context of constitutional structure).

<sup>137</sup> See eg Ernest Young, ‘The Trouble with Global Constitutionalism’ (2003) 38 *Texas International Law Review* 527.

<sup>138</sup> Of course, the question is, ‘it works’ for what? Eg in the context of the Argentine 1853 Constitution, borrowing from US law was done for the purpose of replicating the US success at

‘empirical light’,<sup>139</sup> in Justice Breyer’s words, on issues of constitutional structure such as federalism as well as fundamental rights.<sup>140</sup>

Among other defences of foreign law, Anne-Marie Slaughter has proposed a broader explanation of inter-court borrowing as the outcome of the disintegration of states into networks of judges, legislators, and executives that reach across to their foreign peers.<sup>141</sup> Both professional and sociological factors contribute to the creation of ‘a global community of courts’. Slaughter’s account is compatible with a dialogical model.<sup>142</sup> According to this model, the use of foreign law is a means by which a constitutional system or culture engages with the outside world.<sup>143</sup> The outcome of such engagement is to better understand the presuppositions of one’s own constitutional culture and legal system and, presumably, to change whatever aspects one does not

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attracting foreign investment and immigration. See generally Jonathan Miller, ‘The Authority of a Foreign Talisman: A Study of the US Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith’ (1997) 46 *American University Law Review* 1483. See also Mitchell Gordon, ‘Don’t Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type’ (2009) 8 *Washington University Global Studies Law Review* 487. More generally on the question of the success of legal transplants, see David Nelken, ‘Comparativists and Transferability’ in Legrand and Munday (n 34), 452ff.

<sup>139</sup> *Printz v US* 521 US 898, 977 (1997) (Breyer J dissenting).

<sup>140</sup> *Washington v Glucksberg* 521 US 702, 770 (Rehnquist CJ) (discussing the experience with the legalization of physician-assisted suicide in the Netherlands in the context of a possibility of abuse).

<sup>141</sup> Slaughter (n 89).

<sup>142</sup> Vlad Perju, ‘Comparative Constitutionalism and the Making of A New World Order’ (2005) 12 *Constellations* 464.

<sup>143</sup> See generally Sujit Choudhry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74 *Indiana Law Journal* 819, 855ff; Vicki Jackson, *Constitutional Engagement in a Transnational Era* (2010).

like and has a mandate to change. Since the national judge is always a filter, foreign law as having persuasive authority and its usage is therefore not undemocratic.

Stronger views of the authority of foreign law are also possible.<sup>144</sup> Jeremy Waldron has argued that foreign law is new *jus gentium* (the law of nations).<sup>145</sup> Referring specifically to situations of emerging world consensus, such as the ban on the death penalty for juvenile offenders, Waldron argues that, just like in science, consensus provides ‘an established body of legal insight, reminding [one] that the particular problem had been confronted before and that they . . . should think it through in the company of those who have already dealt with it.’<sup>146</sup> Common answers form an area of ‘overlap, duplication, mutual elaboration, and the checking and rechecking of results that is characteristic to true science.’<sup>147</sup> This theory provides a strong justification for the use of foreign law, but one that is limited to situations of emerging world consensus. More recently, it has been argued that the cosmopolitan ideal in constitutional law can justify constitutional borrowing by judges without regard to the existence of consensus.<sup>148</sup>

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<sup>144</sup> Perhaps the strongest view, grounding the authority of foreign law in natural law has not yet found supporters in the literature. For a discussion of what such an argument might look like, see Roger P. Alford, ‘In Search of a Theory for Comparative Constitutionalism’ (2005) 52 *UCLA Law Review* 639, 659–73.

<sup>145</sup> See Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 *Harvard Law Review* 129.

<sup>146</sup> *Ibid* 133.

<sup>147</sup> *Ibid* 139.

<sup>148</sup> Vlad Perju, ‘Cosmopolitanism and Constitutional Self-Government’ (2010) 8 *International Journal of Constitutional Law* 326.

## VI. Conclusion: The Problem of Convergence

Reflecting on the history of comparative law, Rudolf Schlesinger noted that periods of ‘contractive comparisons’, when the emphasis is on differences between legal systems, alternate with periods of ‘integrative comparison’, when the focus is on similarities.<sup>149</sup> It is perhaps too soon to tell if the same evolution will shape the field of comparative constitutional law. It is clear, however, that a debate is under way on whether and on what scale constitutional migrations are leading or can lead to constitutional convergence.<sup>150</sup> At one level, at least some degree of convergence seems unquestionable. The world constitutional map looks drastically different today than it did half a century ago. The complex phenomenon of globalization makes further convergence all but inevitable.<sup>151</sup> At the same time, recent empirical studies cast doubt on

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<sup>149</sup> Rudolf B. Schlesinger, ‘The Past and Future of Comparative Law’ (1995) 43 *American Journal of Comparative Law* 477.

<sup>150</sup> Rosalind Dixon and Eric Posner, ‘The Limits of Constitutional Convergence’ (2011) 11 *Chicago Journal of International Law* 399 (identifying four paths to convergence: superstructure theories; learning theories; coercion theories; competition theories). It helps to keep in mind that, even when transplants/borrowing results in convergence, that remains only one strategy of convergence. See generally John Henry Merryman, ‘On the Convergence (and Divergence) of the Civil Law and the Common Law’ (1981) 17 *Stanford Journal of International Law* 358, 365ff.

<sup>151</sup> See also Mark Tushnet, ‘The Inevitable Globalization of Constitutional Law’ (2009) 49 *Virginia Journal of International Law* 985, 987 (pointing out that convergence is not tantamount to uniformity). See also Sacco (n 41), 2 (discussing the difference between uniformization and unification).

whether constitutional systems are converging.<sup>152</sup> Moreover, convergence might not be desirable if it stifles democratic experimentation and shuns local expertise and traditions.<sup>153</sup>

In this context, the pervasiveness of the English language in the comparative constitutional materials shapes the comparative landscape and somewhat artificially enhances the perception of congruence. Unlike comparative private lawyers, who are trained to reflect on the problem of translation, the comparative constitutional lawyer has few such concerns. The trap of nominalism becomes particularly worrisome.<sup>154</sup> This is the trap that similar-sounding concepts share an identical meaning. Even when these legal concepts are the outcome of constitutional borrowing, we have seen that their meaning changes in the course of borrowing. A healthy dose of comparative sensibility helps at this stage.

Comparative constitutional law as a field can benefit from engaging with the transplants debate in comparative law, in particular with respect to topics such as convergence and divergence, the relationship between law and culture, and the importance of language and professional culture. Conversely, that debate, and comparative law more generally, can benefit from a study of constitutional borrowings and from the normative finesse that characterizes

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<sup>152</sup> David Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163.

<sup>153</sup> See Neil Walker, 'The Migration of Constitutional Idea and the Migration of the Constitutional Idea: The Case of the EU' in Choudhry (n 6), 317.

<sup>154</sup> See Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771; Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1995) 108 *Yale Law Journal* 1225. See also See Watson (n 3), 10ff.

comparative constitutionalism. This mutually beneficial dialogue also lays the ground for an integrative account of legal transplants, borrowings, and migrations.

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