

## Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections

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In 1997 US Supreme Court Justice Antonin Scalia asserted in *Printz v. United States* that 'comparative analysis [is] inappropriate to the task of interpreting a constitution.'<sup>1</sup> Since then the matter has been debated by judges in and out of the courts<sup>2</sup> as well as by scholars.<sup>3</sup> On 13 January 2005 the American University Washington College of Law hosted a public debate between United States Supreme Court Justices Breyer and Scalia, which was chaired by Professor Norman Dorsen, on the 'Constitutional Relevance of Foreign Court Decisions'.<sup>4</sup> In the course of this debate, Scalia repeated his view that foreign law should not be cited by domestic courts. The reference to, and utility of, foreign law is most clearly visible on three levels: in relation to constitutional and statutory interpretation, in relation to the drafting of a new constitution, and in relation to institutional design (i.e. the creation, development and justification of state organs and constitutional practices that are efficient as well as legitimate).<sup>5</sup> According to Scalia, only the first exercise is problematic. There is

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<sup>1</sup> *Printz v United States*, 521 US 898 (1997), at 2377.

<sup>2</sup> The case law is discussed below. For extrajudicial comments see Justice *Stephen Breyer*, Keynote Address, in (2003) 97 American Society of International Law Proceedings 265; Justice *Stephen Breyer*, Remarks at the Summit of World Bar Leaders, 10 November, 2001), [http://www.supreme-courts.gov/publicinfo/speeches/sp\\_11-10-01.html](http://www.supreme-courts.gov/publicinfo/speeches/sp_11-10-01.html) [visited 20 December 2007]; Justice *Sandra Day O'Connor*, Keynote Address, (2002) 96 American Society of International Law Proceedings 348.; Justice *Sandra Day O'Connor*, Remarks to the Southern Center for International Studies (28 October 2003), [http://www.southerncenter.org/OConnor\\_transcript.pdf](http://www.southerncenter.org/OConnor_transcript.pdf) [visited 20 December 2007]; Justice *Antonin Scalia*, Keynote Address, 'Foreign Legal Authority in the Federal Courts' (2004) 98 American Society of International Law Proceedings 305.

<sup>3</sup> *A.L. Parrish*, 'Storm in a Teacup: the U.S. Supreme Court's Use of Foreign Law', (2007) 2 University of Illinois Law Review 637-680 [for extensive scholarly references see FN 9]; *J. Waldron*, 'Foreign Law and the Modern *Ius Gentium*', (2005) 119 Harvard Law Review 119-147; *M.A. Waters*, 'Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue?', (2004) 12 Tulsa Journal of Comparative & International Law, (Symposium Issue) 149. See also *B. Markesinis / J. Fedtke*, *Judicial Recourse to Foreign Law*, Oxford, 2006.

<sup>4</sup> *Norman Dorsen*, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer', 3(4) International Journal of Constitutional Law, 519-541 [henceforth 'A Conversation'].

<sup>5</sup> *D. Franklin / M. Baum*, *Political Culture and Constitutionalism: A Comparative Approach*, New York, 1995, 222; *L. Epstein* and *J. Knight*, 'Constitutional Borrowing and Nonborrowing' (2003) 1(2) International Journal of Constitutional Law 196-222, 197-8.

consensus that foreign law is admissible in the interpretation of a Treaty;<sup>6</sup> in devising a constitution;<sup>7</sup> and if it is old English law and helps to understand the meaning of the US Constitution when it was adopted.<sup>8</sup> Scalia, as the most outspoken representative of a formal textualist, originalist, even Hamiltonian<sup>9</sup> position, objects only to the judicial use of foreign law in relation to constitutional and statutory interpretation.

The purpose of the present article is to identify the reasons for the originalists' objections to judicial comparative engagement – which are never articulated at length – and then to reveal their empirical incoherency and normative incongruity. The debate regarding the judicial use of foreign law is not only relevant to the framework provided by US constitutional law, but also raises issues of broader relevance to constitutional theory. Constitutional democracy is characterised by 'contradictory principles' that are inherent to the system,<sup>10</sup> and whose significance is defined by, and changes over, time and space.<sup>11</sup> It can also be pointed out that due to its open texture,<sup>12</sup> law is always susceptible to interpretation and contestation. This is particularly true for constitutional law which not only tends to be postulated in abstract and general terms but is also characterised by its close nexus to national politics. The interpretation of constitutional law is thus always controversial, contested, and contingent upon underlying political values.

The debate is evidence, moreover, of law's reflexivity which ultimately is the promise of comparative law. The contingent integrity of the legal order needs to be revealed by developing a self-reflexive understanding of constitutional law by viewing it as 'intercultural dialogue and as contestation between interests'.<sup>13</sup> Every constitutional system needs to have a sense of its own sovereignty, the nature of its constitution, the importance of fundamental rights, and the role of the state. The present article will conclude by arguing

<sup>6</sup> A Conversation', above n. 4, at 521.

<sup>7</sup> Ibid, at 525; 538-9; although see critically *P. Dann* and *Z. Al-Ali*, 'The Internationalized "Pouvoir Constituant": Constitution-Making under External Influence in Iraq, Sudan and East Timor', (2006) 10 Max Planck Yearbook of United Nations Law 423–63.

<sup>8</sup> See also *K. Anderson*, Foreign Law and the U.S. Constitution, (2005) June-July, Policy Review at 34, n.2.

<sup>9</sup> *J.B. Staab*, The Political Thought Of Justice Antonin Scalia: A Hamiltonian On The Supreme Court, Lanham, 2006.

<sup>10</sup> *J. Habermas*, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", (2001) 29(6) Political Theory 766-781.

<sup>11</sup> *R. Bellamy / V. Buffacch / D. Castiglione*, Democracy and Constitutional Culture in the Union of Europe, (London: Lothian Foundation Press, 1995), at 15.

<sup>12</sup> *H.L.A. Hart*, The Concept of Law, 2nd ed., Oxford, at 128-136.

<sup>13</sup> *J. Shaw*, 'Postnational Constitutionalism in the European Union' (1999) 6(4) Journal of European Public Policy 579, at 596. See also *J. Tully*, Strange Multiplicity: Constitutionalism in an Age of Diversity, (Cambridge, 1995, at 30. See also *J. Bast*, The Constitutional Treaty as a Reflexive Constitution, in *P. Dann* and *M. Rynkowski* (eds.), 'The Constitutional Treaty as a Reflexive Constitution', in: The Unity of the European Constitution, Berlin, 2006.

that comparative constitutional law can contribute towards ‘a self-conscious discourse of constitutionalism’ which is a necessary prerequisite for constitutional status.<sup>14</sup>

### I. The Originalists’ Objections

The first argument against using foreign law in the courts relates to the legitimacy of that enterprise. The objection is based on classic sovereignty theory and a state-centred image of national law which conceives law as a body of rules enforceable through adjudication, with an emphasis on rule-orientation, professional (artificial) reasoning, and procedure. The argument is straightforward. Foreign law is not recognised as a valid source of law by the national legal system, and for that reason the legal system cannot cope with the migration of constitutional ideas through a comparative approach to constitutional law. In practice, this means that courts are not permitted to rely on foreign law in order to decide hard cases and to fill gaps when national positive law is insufficient. If foreign law is not an authoritative legal source for judges, then the legitimacy of the comparative method is thrown into doubt. The legitimacy of judicial decisions depends on the judges’ interpretative methodology: courts must justify any recourse to non-state law. Can judges justify the recourse to comparative law for the purposes of constitutional and statutory interpretation? Why should US judge be bound by the dicta of a judge in Zimbabwe, Scalia asks rhetorically?<sup>15</sup> The answer to this question has implications for current conceptions of democracy and sovereignty, as well as for the sociology of law. A culturally-sensitive inquiry needs to ask whether it is legitimate to ‘import’ foreign legal ideas into the national legal arena if it means divorcing those ideas from the cultural context in which they originated.

The second argument relates to hermeneutics, or the correct interpretation of the Constitution. It is important to differentiate between amending the Constitution and interpreting the Constitution. According to Scalia, the only legitimate way to change the Constitution is through the formal amendment process, and not through an active judiciary which (illegitimately) changes the Constitution based on its own preferences and prejudices (which may or may not include non-US law).<sup>16</sup> The current divide with regard to constitutional interpretation of the text is between ‘*original meaning*’ (the judge interprets statutes literally, based on ‘the original meaning of the text, not what the original draftsmen intended’), and ‘*current meaning*’ (the meaning of the US Constitution should be tailored to contemporary

<sup>14</sup> N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317-359, at 343.

<sup>15</sup> ‘A Conversation’, above n. 4, at 528-9.

<sup>16</sup> ‘It’s not the job of the Constitution to change things by judicial decree; change is brought about by democratic legislation’, Scalia in ‘A Conversation’, above n. 4, at 535; See also A. Scalia, ‘The Rule of Law as a Law of Rules’, (1989) 59 *University of Chicago Law Review* 1175, at 1179-81.

and changing social circumstances).<sup>17</sup> Scalia argues that the Constitution has a meaning, and the historical and constitutional role of judges has been to determine its meaning.

‘Now, my theory of what to do when interpreting the American Constitution is to try to understand what it meant, what it was understood by the society to mean when it was adopted. And I don't think it has changed since then. That approach used to be orthodox until about sixty years ago. Every judge would have told you that's what we do. If you have that philosophy, obviously foreign law is irrelevant with one exception: old English law—because phrases like "due process," and the "right of confrontation" were taken from English law, and were understood to mean what they meant there. So the reality is I use foreign law more than anybody on the Court. But it's all old English law.’<sup>18</sup>

Over time judicial interpretation will inevitably produce different accounts of that meaning, but that observation alters neither the judges' interpretative mandate nor the original meaning of the Constitution itself. Scalia views the Constitution as an anchor, as a source of social stability: ‘...the purpose of the Bill of Rights was to prevent change, not to foster change and have it written into the Constitution’.<sup>19</sup> A Bill of Rights, therefore, expresses social scepticism of any axiom that equates ‘evolving standards of decency’ with ‘the progress of a maturing society’.<sup>20</sup> Instead, Scalia bemoans that ‘the American people have been converted to belief in The Living Constitution, a “morphous” document that means, from age to age, what it ought to mean’.<sup>21</sup> Judicial activism based on abstract principles of justice is not only illegitimate as ‘a form of corruption’ that debases the wisdom and virtue inherent in the original meaning,<sup>22</sup> but also has deleterious effects on sovereignty as it thwarts the democratic will of the people.

The third reason against the judicial use of comparative material is political. It would appear that it is not only in relation to strategic and foreign policy issues that ‘Americans

<sup>17</sup> A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton, 1997, at 38; see also A. Reed Amar, ‘The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine,’ (2000) 114 *Harvard Law Review* 26.

<sup>18</sup> ‘A Conversation’, above n. 4, at 525.

<sup>19</sup> *Ibid.* See also Scalia's further comments at 536: ‘I have no problem with change. It's just that I do not regard the Constitution as being the instrument of change by letting judges read [foreign] cases [...]. That's not the way we do things in a democracy. Persuade your fellow citizens and repeal the laws. Why should the Supreme Court decide that question?’.

<sup>20</sup> The famous phrase is Chief Justice Warren's in *Trop v. Dulles*, 356 U.S. 86, 101 (1958); criticism by Scalia in: *A Matter of Interpretation*, above n. 17, at 40-41.

<sup>21</sup> Scalia, *Ibid.* at 47.

<sup>22</sup> Observation by D. Levin, ‘Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory’, (2004) 29(1) *Law and Social Inquiry* 105-126, at 109.

are from Mars, and Europeans are from Venus',<sup>23</sup> but also in relation to democracy, justice and human virtue.<sup>24</sup> Scalia and Breyer portray the USA as the paragon of egalitarian excellence, whereas comparator countries seem only just to have emerged from the dark ages. Breyer notes that '[t]o an ever greater extent, foreign nations have become democratic; to an ever greater extent they have embodied that protection in legal documents enforced through judicial decision making'.<sup>25</sup> Although Breyer suggests that US judges could learn from their foreign counterparts, especially when faced with 'difficult questions without obvious answers',<sup>26</sup> Scalia states bluntly that the USA does not have the same moral and legal framework as the rest of the world. 'If you told the framers of the Constitution that we're to be just like Europe, they would have been appalled.'<sup>27</sup> The xenophobic tone is evident in certain scholarly contributions as well as in the US media.<sup>28</sup>

The fourth argument against comparative law is ideological. Alan Watson observes that comparative law can be used for the purpose of corroborating a preconceived thesis.<sup>29</sup> Scalia's fear is identical, namely that the invocation or rejection of comparative law is determined by the political preferences of the court. In his dissenting opinion in *Roper v. Simmons*<sup>30</sup> Scalia stated: 'to invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry'. The Justices were not seeking 'confirmation' from international consensus, but were seeking to affirm their 'own notion of how the world ought to be, and their diktat that it shall be so henceforth in America'.<sup>31</sup> In *Lawrence v Texas*<sup>32</sup> Scalia in his dissent accused the Supreme Court of

<sup>23</sup> *R. Kagan, Of Paradise and Power: America and Europe in the New World Order*, New York, 2003, 3.

<sup>24</sup> See, e.g. *J. Rubenfed, Unilateralism and Constitutionalism*, (2005) 79 *New York University Law Review* 1971, at 1995-99.

<sup>25</sup> 'A Conversation', above n. 4, at 523.

<sup>26</sup> *Ibid.*

<sup>27</sup> 'A Conversation', above n. 4, at 521. The deprecation of European legal systems by Breyer and Scalia is in turn matched by Kübler who notes that the law of the USA is no longer a 'mere appendix or even the quantité négligeable of an exotic and peculiar development of English law, but an exemplary illustration of a modern legal order's tendency to grow and its ability to differentiate': *F. Kübler, 'Rechtsvergleichung als Grundlagendisziplin der Rechtswissenschaft'*, *Juristenzeitung* 1977, 113- 118, at 118.

<sup>28</sup> See *Parrish, 'Storm in a Teacup'*, above n. 3, see FN 53 for further references. See also *D. Milbank, 'And the Verdict on Justice Kennedy Is: Guilty'*, *Washington Post*, 9 April 2005; Page A03: <http://www.washingtonpost.com/wp-dyn/articles/A38308-2005Apr8.html> (visited 20 December 2007).

<sup>29</sup> *A. Watson, Legal Transplants: An Approach to Comparative Law*, (Athens and London: The University of Georgia Press, 1974), at 12.

<sup>30</sup> 543 U.S. 551 (2005), at 21.

<sup>31</sup> 543 U.S. 551 (2005), at 23.

<sup>32</sup> 539 US 558 (2003), at 2495.

conveniently 'ignoring [...] the many countries that have retained criminal prohibitions on sodomy'. And in conversation with Breyer he added: 'When it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree, we don't use it'.<sup>33</sup> Richard Posner wonders aloud whether the reason for Scalia's objections are practical rather than ideological: if the practical problem of accessing foreign legal judgements were removed through adequate translations, might Scalia himself turn to comparative analysis with a view to supporting his own views on homosexuality, abortion, capital punishment, and the role of religion in public life?<sup>34</sup>

The fifth argument is cultural. It is not appropriate to 'import' foreign legal ideas into the national legal arena if it means divorcing those ideas from the cultural context in which they originated. Using foreign law is difficult because judges have no insight into the 'surrounding jurisprudence'.<sup>35</sup> From this perspective, the comparison of two or more constitutional systems does not exhaust itself in the comparison of their positive constitutional provisions, but needs to be premised on the political, historical, socio-cultural, and philosophical foundations on which the constitutional law of the particular legal regime rests.<sup>36</sup> Not only can comparative law sometimes require sufficient knowledge of another language, but it always requires a sound understanding of another culture; all the more so when constitutional law is the object of comparison. Judges are not expert in foreign law and thus lack the insight and information necessary for the formation of an opinion.<sup>37</sup> These cultural limitations have resulted in a degree of selectivity<sup>38</sup> whenever the US Supreme Court has consulted foreign law. The Court has referred to opinions from Commonwealth countries, but not to East Asia, South American or Islamic courts.<sup>39</sup>

<sup>33</sup> 'A Conversation', above n. 4, at 521.

<sup>34</sup> R. Posner, 'No Thanks, We Already Have Our Own Laws', (July/August 2004) *Legal Affairs*, [http://www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp) [visited 20 December 2007].

<sup>35</sup> 'A Conversation', above n. 4, at 528.

<sup>36</sup> P. Legrand, 'Public Law, Europeanisation, and Convergence: Can Comparativists Contribute?' in P. Beaumont / C. Lyons / N. Walker (eds), *Convergence and Divergence in European Public Law*, (Oxford: Hart, 2002); R. Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (Frankfurt: Suhrkamp, 2003), at 96.

<sup>37</sup> '...the judicial systems fo the rest of the world are immensely varied and most of their decisions inaccessible, as a practical matter, to our monolingual judges and law clerks': R. Posner, above n. 34.

<sup>38</sup> See also W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2<sup>nd</sup> ed, (Cambridge: Cambridge University Press, 2006), at 30: 'Global legal debates on human rights and religious law circle uncomfortably around the often unspoken but systematic denial that anything useful could be learnt from non-Western socio-legal traditions'.

<sup>39</sup> See question by Dorsen, 'A Conversation', above n. 4, at 530.

The sixth argument relates to the dangers of manipulation. In the absence of a US decision, citing a decision 'by an intelligent man in Zimbabwe...looks lawyerly'.<sup>40</sup> A foreign legal source is better than none, and this kind of inventiveness invites manipulation. To be clear, Scalia does not want to prevent judges from consulting foreign cases; he only wants to prevent judges citing them.<sup>41</sup> Waldron and Posner make similar observations. Waldron notes that 'reference to official judgments, whether local or foreign, helps rescue judges from a feeling of intellectual nakedness',<sup>42</sup> whereas Posner describes the judicial search for quotations in and citations of foreign as well as previous decisions as an effort 'to further mystify the adjudicative process and disguise the political decisions that are the core, though not the entirety, of the Supreme Court's output'.<sup>43</sup> This raises the broader issue of what counsel is permitted to cite in court. Posner distinguishes between precedential and informational citations.<sup>44</sup> Although he is sympathetic to Scalia's broader claim that the Supreme Court should never treat a foreign legal judgement as precedential authority, or even as persuasive authority,<sup>45</sup> Posner parts from Scalia's company when he states that 'anything can be cited as source of information bearing on an adjudication'.<sup>46</sup>

## II. Alternative Arguments

In response to Scalia and other critics of comparative law, there are various approaches that could be developed with more rigour than Breyer's utility approach (discussed below) or *The Migration of Constitutional Ideas*,<sup>47</sup> edited by Sujit Choudhry (henceforth MOCI), which merely provides a descriptive counter-weight to Scalia's normative objections. MOCI is the outcome of an international conference at the University of Toronto in October 2004 that wanted to rebut Scalia's doctrinal hostility to the use of foreign decisions in domestic courts. However, the contributions to MOCI fail to analyse (rather than assume) the intrinsic value of comparative methodology as a judicial tool, and to address explicitly Scalia's

<sup>40</sup> 'A Conversation', above n. 4, at 531.

<sup>41</sup> 'I mean, go ahead and indulge your curiosity! Just don't put it in your opinions!', *Scalia*, 'A Conversation', above n. 4, at 534.

<sup>42</sup> *J. Waldron*, 'Foreign Law and the Modern Ius Gentium', above n. 3, at 138.

<sup>43</sup> *R. Posner*, above n. 34.

<sup>44</sup> *Ibid.*

<sup>45</sup> Posner makes the same argument in relation to citing unpublished opinions as precedents (which would increase the court's workload without, according to Posner, leading to better decisions). But the law has now changed. The new Rule 32.1 of the Federal Rules of Appellate Procedure, which took effect on 1 January 2007, allows federal courts to cite unpublished cases.

<sup>46</sup> *Ibid.* (emphasis added).

<sup>47</sup> *S. Choudhry* (ed), *The Migration of Constitutional Ideas*, Cambridge: University Press, 2006. For a review of this edited volume see *J.E.K. Murkens*, 'Neither Parochial Nor Cosmopolitan – An Appraisal of the Migration of Constitutional Ideas', in (2008) 71(2) *Modern Law Review* 303-319.

doctrinal objections to comparative analysis, namely that it is undemocratic. Although Choudhry is aware that ‘courts *must* explain why comparative law should count’,<sup>48</sup> MOCI as a whole fails to offer its own justifications. MOCI is clearly trying to persuade the reader that its own ‘educated, cosmopolitan sensibility’ is better than Scalia’s ‘narrow, inward-looking, and illiterate parochialism’.<sup>49</sup> But cosmopolitanism as a new *Weltanschauung* (as Choudhry knows<sup>50</sup>) is insufficient justification for the judicial use of comparative law method; all the more so because the link between comparative method and improved judicial reasoning cannot be made. Having identified the originalists’ objections, the second half of this article will be devoted to revealing their empirical incoherence and normative incongruity.

### 1. *Empirical incoherence*

The controversy surrounding the judicial use of comparative constitutional law is not new. It is frequently traced back to the 1958 decision of the Warren Court in *Trop v. Dulles*.<sup>51</sup> In that case the Supreme Court referred to the ‘civilized nations of the world’<sup>52</sup> in order to determine the evolving standards of decency that should be used to evaluate which punishments are unconstitutionally cruel and unusual under the Eighth Amendment. In particular, the Court referred to a United Nations’ survey of the laws of eighty-four states which revealed ‘that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.’<sup>53</sup> Since *Coker v. Georgia*,<sup>54</sup> and especially in the last 10 years, Justices John Paul Stevens, Stephen Breyer, and Anthony Kennedy have looked to ‘the climate of international opinion’<sup>55</sup> to support their views.<sup>56</sup>

<sup>48</sup> Choudhry above n 47, at 5.

<sup>49</sup> *Ibid.*, at 4.

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

<sup>51</sup> 356 U.S. 86 (1958).

<sup>52</sup> *Ibid.*, at 102.

<sup>53</sup> *Ibid.*, at 103.

<sup>54</sup> 433 U.S. 584 (1977); international practices regarding the death penalty for rape are relevant to the Court’s ‘evolving standards’ analysis.

<sup>55</sup> *Ibid.*, at 596.

<sup>56</sup> See in particular: *Knight v. Florida* and *Moore v. Nebraska*, 528 U.S. 990 (1999), 995-97, per Breyer J., dissenting, who cited judicial decisions from Jamaica, India, Zimbabwe, and the European Court of Human Rights; *Atkins v. Virginia*, 536 U.S. 304 (2002), at 316 per Stevens J. who cites an amicus curiae brief submitted by the European Union and argues that ‘within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved’; Rehnquist J. dissented as he failed to see ‘how the views of other countries regarding the punishment of their citizens provide any support for the court’s ultimate determination’ (at 325); *Lawrence v. Texas* 539 US 558 (2003), per Kennedy J. who cites decisions of the European Court of Human Rights and strikes down the criminal prohi-

The attempt to discredit comparative judicial engagement ignores the extent to which the USA and other jurisdictions already consult beyond their own borders. Although US Supreme Court Justice O'Connor also dissented in *Roper v. Simmons*, she disagreed with Scalia's insularity: 'over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency'.<sup>57</sup> As regards other jurisdictions, Cheryl Saunders notes that 'at the end of the twentieth century, most constitutional systems are or were derivative in part, with the possible exceptions of the ancestor systems of the United Kingdom, the United States and France'.<sup>58</sup> Major constitutional decisions are now discussed on a transnational basis from the UK House of Lords to the South African Constitutional Court and the Supreme Courts of India and Israel.

## 2. Normative incongruity

### a) Legitimacy

More importantly, from a normative perspective the originalist objection is formalistic. It adheres to the paradigm of one national legal system, with one legitimate law-maker, and one coherent system of norms and legal reasoning. Hence, judicial references to foreign law become functionally unnecessary (foreign law is not binding) and normatively illegitimate (foreign law should have no bearing on judicial decisions). In other words, the democratic nature of law-making procedures is a necessary as well as a sufficient condition for the validity of law. An alternative conception views formal validity as a necessary but insufficient condition for law.<sup>59</sup> Jürgen Habermas, for instance, emphasises the value of substantive legitimacy: at the 'posttraditional level of justification' the making and enforcement of laws must necessarily, and for the sake of legitimacy, 'be rationally accepted by all citizens in a discursive process of opinion- and will-formation'.<sup>60</sup> Whereas originalism presupposes a static will at the original moment of the US Constitution's founding, Habermas treats political preferences as 'open to the exchange of arguments' which can be 'discursively changed'.<sup>61</sup> Although Habermas' discourse theory focuses on law-making procedure, its extension to the court poses no immediate threat to the legitimacy of judicial reasoning: the

bition of homosexual sodomy in Texas; and *Roper v. Simmons* 543 U.S. 551 (2005), where the Court cites international opinion and finds that the juvenile death penalty is unconstitutional.

<sup>57</sup> *Ibid.*, per O'Connor J. (dissenting), at 18.

<sup>58</sup> C. Saunders, 'A Constitutional Culture in Transition', in: *Constitutional Cultures*, Warsaw: Institute of Public Affairs, 2000, at 37.

<sup>59</sup> See generally L.J. Wintgens, 'Legislation as an Object of Study of Legal Theory: Legisprudence' in L.J. Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* Oxford, Hart Publishing, 2002, 27.

<sup>60</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Mass.: MIT Press, 1996, 135.

<sup>61</sup> *Ibid.*, at 181.

introduction of rational arguments from other jurisdictions in domestic judicial reasoning would still need to be appraised according to its 'internal rationality' (the internal consistency and coherence of the legal order) and 'normative rationality' (procedural and substantive legitimacy).<sup>62</sup>

A further contrast to state-centredness is provided by legal pluralism. Boaventura de Sousa Santos conceives law as 'a constellation of different [i.e. plural and interrelated] legalities'.<sup>63</sup> Law does not precede political conflict but exists as a matter of communication between different legal areas, and is thus in a constant state of flux. The intersection of different legal orders is called 'interlegality'<sup>64</sup> which extends the concept of legitimacy beyond the boundaries of the nation state.

'We live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by the intersection of different legal orders, that is, by *interlegality*. Interlegality is the phenomenological counterpart of legal pluralism, and [that is why it is a] key concept in a postmodern conception of law'.<sup>65</sup>

Other commentators too conceive a heterarchical ordering of de-centralised legal systems that exist independently of nation states.<sup>66</sup> According to the heterarchical conception, established legal orders (public international law, WTO, Community law) as well as new phenomena such as transnational law (NGO's, expert committees and agencies<sup>67</sup>) and global law (such as the administration of domain names by ICANN<sup>68</sup>) are loosely linked up in a multi-level state-transcending system of governance which challenges national law. The new legal orders do not subscribe to a territorial pattern but to a functional pattern of regulating diverse sectors, interests, products and values.<sup>69</sup>

<sup>62</sup> Adapted from *K. Tuori*, 'Legislation Between Politics and Law' in L.J. Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation*, Oxford, Hart Publishing, 2002, 105-7; see generally *K. Günther*, *Der Sinn für Angemessenheit*, Frankfurt, 1988.

<sup>63</sup> *B. de Sousa Santos*, *Toward a New Common Sense – Law, Science and Politics in the Paradigmatic Transition*, London, Routledge, 1995, at 111.

<sup>64</sup> *Ibid.*, at 473.

<sup>65</sup> *B. de Sousa Santos*, 'Law: A Map of Misreading: Towards a Post-Modern Conception of Law' (1997) 14 *Journal of Law and Society* 279, 298 [original emphasis].

<sup>66</sup> E.g. *G. Teubner*, "'Global Bukowina'": Legal Pluralism in the World Society' in *G. Teubner* (Ed.), *Global Law Without a State*, Aldershot, Dartmouth, 1996.

<sup>67</sup> See *R.A. Higgott / G.R.D. Underhill / A. Bieler*, *Non-State Actors and Authority in the Global System*, London, Routledge, 2000.

<sup>68</sup> See *J. v. Bernstorff*, 'ICANN as a Global Governance Network: The Rise and Fall of a Governance Experiment' in: *C. Joerges / I.-J. Sand / G. Teubner* (eds), *Transnational Governance and Constitutionalism*, Oxford, Hart, 2004.

<sup>69</sup> *G. Teubner*, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional' in: *C. Joerges / I.-J. Sand / G. Teubner* (eds), *Constitutionalism and Transnational Governance*, Oxford, Hart, 2004.

A summary response to network theory is that networks are not self-legitimizing orders and do not enjoy an executive monopoly, and so cannot rival the sovereignty claim asserted by the states. Networks are necessary emanations of a functionally differentiated society, but the state is still the reference point of political and social development; it remains accountable for processes which it can neither steer nor control. The point to make in relation to originalism is that discourse theory (Habermas), systems theory (Luhmann), networks (Teubner), legal pluralism (de Sousa Santos) constitutional pluralism,<sup>70</sup> and cosmopolitanism<sup>71</sup> are theories that emphasise formal as well as substantive legitimacy, recognise the need to adjust legal reasoning to the complexities of modern society, and challenge the continued authority of classic sovereignty theory (which views the state as the enforcer of law, the sole provider of constitutions and the embodiment of sovereignty) in which 'other law' is at best 'meaningless dicta' and at worst 'dangerous dicta'.<sup>72</sup>

## b) Hermeneutics

In order to identify and defend his constitutional interpretation, Scalia appeals to tradition, original meaning, and historical authenticity which is validated by popular consent. By treating the Constitution as a coherent product, rather than as the result of compromise, Scalia is guilty of what Lawrence Tribe calls 'hyper-integration':<sup>73</sup> the idea of a unique founding moment is the originalist's equivalent of the physicist's big bang theory that fixed in perpetuity the legal and social qualities of US constitutional jurisprudence.<sup>74</sup> Whereas Scalia appeals to history as the authority for a decision, the alternative appeal is to reason.<sup>75</sup> The rule of law and constitutionalism act as the rule of reason, and can offer a legal benchmark for the assessment of new discoveries. The purpose of constitutionalism, which is to subject politics to higher norms of reason, is enhanced in its comparative form. To be sure, the appeal to reason fills law with 'uncertainty':<sup>76</sup> legal logic, clear rules, and a history book do not always provide a satisfactory resolution. And it also gives judges broader powers to interpret the constitution based on supposedly contemporary elitist values which

<sup>70</sup> N. Walker, above n. 14.

<sup>71</sup> U. Beck, 'The Cosmopolitan Society and its Enemies' (2002) 19(1-2) Theory, Culture & Society 17-44; D. Held, 'Principles of Cosmopolitan Order' in G. Brock / H. Brighouse (eds), *The Political Philosophy of Cosmopolitanism*, Cambridge, Cambridge University Press, 2005.

<sup>72</sup> *Lawrence v. Texas* 539 US 558 (2003), 2495 per Scalia, J. (dissenting).

<sup>73</sup> L.H. Tribe / M. C. Dorf, *On Reading the Constitution*, Cambridge, Harvard University Press, 1991, 24-30.

<sup>74</sup> L.H. Tribe, 'Comment', in Scalia, *A Matter of Interpretation*, above n. 18, at 87; J.A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, (1991) 71 *Boston University Law Review*, 1-45, 4.

<sup>75</sup> P. Kahn, 'Comparative Constitutionalism in a New Key', (2003) 101 *Michigan Law Review* 2677-2705, at 2685.

<sup>76</sup> Breyer, in: 'A Conversation', above n. 4, at 529.

are validated by abstract principles of justice (as opposed to supposedly traditional moral norms which are validated by popular consent). It is easy to conclude that if judges are given a broader (purposive) role in the interpretation of constitutional law, then comparative analysis emerges as a natural adjunct to the process of constitutional and statutory interpretation. Yet the two phenomena (judicial activism vs judicial use of comparative law) raise separate legitimacy concerns that should not be conflated: it is quite possible for a judge to adopt a dynamic and purposive interpretation of a statute whilst eschewing the use of comparative law.

In this regard, Scalia's outright rejection of foreign law, but complete acceptance of old English law, is also noteworthy. Scalia offers no justification whatsoever for the normative superiority of his originalist position, which can easily be rejected as an incoherent and unpersuasive source of authority:

'Why should we care more about the intent of the Founders – who are long-dead as well as culturally removed from us – than about the understandings of contemporary judges struggling with the same problems of governance of a modern welfare state in countries with which we must build a just and efficient global order of law?'<sup>77</sup>

### c) Political

Instead of isolating the USA or any other country (or jurisdiction) from the rest of the world in moral, political and legal terms, Breyer and O'Connor insist that foreign and international law matter because of globalisation: '...foreign law today comprises part of ordinary contract law or other business law';<sup>78</sup> and 'no institution of government can afford now to ignore the rest of the world'.<sup>79</sup> According to Breyer, citing foreign decisions can be justified for two reasons: because their citation does not raise a 'technically legal' issue, but rather a 'law-related human question',<sup>80</sup> and for reasons of utility and effectiveness:

'...the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding'.<sup>81</sup>

Scalia retorts that 'if you don't want [foreign law] to be authoritative, then what is the criterion for citing it?'.<sup>82</sup> Both Breyer and O'Connor rise to the challenge. Foreign deci-

<sup>77</sup> *Kahn*, above n. 75, at 2678.

<sup>78</sup> 'A Conversation', above n. 4, at 533.

<sup>79</sup> *O'Connor*, above n. 2. For the impact of globalisation on the judiciary see *A.M. Slaughter, A New World Order*, Princeton, Princeton University Press, 2004, Chapter 2.

<sup>80</sup> 'A Conversation', above n. 4, at 528.

<sup>81</sup> *Knight v. Florida* and *Moore v. Nebraska*, 528 U.S. 990 (1999), 995-97, per Breyer J., dissenting.

<sup>82</sup> 'A Conversation', above n. 4, at 521.

sions are not authoritative, in the sense of being binding, but they may ‘constitute persuasive authority in American courts’,<sup>83</sup> and as such, they may ‘cast an empirical light on the consequences of different solutions to a common legal problem’.<sup>84</sup>

Another helpful conception is proposed by Mayo Moran does not conceive of legal sources in strict hierarchical terms, but develops a more supple system in which constitutional rights migrate.<sup>85</sup> She draws a parallel between the ‘mandatory effect’ of international and comparative law on domestic constitutional law, and the relationship between constitutional law and the law governing private relations. In jurisdictions which deny the horizontal effect of human rights, individual rights have nonetheless developed an ‘influential authority’,<sup>86</sup> which must be taken into account in decision-making and justification.

#### d) Ideological

How accurate is the charge that the invocation or rejection of comparative material is determined by the political preferences of the court?<sup>87</sup> Would an opponent of comparative law reject foreign law out of hand if it supported her position? How much emphasis would a supporter of comparative law place on the law of other jurisdictions if it undermined her own position? These are not rhetorical questions – although the answers may be obvious to Scalia. A constitutional practice in state X may be followed by state Y, but not necessarily. A good judge will – on the basis of convincing legal argument and expected standards – explain why the constitutional practice should converge, or why it should remain divergent. However, the claim that comparative analysis merely masquerades as legal argument in court to support a decision that the judges have already reached has also been made in reverse of Scalia’s originalism which Cook describes as ‘no more than an artifice for imposing [the judge’s] own political vision’.<sup>88</sup> These claims, if true, discredit the authority of legal reasoning and the integrity of the legal system as a whole. Alternatively, it may be agreed that there is no value-neutral mechanism of constitutional interpretation and that the

<sup>83</sup> *O’Connor*, above n. 2, at 350.

<sup>84</sup> *Printz v. United States*, above n. 1, per Breyer J. dissenting. (Breyer mentions the federal systems of Switzerland, Germany, and the European Union to support his argument favouring state implementation of federal law).

<sup>85</sup> *M. Moran*, ‘Inimical to Constitutional Values: Complex Migrations of Constitutional Rights’, in S. Choudhry (ed), *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2006, at 233, 239.

<sup>86</sup> See also *A.-M. Slaughter*, above n. 79, at 75-78.

<sup>87</sup> See *Roper* above n. 56, per Scalia J. (dissenting), at 21: ‘To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry’. In *Lawrence* Scalia accuses the Court of conveniently ‘ignoring [...] the many countries that have retained criminal prohibitions on sodomy’: *Lawrence* above n. 56, at 2495 per Scalia, J. (dissenting).

<sup>88</sup> *A. E. Cook*, ‘The Temptation and Fall of Original Understanding’, (1990) *Duke Law Journal* 1163, at 1164.

claims cancel each other out. Scalia's basic normative claim that the Constitution should only be amended after a formal legislative process, and not through ingenious judicial activism, is offset empirically (originalism has never been strictly followed by the Court) as well as normatively. Constitutional concepts (equality and liberty) and concerns (death penalty, abortion) do not attract a meaning that can be fixed or frozen for all time for the purposes of deriving original understanding.

e) Cultural

Aside from practical problems associated with language and accessibility, comparative law is problematic epistemologically because it

- i) presumes similarities in different legal systems,
- ii) suppresses differences, and
- iii) ignores the role of legal culture.<sup>89</sup>

In order to identify its subject-matter, the comparative method has to assume the unity and coherence of the public legal order. It has to treat both public law systems as comparable when, in reality, constitutional law is contingent upon culture (politics, history etc) as well as interpretation, both of which are incoherent and conflictual. The formalism of the comparative method tends to overlook the individual historical development and the internal rationalities of the two countries, and to overstress the legal characteristics of that development. The neglect of social sources results in superficial analysis of positive constitutional law with negligible scholarly insights.<sup>90</sup>

The complexities underlying comparative constitutional law do not prevent the cross-cultural exchange of information. A degree of transnational harmonisation occurs informally, through global networks of social movements, professionals (which include lawyers, judges and prosecutors)<sup>91</sup> and institutions:<sup>92</sup> 'the networks of national constitutional courts are explicitly focused on the provision and exchange of information and ideas'.<sup>93</sup> According to Breyer law emerges from a 'complex interactive democratic process',<sup>94</sup> that includes all legal professionals and laypersons. He likens the process to a kind of transnational

<sup>89</sup> P. Legrand, 'Public Law, Europeanisation, and Convergence: Can Comparativists Contribute?' in P. Beaumont / C. Lyons / N. Walker (eds), *Convergence and Divergence in European Public Law*, Oxford, Hart, 2002.

<sup>90</sup> R. Cotterrell, *Law, Culture and Society*, Aldershot, 2006, Chapter 9.

<sup>91</sup> Slaughter, 'The Real New World Order', (1997) 76(5) *Foreign Affairs* 183, 185.

<sup>92</sup> Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

<sup>93</sup> Slaughter, above n. 79, at 100.

<sup>94</sup> 'A Conversation' above n. 4, at 522.

‘conversation’ in which constitutional court judges are engaged with each other.<sup>95</sup> This type of conversation is reminiscent of Dworkin’s conversational interpretation<sup>96</sup> and Ackerman’s ‘ongoing dialogue amongst scholars, professionals, and the people at large...’.<sup>97</sup> But this conversation is emphatically transnational and is geared towards understanding the members and practices of another social culture. These transnational conversations and networks arguably even point towards the emergence of a new global civil society<sup>98</sup> which, in turn, transforms nationally-shaped cultures and societies. Some sociology and philosophy scholars imagine a ‘cosmopolitan society’ which, they suggest, transforms the ‘moral life-worlds’ of the people, i.e. their everyday consciousness and identities, through the interconnectedness with other cultures. The consequence is that ‘a nation-based memory of the past’ is gradually being replaced by a ‘shared collective future’.<sup>99</sup>

#### f) Manipulation

A final concern with the originalists’ position is that it openly invites intellectual dishonesty. Scalia does not object to judges *consulting* foreign law; he objects to judges *citing* foreign law in judicial opinions.<sup>100</sup> Both aspects are open to criticism. First, it can neither be necessary nor acceptable for judges *not* to cite legal authority that filters into their opinion. Common law judges are required to provide a written and detailed opinion which, *inter alia*, cites, distinguishes or departs from precedent.<sup>101</sup> What benefit can be derived from artificially concealing the identity of a legal argument simply because it originates outside the jurisdiction?<sup>102</sup> Secondly, judges could also be positively encouraged to consult widely before reaching a decision. Niklas Luhmann points out that, when faced with a legal problem, the legal system draws a distinction between self-reference and external reference. Self-referentiality means that all operations and elements always refer to, and reproduce, the system. The system is normatively closed: it excludes morality which is external to, and

<sup>95</sup> Kahn, above n. 75, at 2679; see also R. Badinter / S. Breyer (eds), *Judges in Contemporary Democracy: An International Conversation*, (New York: New York University Press, 2004); B.-O. Bryde, ‘The Constitutional Judge and the International Constitutionalist Dialogue’, in 80 (1) *Tulane Law Review* 203-220.

<sup>96</sup> R. Dworkin, *Law’s Empire* London, 1986, Chapter 2.

<sup>97</sup> B. Ackerman, *We The People: Foundations*, Cambridge, 1991, at 5.

<sup>98</sup> B.K. Woodward, ‘Global Civil Society and International Law in Global Governance: Some Contemporary Issues’, (2006) 8(2/3) *International Community Law Review* 247-355; M. Wilkinson, ‘Civil Society and the Re-imagining of European Constitutionalism’ (2003) 9(4) *European Law Journal* 451 – 472.

<sup>99</sup> U. Beck, above n. 71, at 27.

<sup>100</sup> ‘A Conversation’, above n. 4, at 534.

<sup>101</sup> *Slaughter*, above n. 79, at 75.

<sup>102</sup> M. Tushnet, ‘When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law’, (2006) 90 *Minnesota Law Review* 1275.

thus not binding on, the legal system. External referentiality, on the other hand, prevents the system from standing still by cognitively opening it up to its environment from where it is fed with new information. Although the legal system may not refer to external norms (e.g. morality), it may (indeed it must) refer to external knowledge. The reference to (not the transfer of) knowledge remains an internal operation: the external reference to information allows the system to recognise a difference to its own condition. Viewed in this way, comparative law can be treated as *obiter dicta*: a remark, observation, illustration, analogy or argument that contributes to the substantive (not formal) validity of a court's judgement. Comparison as a process, be it of norms, of facts, or of facts and norms, is the staff of life for lawyers.<sup>103</sup> Kahn goes even further and counters that it would be efficient for a constitutional court to make use of the research and reasoning of another court that had already confronted the same or a similar set of constitutional issues. 'Comparative materials, thus, come to compete with precedents as a material source of legal reasoning'.<sup>104</sup> In consequence, the reflexive use of transnational and comparative law can be seen as a functional requirement for, and an efficient manner of, legal reasoning in complex modern societies.<sup>105</sup>

### III. Conclusion

The originalists' objections raise many additional issues. If comparative analysis is inappropriate to the task of interpreting constitutional law, does that make references to foreign law appropriate in relation to private law? Why is it acceptable to borrow from other legal systems when a new constitution is written, but not when it is interpreted? Finally, why is a historical legal approach legitimate (Scalia cites old English law), but not a comparative legal approach, when their intellectual origins (both legal history and comparative law had to be reconceived due to the codifications of the 19<sup>th</sup> and early 20<sup>th</sup> centuries) are identical.<sup>106</sup> Scalia boasts that he uses 'foreign law more than anybody on the Court. But it's all old English law'.<sup>107</sup> This smacks of inconsistency and double-standards. Scalia's originalism only makes sense as 'a self-justifying system of constitutional interpretation' whose sole purpose is 'the rejection of contemporary liberal jurisprudence...'.<sup>108</sup>

<sup>103</sup> See A. Junker, 'Rechtsvergleichung als Grundlagenfach', *Juristenzeitung* 1994, 921-928, at 922. The US Supreme Court not only cites primary authority, but also secondary authorities (from scholarly treatises to legal dictionaries), and also non-legal material ranging from M\*A\*S\*H\* and Sesame Street to popular music and poetry, and the classics (Plato, Aristotle, Shakespeare, Montaigne): see Parrish, 'Storm in a Teacup', above n. 3, at 655-6 [with references].

<sup>104</sup> Kahn, above n. 75, at 2685.

<sup>105</sup> N. Luhmann, *Law as a Social System*, Oxford, 2004, 157-8.

<sup>106</sup> Junker, above n. 103, at 923.

<sup>107</sup> 'A Conversation', above n. 4, at 525; 527.

<sup>108</sup> D. Levin, 'Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory', above n. 22, at 109.

The big bang theory, which freezes the legal and social values of the Founding Fathers, does not stand up to scrutiny in the real life world: ‘no research program can fetishize its own past; rather it must remain open to new “discoveries” wherever they are made’.<sup>109</sup>

Jeremy Waldron, arguing on the other end of the normative spectrum, suggests that foreign law should be viewed as a latterday *ius gentium*, i.e. a ‘set of principles’ that represents ‘a sort of consensus among judges, jurists, and lawmakers around the world’.<sup>110</sup> Waldron draws an analogy with scientific problem-solving and asks the reader to imagine a new disease or epidemic appearing within the country. In such a case scientists would

‘want to look abroad to see what scientific conclusions and strategies had emerged, had been tested, and had been mutually validated in the public health practices of other countries. We can think of citation to foreign law in *Roper* in the same way’.<sup>111</sup>

In other words, in deciding the ethical, moral and constitutional aspects of who or what is right or wrong, the Supreme Court should feel compelled to consult widely: ‘...to ignore foreign solutions, or to refrain from attending to them because they are foreign, betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face’.<sup>112</sup> The accumulation of authorities represents ‘a dense network of checking and rechecking results, experimental duplication, credentialing, mutual elaboration, and building on one another’s work’.<sup>113</sup>

Waldron’s approach too needs to be handled with care. Decisions on rights and justice cannot be compared to consensus in the natural sciences. The philosophy of science embraces theories of knowledge (epistemology) and of learning (methodology), as well as the study of the principles of science (metaphysics),<sup>114</sup> and thus operates with a different logic than law.<sup>115</sup> Although only few scientists have genuine Eureka moments, legal scholars do not generally develop hypotheses after a new discovery or an investigation based on the scientific method (i.e. conducting research, identifying the problem, stating a hypothesis, conducting project experimentation, and reaching a conclusion).

Furthermore, the analogy with natural sciences masks important differences particularly with regard to constitutional law. Comparative constitutional law oscillates between ‘seeking similarity’ and ‘appreciating difference’.<sup>116</sup> Underlying comparative constitutional law

<sup>109</sup> *Kahn*, above n. 75, at 2685.

<sup>110</sup> *J. Waldron*, ‘Foreign Law and the Modern *Ius Gentium*’, above n. 3, at 132.

<sup>111</sup> *Ibid.* at 143.

<sup>112</sup> *Ibid.* at 144.

<sup>113</sup> *Ibid.* at 145.

<sup>114</sup> *J. Agassi*, ‘The Philosophy of Science Today’, in: S.G. Shanker (ed), *Routledge History of Philosophy*, Vol IX, London, 1996, Chapter 7.

<sup>115</sup> *K.R. Popper*, *The Logic of Scientific Discovery*, London, 1992.

<sup>116</sup> *R. Cotterrell*, above n. 90, at 148; see also *N. Berman*, ‘Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion’ (1997) *Utah Law Review* 281, at 282-4.

is a tension which gives comparative law the potential to broaden horizons but undermine national culture. Waldron's analogy with the natural sciences on the one hand, and *ius gentium* on the other, ignores the role and power of national politics and the national constitutional traditions. In other words, it does not recognise crucial constitutional differences that exist between states, but sees only sameness. Moreover, the idea of sameness (i.e. a genuine constitutional paradigm) is based on a false sense of homogeneity amongst Western states. To be sure, there is basic consensus at the general level of human dignity and pluralistic democracy, human rights, rule of law, proportionality, and tolerance. But beyond that floor of agreement there exists great diversity in relation, say, to the constitutional protection of free speech rights, social welfare rights, civil rights (e.g. the right to bear arms), and capital punishment which *ius gentium* does not capture.

The purpose of this article was to contrast Scalia's objections with alternative approaches in contemporary constitutional discourse. The recourse to heavyweight constitutional principles (sovereignty, majoritarianism, original meaning, formal legitimacy), and seemingly serious extra-legal arguments (in using foreign law judges impose their own ideology, divorce legal ideas from their cultural context, and manipulate or mystify the adjudicative process), means that Scalia's objections are easily criticised, but not so easily replaced. This article endorses neither Scalia's big bang theory nor Waldron's analogy with the natural sciences. Instead, the objective has been to ascribe a modest meaning to the judicial use of comparative constitutional law. If the courts, or any other institution, wish to engage in a process of comparative constitutional law, that process must identify the national specificity of law and grasp the mediating potential of law as a self-reflexive discourse.

A reflexive orientation does not ask whether there are social problems to which the law must be responsive. Instead it seeks to identify opportunity structures that allow legal regulation to cope with social problems without, at the same time, irrevocably destroying valued patterns of life.<sup>117</sup>

Self-reflexion explains why the USA would not be bound by the dicta of a judge in Zimbabwe, but would want to cite a European Court of Human Rights case on the decriminalisation of homosexuality. Michelman and Kahn argue that comparative analysis allows US courts 'to clarify our picture of ourselves',<sup>118</sup> and that it helps 'us to understand who we are',<sup>119</sup> without having to engage in constitutional borrowing. Comparative law is a

<sup>117</sup> G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review* 239–285, at 274.

<sup>118</sup> F.I. Michelman, Reflection, (2004) 82 *Texas Law Review* 1737, at 1758–59.

<sup>119</sup> Kahn, above n. 75, at 2679.

reflexive *process* in order to understand *law*.<sup>120</sup> Its purpose is not to import a final resolution or to contract out the judges' duty to decide hard cases.<sup>121</sup>

'[Law] operates reflexively. The mode of expecting is not random, nor is it left to simple social convenience. It is provided for in the legal system itself. In this way the system controls itself at the level of second-order observations, which is a typical condition for differentiation and operative closure [...]. Law is not something that is simply maintained with the help of powerful political support and then, more or less, enforced.'<sup>122</sup>

At one level, Scalia's objections, and the objections to his objections, tell a familiar story about the 'contradictory principles' of constitutional law. At another level, the entire judicial and scholarly debate about the rights and wrongs of using foreign law in the courts has missed out on law's intrinsic reflexive dimension which comparative law can, and should, nurture.

<sup>120</sup> A. Junker, above n. 103, at 922.

<sup>121</sup> D. Fontana, 'Refined Comparativism in Constitutional Law', (2001) 49 UCLA Law Review 539, at 558; J. Goldsworthy, 'Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism, and the Limits of Convergence', in S. Choudhry (ed), *The Migration of Constitutional Ideas*, Cambridge, 2006, at 141.

<sup>122</sup> N. Luhmann, above n. 105, at 157-8.