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# BOOK REVIEW

## COMPARATIVE CONSTITUTIONAL LAW IN A GLOBAL AGE

COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS. Edited by Norman Dorsen, Michel Rosenfeld, András Sajó & Susanne Baer. 2003. St. Paul, Minn.: West Group. Pp. lxxv, 1383. \$86.00.

*Reviewed by Ruti Teitel\**

This Review addresses the very heart of comparative constitutional law's current renaissance. What are the causes of the increasing emphasis on foreign and international law? What is the meaning of this development in light of present political realities? At a time of globalizing politics, what should be constitutional law's normative relation to the state?

*Comparative Constitutionalism's* release occurs against the backdrop of a recent wave of constitutional changes, which began in the postwar phase of constitution-making and gained momentum with post-Cold War liberalization,<sup>1</sup> European unification processes,<sup>2</sup> and the ensuing ramifications of globalization.<sup>3</sup> Increasingly, constitutionalism extends beyond the state, complicating constitutional law's relation to contemporary politics.

The dynamic changes are evident in multiple realms. *Comparative Constitutionalism*, edited by Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanne Baer, is the latest casebook in comparative constitutional law and the second in four years,<sup>4</sup> which reflects the contemporary explosion in both the field and the scholarship.<sup>5</sup> At pre-

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<sup>1</sup> See generally Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 COLUM. HUM. RTS. L. REV. 167 (1994).

<sup>2</sup> See generally J.H.H. WEILER, *THE CONSTITUTION OF EUROPE* (1999); Joseph H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1999).

<sup>3</sup> See generally ULRICH BECK, *WHAT IS GLOBALIZATION* (Patrick Camiller trans., 2000); DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999).

<sup>4</sup> See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1999).

<sup>5</sup> See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); see also *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* (Mark Tushnet ed., 1990); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Foreword, 1997 UTAH L. REV. 255.

sent, there is a plethora of programs, centers, and conferences on comparative constitutional law<sup>6</sup> and globalism.<sup>7</sup>

The issue of the relevance of the constitutional law of other countries is now gaining momentum even in the U.S. Supreme Court:<sup>8</sup>

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<sup>6</sup> Law schools offering comparative law programs include Chicago-Kent College of Law, Georgetown University Law Center, George Washington University School of Law, New York University Law School, Notre Dame Law School, St. Mary's University, and Temple University. See *The Resource Guide to LL.M. Programs*, NAT'L JURIST, at [http://www.nationaljurist.com/lawSchool\\_program.asp?id=L\\_L\\_M\\_Programs](http://www.nationaljurist.com/lawSchool_program.asp?id=L_L_M_Programs) (last visited May 4, 2004).

<sup>7</sup> One such example is New York University's Global Law School program. New York University Law School's Center for International Studies and Institute for Judicial Administration have hosted regular conferences. See *NYU Conference Discusses Impact of International Tribunals*, INT'L JUD. OBSERVER (Fed. Judicial Ctr./Am. Soc'y of Int'l Law, Washington, D.C.), Sept. 1995, at 3; see also INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 373, 383 (Thomas M. Franck & Gregory H. Fox eds., 1996); *Yale Law School Establishes Seminar on Global Constitutional Issues*, INT'L JUD. OBSERVER (Fed. Judicial Ctr./Am. Soc'y of Int'l Law, Washington, D.C.), June 1997, at 2; Conference of European Constitutional Courts, at <http://www.confcoconsteu.org/en/common/home.html> (last visited May 4, 2004).

<sup>8</sup> See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (relying on a European Court of Human Rights case in addressing an issue of constitutional privacy rights); *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring) (relying on a U.N. resolution); *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 n.21 (2002) (relying on a European Union amicus brief regarding international standards on the application of the death penalty to mentally retarded criminals); *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (stating that a particular detention of aliens "accords with international views on detention of refugees" and citing a U.N. report on the subject); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (finding the Court's First Amendment jurisprudence consistent with decisions of the European Court of Human Rights and the Canadian Supreme Court); *Knight v. Florida*, 528 U.S. 990, 995-98 (1999) (Breyer, J., dissenting from denial of certiorari) (finding decisions of the Privy Council, the Supreme Court of India, the Supreme Court of Zimbabwe, the European Court of Human Rights, the Canadian Supreme Court, and the U.N. Human Rights Committee instructive in determining whether lengthy delay in execution renders it inhumane); *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (noting how the federal systems of Switzerland, Germany, and the European Union seek to reconcile the practical need for a central authority with the democratic virtues of more local control); *Washington v. Glucksberg*, 521 U.S. 702, 785-87 (1997) (Souter, J., concurring in the judgment) (examining Dutch constitutional practice on physician-assisted suicide); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (arguing that Australian, Canadian, and English laws banning anonymous campaign speech suggest that such bans need not impair democracy); *Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring in the judgment) (mentioning the voting systems of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe in assessing race-consciousness in the American voting system); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing abortion decisions by the West German Constitutional Court and the Canadian Supreme Court); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (stating that execution of juveniles violates norms agreed on "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"); *id.* at 851 (O'Connor, J., concurring in the judgment) (noting that the United States had agreed by ratifying Article 68 of the Geneva Convention to set a minimum age of eighteen for capital punishment in certain circumstances); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (relying on the Nuremberg Military Tribunals in arguing against nonconsensual medical experimentation on humans); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982) (not-

more than ever before, there is a growing acceptance of foreign influence in constitutional justice, particularly with regard to human rights.<sup>9</sup> Yet there are still profound normative questions regarding the extent to which such influence appropriately guides constitution-making and constitutional interpretation. These questions are the focus of this Review.

As the world globalizes economically, technologically, and politically, the burning question is the extent to which this integration is also taking place in the law.<sup>10</sup> Constitutional law appears to be the last frontier. Given constitutionalism's close nexus to national sovereignty, which is itself undisputably undergoing transformation, the comparative project faces new challenges.<sup>11</sup> Although comparative law previously might have been able to avoid discussing politics and international relations, the present extension of comparative analysis to constitutional questions makes avoidance of such issues impossible.

To a great degree, *Comparative Constitutionalism* follows an approach that assumes the normative questions raised above regarding the role of comparativism in constitutional law have clear and determinate answers. Much of this Review is dedicated to analyzing the methodology that is the basis for these assumptions. This Review explores these questions through discussion of the normative role of the comparative constitutional method. After all, the question of methodology goes directly to the authority and legitimacy of foreign law. This in turn relates to a longstanding debate in American jurisprudence concerning constitutional interpretation; questions about constitutional law's relation to politics and national identity; and the broader potential in political projects such as the rule of law, nation-building, empire,<sup>12</sup> or globalization.<sup>13</sup>

Part I introduces *Comparative Constitutionalism* and the central questions it raises about the method and aims of comparative constitu-

ing the elimination or restriction of felony murder in England, India, Canada, and a "number of other Commonwealth countries").

<sup>9</sup> For a discussion of the increasing importance of foreign sources, see *infra* Part IV. This trend is particularly evident in Eighth Amendment jurisprudence. See *Thompson*, 487 U.S. at 851-52. Compare *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (rejecting comparative data regarding the juvenile death penalty in other countries as irrelevant to the interpretation of the Eighth Amendment doctrine), with *Atkins*, 536 U.S. at 316-17 n.21 (noting the world community's disapproval of the death penalty for mentally retarded offenders). Regarding the earlier period of the use of foreign sources in constitutional interpretation, see *Trop v. Dulles*, 356 U.S. 86, 102 & n.35 (1958). See also *infra* notes 110-112 and accompanying text.

<sup>10</sup> On the processes of transnationalism, see Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

<sup>11</sup> See generally HELD ET AL., *supra* note 3.

<sup>12</sup> See generally MICHAEL HARTD & ANTONIO NEGRI, *EMPIRE* (2000); JACK SNYDER, *MYTHS OF EMPIRE: DOMESTIC POLITICS AND INTERNATIONAL AMBITION* (1991).

<sup>13</sup> See generally HELD ET AL., *supra* note 3.

tional law. Part II locates *Comparative Constitutionalism* in its intellectual history, identifying and discussing its “neofunctionalist” perspective.<sup>14</sup> Part III evaluates *Comparative Constitutionalism* from the “critical” perspective. Part IV discusses *Comparative Constitutionalism* from the “dialogical” perspective. Part V theorizes contemporary constitutional interpretation, elucidating the functionalist contribution as reflected in the paradigmatic uses of comparativism in contemporary constitutional rights jurisprudence.

This Review analyzes *Comparative Constitutionalism* from a methodological perspective, illuminating its interpretive ramifications in juxtaposition with those of other comparative approaches. It contends that *Comparative Constitutionalism*'s neofunctionalist method is limited in its capacity to comprehend comparative law's present role and evolution in contemporary globalizing politics. This neofunctionalist approach, which considers legal problems and their solutions in isolation, assumes comparativism's contribution as a general matter in contemporary globalizing conditions. Nevertheless, this reliance on abstraction has made the neofunctionalist perspective highly useful in the adjudicatory context and helps to explain the increasing interest in comparative practices.

## I. INTRODUCTION

*Comparative Constitutionalism* is an ambitious undertaking. Its aim is broad and sweeping: it seeks to canvass enduring answers to common constitutional questions. Its method is here termed “neofunctionalist.”<sup>15</sup> Divided into three parts, the casebook considers what a constitution is (ch. 1) and how it relates to the structure of governments (chs. 2–4). It then moves into polarized discussions of isolated rights or issues (chs. 5–10) and concludes by addressing the constitutional guarantees of democracy (ch. 11). The casebook assumes that “[c]omparison is at the center of all serious inquiry and learning” (p. 1) and that one should always conduct the inquiry with an eye to convergence. In this regard, *Comparative Constitutionalism* attempts to recover the comparativist project's longstanding ambition of reclaiming a belief in a coherent body of law:<sup>16</sup> “the study of law, naturally, should be drawn to — and benefit from — comparative analysis in general

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<sup>14</sup> The term “neofunctionalism” is coined here to distinguish functionalism's contemporary renaissance in constitutional law from its uses generally in comparative law. See sources cited *infra* notes 23–25. In sociology, see TALCOTT PARSONS, *ESSAYS ON SOCIOLOGICAL THEORY* (1954).

<sup>15</sup> The usage herein is not to be confused with neofunctionalism in international relations. See Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 *J. COMMON MARKET STUD.* 473, 474–75 (1993).

<sup>16</sup> Its actual normative potential is more limited. See *infra* Part IV.

and comparative constitutional analysis in particular" (p. 1). The casebook is a massive tome — the largest cross-cultural project of its kind. *Comparative Constitutionalism's* singular focus on problem solving, discussed below, enables comparative work outside a country-specific expertise. Given legal education's evident constraints in this regard, the casebook should have substantial appeal to the academy.

Yet *Comparative Constitutionalism* is largely silent regarding the nature and ramifications of its method. The casebook pursues a distinct comparative law methodology known as the "functionalist" approach,<sup>17</sup> although it does not mention this explicitly. First theorized in the 1900's, this approach treats comparative law as a technique of problem solving. The subject of comparative analysis is the legal problem, excised from its context: "The basis methodological principle of all comparative law is that of functionality."<sup>18</sup> Although scholars historically have applied functionalism to private law problems,<sup>19</sup> *Comparative Constitutionalism* extends this approach to the sorts of problems likely to arise in constitutional decisionmaking. At first blush, the casebook appears simply to extend historical functionalism, generalizing from comparativism in private law to its uses in public, constitutional law. Neofunctionalism's aim, as *Comparative Constitutionalism* reflects, is universal science, in which the existence of various constitutional systems is assumed and treated as amenable to comparative inquiry (pp. 10-44). Ultimately, the question that the casebook raises is whether functionalism's renaissance can transcend the various intellectual challenges to such theories of knowledge and thus allow a return to the firm belief in the rationalizing potential of the law. *Comparative Constitutionalism* answers that question in large part by applying neofunctionalism to today's practical realities.

## II. THE NEW FUNCTIONALISM IN HISTORICAL PERSPECTIVE

### A. Historical Functionalism

*Comparative Constitutionalism* builds on the longstanding functionalist approach to comparative law,<sup>20</sup> in which the relevant unit of analysis is not a geographic entity, such as a country or region, but is rather the problem and its legal solution. For generations of compara-

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<sup>17</sup> See KONRAD ZWIEGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 32-47 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998) (1977).

<sup>18</sup> *Id.* at 34.

<sup>19</sup> See *id.* at 36-40 (tracing the history of functionalism as it arose in private law); see also ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 6-9 (2d ed. 1993).

<sup>20</sup> See ZWIEGERT & KÖTZ, *supra* note 17, at 34; see also O. Kahn-Freund, *Comparative Law as an Academic Subject*, 82 L.Q. REV. 40 (1966).

tivists — the postwar generation in particular — functionalism was the preeminent approach to comparative law.<sup>21</sup> As Rudolph Jhering notes, “The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden.”<sup>22</sup>

In the mid-nineteenth century, comparative law was considered the international science of problem solving, distinguished by a universalizing method and epistemology. The comparative project promoted by the leading scholars in the field at the time, such as Rudolph Schlesinger and Konrad Kötz, focused on arriving at practical solutions. Indeed, the claim of comparative law — that it was *the* vehicle to legal truth — was even more ambitious:

[C]omparative law offers the only way by which law can become international and consequently a science. In the natural and medical sciences . . . discoveries and opinions are exchanged internationally. . . . But the position in legal science is astonishingly different. . . . Comparative law has started to put an end to such narrowmindedness. The primary aim of comparative law, as of all sciences, is knowledge.<sup>23</sup>

Moreover, comparativism’s origins in private law<sup>24</sup> rendered its subject matter easy to isolate from ambient politics.<sup>25</sup> Although two world wars, ensuing treaty-making, and the law reform movement fueled the interest in comparativism,<sup>26</sup> that interest would be short-lived and confined to discrete areas of the private law or to the immediate postconflict periods.<sup>27</sup>

### B. *The Advent of Neofunctionalism*

*Comparative Constitutionalism* posits a return to the reigning postwar comparative method. Transcending functionalism’s tradi-

<sup>21</sup> See ZWEIGERT & KÖTZ, *supra* note 17, at 15–21.

<sup>22</sup> See *id.* at 17 (quoting Rudolph von Jhering) (internal quotation marks omitted); see also Konrad Zweigert & Kurt Siehr, *Jhering’s Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L. 215, 215 (1971).

<sup>23</sup> ZWEIGERT & KÖTZ, *supra* note 17, at 15.

<sup>24</sup> See *id.* at 59 (referring to the “Paris Congress of Comparative Law of 1900”); see also RUDOLPH B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 9 (6th ed. 1998) (noting nineteenth-century American use of French and Dutch authorities in the private law context).

<sup>25</sup> For an elaboration of the private law origins and the facility of “transplant,” see O. Kahn-Freund, *On the Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 16–17 (1974). For a critical discussion, see *infra* pp. 2581–83. See also David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 599, 622–23 (1997). Comparativism’s origins in private law can also be seen in the movement’s beginnings in the United States. See ZWEIGERT & KÖTZ, *supra* note 17, at 57.

<sup>26</sup> See ZWEIGERT & KÖTZ, *supra* note 17, at 59–62.

<sup>27</sup> See *id.*

tional focus, *Comparative Constitutionalism* represents a sustained endeavor to revive this approach — this time with respect to constitutional law (p. 3). Historically, functionalism assumed that legal problems could simply be excised from their political context, a notion easy to sustain in private law. By contrast, the crux of neofunctionalism is the plausibility of the method's application to constitutional law — an area beyond its traditional purview.

Yet *Comparative Constitutionalism* never really grapples with the central question of its own purpose: how to justify extending the principles of functionalism to constitutional analysis. Instead, it presupposes that functionalism is a proper approach (p. iv).<sup>28</sup> The editors assert: "Without regard to whether problems and solutions are essentially similar across different constitutional systems, one can maintain that there is a significant degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracy" (p. 8).<sup>29</sup> But this notion appears to assume a shared understanding of the aims of constitutionalism that has not yet emerged. In the absence of such a common normative constitutional vision across societies, it is not clear what it means to engage in the "functionalist pursuit."

Nonetheless, the functionalists downplay any differences among constitutional democracies. The editors characterize the functionalist aim as the comparative study of constitutional responses across cultures and the evaluation of constitutional decisions in their respective constitutional systems and cultures. But the editors always proceed with an eye toward convergence among systems: "Although these difficulties should not be overlooked," the editors resolutely maintain, "they can be adequately managed through proper consideration of significant contextual differences" (p. 3). One might see this as an enlightened version of functionalism that recognizes the constitutional experiences of diverse cultures. Ultimately, however, the editors' position is that the areas of agreement among constitutional democracies outweigh the differences. At a minimum, their argument is for "a workable overlap." In the area of basic rights, however, their contention is more sweeping; they posit a "widespread overlap — if not underlying universalism — at the core" (p. 3).<sup>30</sup>

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<sup>28</sup> The editors commit to presenting problems "generically."

<sup>29</sup> For a discussion of the debate over how much convergence presently exists between common law and civil law systems, see Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 690 n.109 (2002). Reimann compares James Gordley's view that there is complete convergence with Pierre Legrand's opposite view. *See id.*

<sup>30</sup> Some of these assertions may well be borne out. *See infra* section V.C.

In its quest to forge a transatlantic inquiry, *Comparative Constitutionalism* often pursues a formalist method removed from the actual problems faced by constitutional regimes. The rationale behind this approach is that abstracting legal problems across different cultures necessitates a high level of generality. However, as the editors concede, the apparent similarities in such a framework can be misleading (p. 4).<sup>31</sup> This concession introduces doubts that go to the core of the functionalist project, as there is no prevailing agreement on the solutions to common constitutional problems. As a result, in adhering to the methodology of comparative legal science (p. iv), *Comparative Constitutionalism* abstracts problems from their particular contexts to arrive at a constitutionalism hardly identifiable with politics or place. The book's stated goal is to systematically offer a series of objective accounts of various constitutional systems with an eye toward evaluating the potential power of law. By focusing on a seemingly never-ending array of legal responses, the functionalist method attempts to show that law has affirmative potential. As Part V discusses, faith in the usefulness of functionalism, however overstated, may account for the current fashionableness of comparative constitutional adjudication.

Nevertheless, the ultimate issue at the heart of neofunctionalism is the relationship between the means and their ends. After all, this comparative project holds out the aspiration of defining a normative constitutionalism that is universal. The cumulative effect of a multiplicity of constitutional experiences, the editors contend, can lay a foundation for universal science (pp. 8–10): "If there were a universal ideal of 'constitutionalism,' then all constitutions could be evaluated according to the same criteria. Moreover, consistent with the prescriptions of constitutionalism, one could determine in what respects all constitutions ought to be alike and in what respects they could legitimately differ."<sup>32</sup>

This universalizing aim is manifest in the casebook's structure and its framing of the relevant problems, as well as in its other substantive choices. Avoiding the thickets of political realities, the casebook seeks to provide a culturally neutral, panoptic perspective on constitutionalism. Its object is to "present[] issues generically" (p. iv), detached from constitutional particulars (p. iv).<sup>33</sup> Abstracting the issues from their relevant contexts enables the editors to construct a constitutional ideal.

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<sup>31</sup> Dorsen and his coeditors note, for example, that comparativists may overestimate similarities for ideological reasons (p. 9) (citing Günther Frankenberg, *Stranger than Paradise: Identity and Politics in Comparative Law*, 1997 UTAH L. REV. 259, 262–63).

<sup>32</sup> DORSEN ET AL., *TEACHER'S MANUAL TO ACCOMPANY COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1-3* (2003) [hereinafter *TEACHER'S MANUAL*].

<sup>33</sup> See also *id.* at i (referring to the editors' effort to present issues "generically rather than as characterized in particular constitutional systems").

However, this endeavor seems paradoxical: if the aim of the functionalist project depends on the pursuit of an ideal constitutionalism constructed largely by processes of abstraction, how can the editors proceed to evaluate this normative good of constitutionalism outside a political and social context? The absence of an adequate definition of terms makes it difficult to address the normative questions raised here regarding the potential role of comparativism in constitution-making or constitutional interpretation. Furthermore, as is elaborated below, the functionalist approach to the definitional query is to abstract constitutional problems from their contexts. This approach does not pay adequate attention to the extent to which constitutional problems are informed by politics and culture.

### III. METHODOLOGICAL PERSPECTIVES ON THE NEW FUNCTIONALISM

#### A. *The Problem of Defining Constitutionalism: Methodological Consequences*

Although *Comparative Constitutionalism* generally eschews an open discussion of methodology, the editors' approach is implicit in the framing of the various constitutional issues as well as in the casebook's attempt to abstract constitutional problems from their contexts.

The definitional problem is reflected in the casebook's introductory discussion of the foundational question, "What is a Constitution?" (pp. 1-98), in which the editors define their subject matter. Dorsen and his coeditors reproduce Michel Rosenfeld's taxonomy of four constitutional models: German, French, American, and Spanish (p. 42). Introduced as "prototypes" (p. 44), each of these four constitutional schemes reflects a different form of identity: the German, *ethnos*; the French, *demos*; the American, nation; the Spanish, a broader regional identity (p. 42). Although these models offer the promise of a constitutional norm, they are discussed only briefly. Evaluation of these diverse constitutional schemes is difficult in the absence of a normative constitutional vision. In any event, these are not overarching models intended to guide the structure of the book, as other models are similarly introduced elsewhere in the book (pp. 16-21, 72-87).<sup>34</sup>

The editors again take up the nature of constitutionalism in their discussion of "[c]onstitutions [b]eyond the [n]ation-[s]tate" (pp. 47-66). Here, the topic is how contemporary global transformation affects prevailing assumptions about a constitutional regime's nexus to the state

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<sup>34</sup> The book provides an excerpt addressing the relationship between constitutionalism and the rule of law and provides excerpts and discussion on four distinct models of constitution-making in modern history. See *infra* notes 49-50.

and spurs the rise of apparently independent transnational normative regimes. In the end, we are led to conclude that globalism brings contradictory consequences for comparative constitutional analysis: political centralization and decentralization; fragmentation and unification.<sup>35</sup> Consequences follow for new understandings of what constitutes a constitutional regime, as well as for the status and treatment of supranational constitutionalism. These developments in transnational constitutional regimes support an expanded rationale for comparative constitutional law.<sup>36</sup> This does not escape *Comparative Constitutionalism*, which is poised at the forefront of these global changes. A chapter is devoted to the definition of a constitutional regime. The editors take a capacious view of the inquiry, considering transnational constitutional regimes like the European Human Rights Convention (pp. 47–66).<sup>37</sup>

Might political changes necessitate redefining the notion of a constitutional regime? Here, as always, the editors frame the relevant rule in terms of their broader operative approach: “The question is . . . how they function. Do they — or can they — function as constitutions?” (p. 47) This inquiry, however, appears to assume an antecedent analytic conception regarding what a constitution is supposed to do. It fails to address the questions raised by constitutionalism’s expansion beyond the nation-state, the juridical consequences of their analytical approach, a recognition rule, or a cabining principle in comparative constitutional analysis (p. 47–71).

Neofunctionalism’s normative vision pervades the editors’ framing of the constitutional issues. The chapter titled “Constitutional Guarantees of Democracy” (pp. 1267–1373) addresses those constitutional rights that relate to assuring democratic government. It endeavors to abstract the constitutional problem from its contextual factors in the hope of identifying best practices. The relevant issues are represented as timeless and universal. Consider the treatment of political parties in U.S. and European constitutional law. Although in the United States, except with respect to the First Amendment, political parties do

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<sup>35</sup> See Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183, 183–86 (describing the emergence of “transgovernmentalism,” in which distinct institutions of the state disaggregate and network with their counterparts in other countries).

<sup>36</sup> There is a substantial and growing literature on the changing nature of sovereignty. See, e.g., GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); HELD ET AL., *supra* note 3; SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS (1999). But see STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999) (arguing against the notion that the nature of state sovereignty is changing).

<sup>37</sup> The Supreme Court has also taken an expansive view of constitutionalism in recent decisions, invoking the European Court of Human Rights as representative of “western tradition.” See *infra* pp. 2591–92. Strangely, this transnational regime is being invoked as a constitutional regime.

not have special status under the Constitution,<sup>38</sup> in Europe party politics are subject to greater scrutiny and have more constitutional significance.<sup>39</sup> Understanding the basis for these differences requires a consideration of the differences between the natures of presidential and parliamentary democracies. In the casebook's discussion of Germany's close constitutional review of political parties,<sup>40</sup> known as "militant democracy," the editors assert that "the protection of democracy against its enemies is a matter that states confront at all times" (p. 1276), suggesting that vigilance is essential to constitutionalism. Yet militant democracy is a distinct postwar response that is associated with a particular political and constitutional history and that assumes a normative take on constitutional democracy. The editors' inquiry does not address the relevance of values to constitutional protection of democracy or the extent to which "militant democracy" raises critical tradeoffs best understood in light of the unique features of a particular legal and political culture. Indeed, current events, such as the campaign against terrorism, render comparative analysis of constitutionalism and democracy all the more relevant, giving rise to a demand for constitutional principles that are flexible enough to adapt to changing conditions.<sup>41</sup> The politics of neofunctionalism is elaborated further in the next Part.

### B. *The Critical Legal Studies Perspective*

*Comparative Constitutionalism's* methodology may be best understood in light of other perspectives on the field, notably critical legal theory.<sup>42</sup> The Critical Legal Studies (CLS) critique focuses on the functionalist enterprise's method and aims and on whether constitu-

<sup>38</sup> Most constitutional law casebooks include little or no mention of political parties. See, e.g., GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (4th ed. 2003). On the constitutionalization of political parties, see Samuel Issacharoff, *The Structures of Democratic Politics*, 100 COLUM. L. REV. 593, 593-97 (2000). See also KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* (14th ed. 2001).

<sup>39</sup> See, e.g., GRUNDGESETZ [GG] [Constitution] art. 21 (F.R.G.).

<sup>40</sup> *Id.* ¶ 2. For a discussion of this article, see DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 200-16 (2d ed. 1997).

<sup>41</sup> Indeed, more than one Justice on the Court has suggested that the area of constitutional rights relating to terrorism demands international cooperation and the study of comparative constitutionalism. See Justice Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 15, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 349, 350 (2002); see also *Terrorism and Civil Liberties*, in *GLOBAL CONSTITUTIONALISM: PRIVACY, PROPORTIONALITY, TERRORISM AND CIVIL LIBERTIES* (Paul Gewirtz & Jacob Katz Cogan eds., Supp. 2002); *Terrorism: Detention, Judicial Responsibilities*, in *GLOBAL CONSTITUTIONALISM: TERRORISM, FREEDOM OF EXPRESSION, THE PROPOSED EUROPEAN CONSTITUTION* (Paul Gewirtz & Jacob Katz Cogan eds., Supp. 2003).

<sup>42</sup> For a discussion of critical legal theory in comparative law, see David Kennedy, *supra* note 25. For a general discussion of critical theory, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

tional law can plausibly be conceptualized as a universal legal science. Although CLS, of course, has grounded its major methodological critique in the area of private law,<sup>43</sup> it is now extending these arguments to the area of constitutional law, which one might well expect to be even more dependent on politics. What is it that is being compared when the subject is an abstracted legal response? From the CLS perspective, the functionalist project is of limited value because the functionalist comparative constitutional analysis tends to elide political, economic, and social realities in its quest to identify legal regimes that can be transplanted across national lines.<sup>44</sup>

Although in the neofunctionalist account comparative constitutional law is treated as a mechanism that is amenable to independent study, the CLS critique would instead give a narrative about a constitutional law that is deeply contingent upon political, historical, social, and economic realities. In this regard, one might contrast the approach pursued in another recent casebook, *Comparative Constitutional Law*,<sup>45</sup> in which Vicki Jackson and Mark Tushnet seek to account for historical and political context<sup>46</sup> and, more particularly, for the politics of democratic transformation.<sup>47</sup> While Dorsen et al.'s neofunctionalist logic is timeless and universal,<sup>48</sup> for Jackson and Tushnet the relevant inquiry is historical and political.<sup>49</sup> From the perspective of a hermeneutics associated with political, historical, and cultural contingency, the critical theory critique better accounts for constitutionalism's changing and particular dimensions, questioning whether transcultural comparativism is even possible and challenging functionalism's emphasis on constitutionalism in common.

The parts of the book discussed below address questions about constitutionmaking, the allocation of government power, and constitutionalism's relation to the rule of law and democracy. In their section titled "Constitution-Making in Historical Perspective" (pp. 72–88), Dorsen and his coeditors survey the constitutional phenomena across world history, proposing "four different models of constitution-making

<sup>43</sup> See, e.g., Morton Horwitz, *THE TRANSFORMATION OF AMERICAN LAW: 1860–1960* (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 79 HARV. L. REV. 1685 (1976).

<sup>44</sup> See, e.g., Günther Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 440 (1985).

<sup>45</sup> JACKSON & TUSHNET, *supra* note 4, at 182–89.

<sup>46</sup> See *id.* at 251–354.

<sup>47</sup> For a discussion of the law and politics of democratic transformation, see, for example, RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000). See also JACKSON & TUSHNET, *supra* note 4, at 251–356.

<sup>48</sup> See *supra* pp. 2577–78.

<sup>49</sup> See JACKSON & TUSHNET, *supra* note 4, at 182–89. On practices of self-reflection in comparative analysis, see Frankenberg, *supra* note 44, at 441–43.

[that] have emerged since the eighteenth century": a model associated with violent revolution; a second model associated with postwar foreign occupation; a third model associated with peaceful transition from authoritarianism to democracy; and a fourth model associated with postcolonial nation-building (pp. 72–73). Although the models appear to be structured according to political provenance, in the recent wave of political transitions, constitution-making processes have become more complex, and have affected functionalism's capacity to abstract constitution-making processes from myriad political and historical factors. It is unclear how this analytical framework can help guide contemporary constitutional projects, such as those in Afghanistan or Iraq.

In recent decades, rapid political change has spawned new areas of study and stirred related comparative constitutionalism to vital debates regarding the role of the law in political transformation.<sup>50</sup> These developments raise questions regarding constitutionalism's relation to political change. Whereas the neofunctionalist approach tends to understate the significance of political change, the critical approach may well overstate the significance of such developments. While Dorsen and his coeditors seek to abstract, Jackson and Tushnet endeavor to situate various constitutional problems in their animating political circumstances.<sup>51</sup> As such, Jackson and Tushnet devote large portions of their casebook to the exploration of constitutional law in periods of political transformation,<sup>52</sup> such as postwar and post–Cold War constitutionalism.<sup>53</sup>

### C. Illustrations

The two casebooks' discussions of foundational issues, such as constitutional law's normative relation to the rule of law and democracy, highlights their difference methodologies. Following the functionalist approach, Dorsen and his coeditors endeavor to systematize the relationship by proposing three models: German, French, and Anglo-American, each reflecting a distinct understanding of the rule of law (pp. 16–21). For example, to elucidate the German "*Rechtsstaat*" law-based approach, the editors juxtapose a leading Hungarian

<sup>50</sup> See TEITEL, *supra* note 47, at 3–9.

<sup>51</sup> JACKSON & TUSHNET, *supra* note 4, at 334–56.

<sup>52</sup> See *id.* at 251–356. For an analysis of transitional constitutionalism, see TEITEL, *supra* note 47, at 191–211.

<sup>53</sup> For a discussion of post–World War II constitution-making, see CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 225–59 (Louis Henkin & Albert J. Rosenthal eds., 1990). For a discussion of post–Cold War constitutionalism, see Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 COLUM. HUM. RTS. L. REV. 167 (1994).

constitutional court decision establishing that country's foundational rule of law (p. 21–28). But the models alone cannot fully explain the bases for the divergent constitutional court decisions, which strike varying balances of the relative rule-of-law values of foreseeability and fairness. Jackson and Tushnet's discussion of the same question incorporates historical materials and commentary regarding the rule of law's more political dimensions; this approach helps to show the extent to which the construction of legality — particularly in transitional constitutionalism — is both contingent and determinate.<sup>54</sup> Jackson and Tushnet's analysis elucidates that the rule of law involves a balance of values, often constituting transformative responses to prior illegality.<sup>55</sup> Neofunctionalism helps to understand the affinities in comparative legal phenomena, while CLS helps to understand the differences.

One might also compare these divergent approaches by looking to their respective treatment of the separation of governmental powers within the broader political arrangement. In reflecting upon institutional structures in constitutional arrangements, *Comparative Constitutionalism* incorporates an extraordinarily comprehensive discussion of the separation of powers in parliamentary and presidential democracies (pp. 212–349). Still, evaluation of constitutional developments regarding the separation of powers necessitates more attention to the historical and political context. By including the particular political, economic, and social conditions, the critical perspective better explains the present allocation-of-powers phenomena, such as presidentialism's renaissance, and their risks for democracy.<sup>56</sup>

#### *D. The Limitations of the Critical Legal Studies Approach*

While appealing in some respects, the CLS critique too has its distinct limits. Although it is often framed as universally applicable, the CLS insight is not equally apposite in all contexts.<sup>57</sup> Indeed, the critical approach is most relevant to moments of political transformation when it illuminates the law and politics of constitutional foundings and transitions. Contributing the additional political context helps to reveal the contradictions in the enterprise. Beyond these circumstances, however, the approach does not appropriately account for ar-

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<sup>54</sup> See JACKSON & TUSHNET, *supra* note 4, at 334–56.

<sup>55</sup> For discussion of this legal phenomenon, see Ruti Teitel, *Paradoxes in the Revolution of the Rule of Law*, 19 YALE J. INT'L L. 239 (1994).

<sup>56</sup> See Alfred Stepan & Cindy Skach, *Presidentialism and Parliamentarism in Comparative Perspective*, in THE FAILURE OF PRESIDENTIAL DEMOCRACY 119, 120 (Juan J. Linz & Arturo Valenzuela eds., 1994) (analyzing and cautioning against the rise of the presidential regimes with reference to the various historical, political, and economic forces in play).

<sup>57</sup> See, e.g., Frankenberg, *supra* note 44.

eas of constitutional affinity and consensus, and therefore can offer only a limited theory of comparative constitutional interpretation.<sup>58</sup>

The CLS critique of neofunctionalism transcends politics because the criticism goes to the central universalizing aims of this ambitious comparative constitutional project.<sup>59</sup> Whereas the critique goes to the likely illegitimacy of a constitutional law extending beyond political parameters, functionalism's universalizing dimension has nevertheless garnered support from recent globalizing political changes that have invigorated the present interest in transnational constitutionalism.

#### IV. THE DIALOGICAL APPROACH

##### A. Global Challenges

Globalization is now spurring an alternate theory of comparative law and politics that endeavors to account for the processes of constitutional change with reference to present political realities. Recent globalizing changes have affected the very basis for juridical identity and subjectivity in the transnational sphere, with attendant consequences for comparative practices.

##### B. Comparative Constitutionalism as Discourse

*Comparative Constitutionalism* depends upon the notion of a universal constitutional ideal that presently lies beyond constitutional realities. As discussed below, however, neofunctionalist logic does not offer a way to fully elucidate normative constitutional evolution.

In the present context of a globalizing politics, a new approach, here characterized as the "dialogical" perspective,<sup>60</sup> offers such a strategy by theorizing comparative constitutionalism as a dynamic interpre-

<sup>58</sup> For compelling critical analysis in comparativism, see Kennedy, *supra* note 25; and Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

<sup>59</sup> See, e.g., Frankenberg, *supra* note 31; Kennedy *supra* note 25. The challenge to universal comparative law, however, is not confined to CLS. See George P. Fletcher, *The Universal and the Particular in Legal Discourse*, 1987 BYU L. REV. 335; Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 535 (1992). Even where problems appear similar, legal solutions differ due to societal context. See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 10 (2d ed. 1994). For a related formulation of the criticism, see Klaus Günther, *Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory* (n.d.), available at <http://www.law.nyu.edu/clppt/program2003/readings/gunther.pdf>.

<sup>60</sup> See HELD ET AL., *supra* note 3, at 49–52 (asserting that the leading exponents come from international legal studies and aimed at international order). See generally David Kennedy, *supra* note 25, at 581; Koh, *supra* note 10 (discussing the relationship between transnational legal process and international relations); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) (discussing the implications of a globalizing self-conscious judiciary on international and national politics).

tive and discursive practice.<sup>61</sup> Identified closely with the most recent wave of constitutional reforms, and the attendant expansion of constitutional review,<sup>62</sup> this view of a contemporary transnational constitutional regime offers an alternative basis from which to justify comparativism that is grounded in the processes of judicial review.<sup>63</sup> This theory suggests that comparative constitutionalism practices can be legitimated by the prestige of other judiciaries,<sup>64</sup> particularly the new constitutional courts.<sup>65</sup> The force of this normative vision is borne out by the heightened judicialization<sup>66</sup> in countries that either lacked judicial institutions with legitimacy<sup>67</sup> or lacked institutions of judicial review altogether.<sup>68</sup>

Whereas the neofunctionalist approach focuses on the constitutional problem and its solution, the dialogical approach focuses on the processes of constitutional interpretation (p. 207).<sup>69</sup> Although in the

<sup>61</sup> See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192–94 (2003) [hereinafter Slaughter, *A Global Community of Courts*]; Slaughter, *supra* note 60, at 1104. Related to this dynamic, communicative approach, is the idea that law has been viewed as a form of rhetoric that is “the central art . . . transformed.” James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985). There are several prominent examples of a discursive approach to constitutional law. See, e.g., PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (3d ed. 1992); JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1994) (1981); ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

<sup>62</sup> See Teitel, *supra* note 1, at 169 (“The post-communist constitutional courts point to a form of judicial review that is actively involved in delimiting the lawmaking of the new states.”).

<sup>63</sup> See Slaughter, *A Global Community of Courts*, *supra* note 61, at 194–96 (2003) (referring to “dialogue” and the emergence of “a community of courts”).

<sup>64</sup> On judicial theory generally, see MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981). On comparative judicial review, see A.R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW (1989); and MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (Paul J. Kollmer ed., 1996).

<sup>65</sup> See, e.g., Teitel, *supra* note 1, at 186–87.

<sup>66</sup> The courts have, for example, taken on a major role in addressing the *political* implications of joining the European Union. See, e.g., *Maastricht Treaty Case*, 89 BVerfGE (1993) (challenging the constitutionality of Germany’s participation in the European Union in Germany’s Federal Constitutional Court). Germany’s Federal Constitutional Court arguably has a history of addressing such issues. See *Southwest Case*, 1 BVerfGE 14 (1951) (addressing the sovereignty of states in postwar Germany); see also KOMMERS, *supra* note 40, at 50–57, 108–09; Teitel, *supra* note 1, at 182–90. The notion of what is a political question is itself controversial and contingent.

<sup>67</sup> See TEITEL, *supra* note 47, at 22–26; Teitel, *supra* note 55 (discussing the difficulties faced by developing judiciaries in countries previously lacking judicial legitimacy).

<sup>68</sup> See KOMMERS, *supra* note 40, at 4–7 (discussing the history of constitutional review and judicial review in Germany).

<sup>69</sup> Anne-Marie Slaughter and Harold Koh are leading proponents of this dialogical view. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1502, 1512–14 (2003) (defining “transnational legal process” and proposing that legal interpretations should be sought

functionalist view there are fixed paths of adjudicatory development, in the discursive view there is no necessary directionality. Instead, what is contemplated is a move from diffusion and reception to dialogue — from the transfer of foreign law to an active engagement with it.<sup>70</sup> Comparative exchange is not bound in path-dependent or hierarchic ways. Rather, it poses a comity-based<sup>71</sup> “transjudicial[.]” enterprise<sup>72</sup> — a decentered view of constitutional practices<sup>73</sup> deriving from pluralist sources, with the possibility of “cross fertilization.”<sup>74</sup>

### C. Dialogism and Constitutional Change

Dialogism makes an ambitious argument in favor of normative comparative constitutionalism.<sup>75</sup> In the dialogical conception, comparative practices in judicial review offer a dynamic process apt to producing constitutional change. Most significantly, this view contemplates a way to constitutional evolution that is potentially independent of politics.<sup>76</sup>

Following the dialogical approach, the potential for comparative constitutional analysis goes beyond its uses in domestic constitutional adjudication. When engaged in by a transnational judiciary, comparativism offers the potential for global solidarity:<sup>77</sup> the concerted turn outward enables alternative justifications to form the basis of principled decisionmaking.<sup>78</sup> Through pluralizing rationales, comparativism

on a global rather than exclusively domestic basis); Slaughter, *A Global Community of Courts*, *supra* note 61; *see also* Slaughter, *supra* note 60.

<sup>70</sup> *See* Slaughter, *A Global Community of Courts*, *supra* note 61, at 196.

<sup>71</sup> *See id.* at 194 (arguing for an evolving doctrine of “judicial comity”); *see also* Slaughter, *supra* note 60, at 1112.

<sup>72</sup> *See* O’Connor, *supra* note 41, at 350.

<sup>73</sup> *See* Jürgen Habermas, *Interpreting the Fall of a Monument*, 4 GERMAN L.J. 701, 707–08 (2003) (arguing for judicial and other reciprocity to advance cosmopolitanism).

<sup>74</sup> *See* Slaughter, *A Global Community of Courts*, *supra* note 61, at 193. To some extent, the discourse harkens back to earlier comparativist scientizing. *See, e.g.*, Zweigert & Siehr, *supra* note 22.

<sup>75</sup> On the proposed link between discourse and solidarity, *see* Jürgen Habermas, *Justice and Solidarity: On the Discussion Concerning Stage 6*, in *THE MORAL DOMAIN: ESSAYS IN THE ONGOING DISCUSSION BETWEEN PHILOSOPHY AND THE SOCIAL SCIENCES* 224, 243–49 (Thomas E. Wren ed., 1990). *See also* Fletcher, *supra* note 59; Glendon, *supra* note 59, at 519–20.

<sup>76</sup> This approach, in contrast to that of CLS, emphasizes the juridical rather than the political or economic basis for comparative exchange.

<sup>77</sup> *See* Slaughter, *A Global Community of Courts*, *supra* note 61, at 218–19 (noting that transnational adjudication can contribute to a “global community of courts”).

<sup>78</sup> For example, consider reliance on cosmopolitan law, defined as “those elements of law — albeit created by states — which create powers and constraints, and rights and duties, which transcend the claims of nation-states and which have far-reaching national consequences.” HELD ET AL., *supra* note 3, at 70. The cosmopolitan project attempts to specify the principles and institutions for making sites and forms of power, which presently lie beyond the scope of state democratic processes. *See id.* at 449–50. *See generally* Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REF. 751 (1992). For a related claim that proposes

in judicial review offers potential cosmopolitan effects that may well transcend any individual state. Although this view derives some support from the significant contemporary increase in the use of comparative analysis in domestic constitutional courts, as discussed below, this globalizing potential is most evident in the area of human rights — an area that is by nature transnational.

## V. THEORIZING COMPARATIVE CONSTITUTIONAL INTERPRETATION

### A. *Constitutional Continua*

*Comparative Constitutionalism* makes an ambitious claim for comparative analysis's relevance to a wide range of constitutional problems. While contemporary constitutional adjudication gives some support to the functionalist assumptions, the comparativist role in constitutional interpretation is more circumscribed, and is best rationalized in terms of practices in conditions analogous to those of constitutional change, primarily involving discrete areas of unsettled law.<sup>79</sup> Foreign authority's dynamic influence, it is contended, can be best understood along a continuum of constitutional development. Here, a functionalist understanding of comparativist practices is most apt: it is a mode of analysis offering alternative bases for the resolution of constitutional issues, but limited to particular conditions of legal change.

Foreign sources are at their most persuasive in distinct periods associated with heightened political transformation. In the United States, as in other countries, comparative practices are demonstrably associated with various stages of normative transformation in foundational periods of nation-building and consolidation. Thus, the American constitutional tradition has been subject to the influence of foreign law in varying degrees in various periods of political and juridical transformation.<sup>80</sup> Reflection on how American constitutional practices

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judicial review modeling democratic self-determination, see Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74–77 (1986).

<sup>79</sup> For example, the U.S. Supreme Court reversed itself on the constitutionality of the death penalty. Compare *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that the death penalty as then applied in the United States was unconstitutional because of unguided jury discretion), with *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding some degree of jury discretion in capital sentencing).

<sup>80</sup> See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928) (suggesting that judicial processes model fledgling integration); cf. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1135–46, 1177 (1987) (noting that the practice of referring to foreign law, normally imperial charters, the "law of nations," and national law as a component of judicial review predates constitutional law).

have changed over the years reveals a circumscribed role for comparative analysis at dynamic junctures in the legal order.

Potential guiding principles regarding the influence of comparative law in American constitutional doctrine can be located along a constitutional timeline. First, Justices are willing to integrate foreign sources when comparativism goes to constitution-making, rather than constitutional interpretation, as there is a conceded legitimacy to preconstitutional consultations.<sup>81</sup> Thus, in Justice Scalia's words, "comparative analysis [is] inappropriate to the task of interpreting a constitution, though it [is] of course quite relevant to the task of writing one."<sup>82</sup>

Once there is constitutional supersession, the normative question concerning the legitimacy and authority of comparativist analysis is subsumed within the broader question concerning constitutional interpretation. As part of this more general inquiry, comparative constitutionalism ought to be reconcilable with originalist principles of judicial review. For long stretches of legal history, comparativist practices were noncontroversial, as such experience was readily associated with common law tradition.<sup>83</sup> From its inception, the colonial judiciary referred to English law, Norman law, and other classical influences.<sup>84</sup> Historically, the very idea of "higher" law was informed by international and foreign sources.<sup>85</sup> Comparative constitutionalism interrogated foreign mores as a step in the pursuit of universal morality.

<sup>81</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) ("We emphasize that [when interpreting the Eighth Amendment] it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.")

<sup>82</sup> *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997). There may be important methodological differences between the ways in which common law and civil law jurisdictions treat foreign sources. For example, South Africa, a common law jurisdiction, offers a current comparative constitutional jurisprudence of a young, scarcely interpreted constitution. The constitution itself draws its attention to foreign sources. See S. AFR. CONST. § 39(1)(c). Thus, South African courts more readily appeal to foreign sources. See, e.g., *S v. Makwanyane*, 1995 (3) SALR 391 (CC), 519-20 (Sachs, J., concurring) ("Germany after Nazism, Italy after fascism, and Portugal, Peru, Nicaragua, Brazil, Argentina, the Philippines and Spain all abolished capital punishment for peacetime offenses . . . It is not unreasonable to think that similar considerations influenced the framers of our Constitution as well.")

<sup>83</sup> See THE FEDERALIST NOS. 18-20 (James Madison); see also THE FEDERALIST NO. 63, at 425-30 (James Madison), NOS. 67, 69, 83, 84, at 452-53, 463-65, 568, 577-78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (referring to foreign constitutional precedents); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

<sup>84</sup> See WATSON, *supra* note 19, at 65-70 (discussing the early law of the Massachusetts Bay Colony).

<sup>85</sup> See ZWEIGERT & KÖTZ, *supra* note 17, at 57-59. Indeed, the notion of universal rights, as a matter of higher law, underlies the theory of international law. Thus, it is informative to consider the link between comparative constitutional law and the sources of international law. See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060 (providing that international custom offers evidence of a general practice accepted as law).

Moreover, comparative analysis allowed states to move beyond indigenous law in pursuit of legal transformation. This is evident, for example, in the post-Reconstruction and New Deal United States, when constitutional interpretation relied on comparativism for defining and consolidating national standards.<sup>86</sup> The relevant inquiry during these periods was whether the right at issue was a “fundamental principle of liberty and justice which inheres in the very idea of free government.”<sup>87</sup> Although the invocation of foreign standards in rights inquiries dislodged the sense of complete autonomy associated with national law, it did not necessarily move constitutional doctrine in a rights-expanding direction.<sup>88</sup> Nevertheless, this stage of national legal consolidation illuminates the potential of comparative constitutional law to play a dynamic role in the development of national standards.

At present, in a period of change toward a singular global order, the potential normative role of comparative constitutional law is taking on new urgency.<sup>89</sup> The U.S. Supreme Court is engaging more often with foreign sources in constitutional interpretation.<sup>90</sup> A consensus appears to be forming regarding the relevance of foreign sources, at

<sup>86</sup> See, e.g., *Trop v. Dulles*, 356 U.S. 86, 102 & n.35, 103 (1958) (referring to the “virtual unanimity” of “[t]he civilized nations of the world”); *Palko v. Connecticut*, 302 U.S. 319, 326 n.3 (1937) (comparing the protection against self-incrimination in the United States to that in continental Europe); *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>87</sup> *Twining*, 211 U.S. at 106.

<sup>88</sup> For example, analogies to foreign law would sometimes work against the incorporation of national standards. For a probing analysis of this “flexible-natural law” interpretive approach, see Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 *YALE L.J.* 319 (1957).

<sup>89</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion) (noting a consensus regarding imposition of the death penalty on minors among “nations that share our Anglo-American Heritage”). Compare *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (describing a case in which the European Court of Human Rights held that a law prohibiting consensual homosexual conduct violated European law), *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (“[W]ithin the world community, imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”), and *Stanford v. Kentucky*, 492 U.S. 361, 390 (1988) (Brennan, J., dissenting) (“Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.”), with *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting) (dismissing the Court’s discussion of foreign views as “meaningless dicta”), *Atkins*, 536 U.S. at 324–25 (Rehnquist, C.J., dissenting) (asserting irrelevance of “the views of other countries regarding the punishment of their citizens”), and *Stanford*, 492 U.S. at 369 n.1 (“We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.”).

<sup>90</sup> See cases cited *supra* note 8; see also *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (noting that “comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one”). Although this debate is taking place now, this is certainly not the first time the Court has engaged in comparative analysis in constitutional adjudication. Foreign materials were used at the founding of the United States and also at other times of national unification and political flux. See *infra* pp. 2591–92.

least within circumscribed parameters.<sup>91</sup> The justification for comparativist analysis is couched largely in functionalist terms: as a basis for the resolution of specific constitutional issues, particularly in areas of unsettled law. Seven years ago, Justice O'Connor asserted that "[o]ther legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit."<sup>92</sup> More recently, she noted, "[w]hile ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here."<sup>93</sup> She added in a speech this year, "I suspect that over time, we will rely increasingly — or take notice at least increasingly — [of] international and foreign law in resolving domestic issues."<sup>94</sup>

Similarly, Justice Breyer has described the value of comparative constitutionalism as dealing primarily with "open questions": "[W]e face an increasing number of . . . constitutional issues, where the decisions of foreign courts help by offering points of comparison."<sup>95</sup> In a recent decision concerning federalist structures, Justice Breyer advocated the use of comparative material where "other countries [face] the same basic problem."<sup>96</sup> He acknowledged that "there may be relevant political and structural differences between their systems and our own," but argued that "[t]heir experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."<sup>97</sup> In both rhetoric and opinions, the current Court increasingly relies upon the functionalist rationale for its growing comparative constitutional jurisprudence.

### B. Comparative Practices — Adjudicatory Constraints

Comparative analysis in constitutional adjudication has distinct parameters — it is not unbounded. Nonetheless, functionalism appears

<sup>91</sup> See *infra* notes 118–132 and accompanying text. One common scenario for reliance on foreign law is during periods of political transformation. On constitutional moments, see 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 345–82 (1998), which affirms the role of constitutional interpretation in constitutional transformation. For a gradualist view, see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009 (1997).

<sup>92</sup> Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, *INT'L JUD. OBSERVER*, June 1997, at 2.

<sup>93</sup> O'Connor, *supra* note 41, at 350.

<sup>94</sup> See Jonathan Ringel, *O'Connor Speech Puts Foreign Law Center Stage*, *FULTON COUNTY DAILY REP.*, Oct. 31, 2003, <http://www.law.com/jsp/article.jsp?id=1067350962318>.

<sup>95</sup> See Justice Stephen Breyer, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), in 97 *AM. SOC'Y INT'L L. PROC.* 265, 266 (2003).

<sup>96</sup> *Printz v. United States*, 521 U.S. 898, 976 (1996) (Breyer, J., dissenting).

<sup>97</sup> *Id.* at 976–77.

to explain well the force of comparative constitutionalism in a common law system. With the constitutional problem front and center, functionalism is a useful device aiding judicial activism in the comparativist enterprise.<sup>98</sup> Moreover, as is elaborated below, the method has its roots in American constitutional tradition.

Adjudicatory practices illuminate political structures and a transnational nexus. In the American constitutional context, the adjudicatory structure itself suggests the limits on (or parameters of) foreign authority. The reasons may well hearken back to the differences in legal cultures that fuel comparative legal science.<sup>99</sup> In the United States, the relative willingness to look at foreign materials appears to depend less upon judicial philosophy<sup>100</sup> than upon factors that relate to case law and its parameters.<sup>101</sup>

Prevailing adjudicatory practices, particularly in the Supreme Court, reflect the distinct parameters of the comparative enterprise. The turn outward to foreign law reveals alternative operating principles, proxies for the usual nation-bound bases for judicial review. There is always a nexus between the domestic and foreign authorities being compared, whether it is couched in terms of legal culture or political tradition.<sup>102</sup> For the first half of the twentieth century, in U.S. constitutional jurisprudence, the relevant nexus was defined on the basis of a community of language, notably of "English-speaking nations."<sup>103</sup> This principle was ultimately abandoned, however, because it lacked meaningful parameters.<sup>104</sup>

<sup>98</sup> Thus, Justice Breyer has referred to the judiciary's instrumentalization in the evolution of human rights law. Breyer, *supra* note 95, at 266 (referring to independent judiciaries as instruments to implement human rights law).

<sup>99</sup> See BREWER-CARIAS, *supra* note 64 (discussing varying approaches to judicial review); see also CAPPELLETTI, *supra* note 64.

<sup>100</sup> See *Printz*, 521 U.S. at 976-78 (Breyer, J., dissenting) (employing functionalist considerations to advocate a comparative analysis). Indeed, comparativists on the court are generally identified by their pragmatic, case-by-case methodology. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003).

<sup>101</sup> See *Printz*, 521 U.S. at 921 n.11.

<sup>102</sup> See, e.g., *Knight v. State*, 721 So. 2d 28 (Fla. 1998), *cert. denied*, 528 U.S. 990, 995-97 (1999) (Breyer, J., dissenting from denial of certiorari) (referring to court rulings in Great Britain, Jamaica, India, Zimbabwe, and Canada — all part of the Anglo-American common law tradition).

<sup>103</sup> See, e.g., *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (arguing that the regulation at issue "involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty'"); *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (referring to "the history and basic constitutional documents of English-speaking peoples"); *Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (interpreting due process in light of the history of freedom of English-speaking peoples); *Otis v. Parker*, 187 U.S. 606, 609 (1903) (referring to constitutions as "generally understood by all English-speaking communities").

<sup>104</sup> See *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring) (questioning a limit to "English-speaking" peoples).

Modern authority's limiting condition derives from the "common law" or "Anglo-American heritage,"<sup>105</sup> drawing from historical inquiry into preconstitutional traditions.<sup>106</sup> The relevant constitutional parameters regarding foreign sources are commonly grounded in political cultures that are, in particular, "democracy-based."<sup>107</sup> Indeed, the current reliance on the jurisprudence of the European Court of Human Rights is exemplary,<sup>108</sup> harking back to historical understandings of unified law on the continent. This trend peaked in last Term's *Lawrence v. Texas* opinion,<sup>109</sup> which invoked European Court of Human Rights rulings and western tradition to discredit *Bowers v. Hardwick*.<sup>110</sup> In such cases, the comparativism is bounded by functional lines.

### C. *Comparativism in Human Rights as Global Rule of Law*

*Comparative Constitutionalism*, as discussed above, sets out the goal of universal constitutionalism.<sup>111</sup> The editors conceive of comparative analysis in terms of a timeless legal convergence, systematizing broadly across cultures and world history (p.10). Although this understanding of the direction of legal integration is a theoretical

<sup>105</sup> See *Knight*, 528 U.S. at 995–97 (Breyer, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (relying on "nations that share our Anglo-American heritage"); *Adamson v. California*, 332 U.S. 46, 54 (1947) (regarding "Anglo-American legal tradition" as the basis for the relevant connection). In the lower courts, this following of Anglo-American jurisprudence reflects adherence to a system of binding authority, while in the Supreme Court, such common law norms reflect a broader concern for remaining within the legal tradition.

<sup>106</sup> See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 952–53 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (noting that "the historical traditions of the American people" began with "[t]he common law which we inherited from England"); *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (justifying the American law as in "accordance with the standards of this common-law tradition"); *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (questioning "whether . . . a procedure is necessary to an Anglo-American regime of ordered liberty"); *Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (noting that the constitutional idea of "due process" began with the English Declaration of Rights of 1688 and the Magna Carta).

<sup>107</sup> See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (discrediting *Bowers v. Hardwick*, 478 U.S. 186 (1986), in part by showing that *Bowers* was at odds with a European Court of Human Rights case that is binding upon forty-five western nations); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (referring to the crime of assisted suicide "in almost every western democracy"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (referring to "foreign democracies"); *Stanford*, 492 U.S. at 389–90 (Brennan, J., dissenting) (noting that prior Supreme Court cases have held that objective indicators of contemporary standards of decency in the form of legislation in other western countries are relevant to Eighth Amendment analysis).

<sup>108</sup> See, e.g., *Lawrence*, 123 S. Ct. at 2481, 2483 (citing the decisions of the European Court of Human Rights); see also *Thompson*, 487 U.S. at 830 (considering the views of "leading members of the Western European Community").

<sup>109</sup> 123 S. Ct. 2472 (2003).

<sup>110</sup> See *id.* at 2483 (relying on *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981)).

<sup>111</sup> See *supra* pp. 2576–77.

ideal,<sup>112</sup> in reality, this integration is more limited, and it is demonstrably negotiated at the juncture of law, politics, and culture.<sup>113</sup> Insofar as there is contemporary movement toward constitutional convergence, the movement occurs primarily in the area of international human rights, which one might characterize as the “law of humanity.”

*Comparative Constitutionalism* points us in the direction of heightened convergence in the law in distinct areas, perhaps the most robust being transnational human rights law. Peremptory norms, elucidated in and by comparative law, structure a threshold rule of law across nations that operates as an unwritten constitutional regime for a global order. Substantial agreement among national constitutions and conformity with international conventions (p. 3) demonstrate a consensus on basic human rights<sup>114</sup> and on the importance of protecting decency<sup>115</sup> and integrity.<sup>116</sup>

From these data points one might infer a limited universal “law of humanity,” the culmination of comparativism.<sup>117</sup> “Humanity rights” are pivotal in the present globalizing regime, which is distinguished by interdependence but not integration. Comparative constitutional law’s current extension, therefore, offers an alternative conception of legitimacy, grounded in core human rights and aimed at reinforcing the nascent global order.

From this realm of threshold human rights, comparative constitutionalism is now extending its quest for conformity into the sphere of due process.<sup>118</sup> The phenomenon is most evident in developments within criminal procedure. In a chapter devoted to “Criminal Proce-

<sup>112</sup> “Constitutionalism is an ideal that may be more or less approximated by different types of constitutions . . .” (p.10).

<sup>113</sup> See *infra* 2593–95.

<sup>114</sup> On the “law of humanity,” see Ruti G. Teitel, *Humanity’s Law: Rule of Law for the New Global Politics*, 35 CORNELL INT’L L.J. 355 (2002).

<sup>115</sup> See, e.g., *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) (citing the Privy Council regarding the “inhumanity” of death penalty delays).

<sup>116</sup> See *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (describing Fourteenth Amendment “due process” rights understanding); *Atkins v. Virginia*, 536 U.S. 304 (2002) (analyzing Eighth Amendment jurisprudence); *Washington v. Glucksberg*, 521 U.S. 702, 785–87 (1997) (Souter, J., concurring in judgment) (referring to the law of the Netherlands when discussing the right to assisted suicide); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (holding that the execution of juveniles violates norms of the Western European community); see also *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O’Connor, J., concurring in part and dissenting in part) (noting the relevance of Nuremberg Trials procedures regarding consent standards for medical experimentation); *Trop v. Dulles*, 350 U.S. 86, 101 (1958) (plurality opinion) (inquiring into “evolving standards of decency”).

<sup>117</sup> See Teitel, *supra* note 114.

<sup>118</sup> Due process has been deemed to include procedures necessary for the “protection of ultimate decency in a civilized society.” *Adamson v. California*, 332 U.S. 46, 61 (1947). Comparative authority is informed by international law as well. See, e.g., The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Part I, at 71, U.N. Doc A/810 (1948).

dure (Due Process)" (p.1043-1154), *Comparative Constitutionalism* advocates a core bill of criminal procedural rights and claims that there is worldwide convergence toward that ideal (p. 1047-48). Although this is by far the area of greatest constitutional integration, criminal process does not necessarily fall within the rubric of constitutionalism,<sup>119</sup> but instead depends on the particularities of a political system and legal culture.<sup>120</sup> Moreover, the normative desirability of such a convergence is debatable,<sup>121</sup> particularly because of the same stark differences in legal cultures and political traditions.<sup>122</sup>

The normative role of comparativism in constitutional interpretation is most evident in current American constitutional doctrine in the context of Fifth, Eighth, and Fourteenth Amendment jurisprudence, with respect to which the Court has turned outward to construct its sense of evolving human decency and order. Particularly when interpreting the Eighth Amendment protection from "cruel and unusual punishment," case law from *Thompson v. Oklahoma*<sup>123</sup> through *Stanford v. Kentucky*<sup>124</sup> and *Atkins v. Virginia*<sup>125</sup> demonstrates an increasing reliance on foreign sources of law to support the Court's findings. In *Stanford*, Justice Brennan in dissent relied on comparative materials to support his notion that "contemporary standards of decency" would preclude the execution of juveniles.<sup>126</sup> A plurality in *Thompson* relied on comparative experience to inform the meaning of "civilized standards of decency,"<sup>127</sup> over a vigorous dissent challenging foreign

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<sup>119</sup> Indeed, most other comparative constitutional law and domestic constitutional law casebooks do not include criminal procedure, which tends to be addressed separately. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986); STONE ET AL., *supra* note 38; SULLIVAN & GUNTHER, *supra* note 38; CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 1999). *But see* MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* 381-456, 494-542 (1979).

<sup>120</sup> See generally THOMAS M. FRANCK, *COMPARATIVE CONSTITUTIONAL PROCESS, CASES AND MATERIALS: FUNDAMENTAL RIGHTS IN THE COMMON LAW NATIONS* (1968).

<sup>121</sup> On convergence in criminal law, compare GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* (1998), which argues for convergence, with JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003), which discusses divergence among American, German, and French criminal justice policies. For the danger of misinterpreting similarities in comparative analysis, see William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 955 (1986).

<sup>122</sup> See Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 844-47, 851 (1997) (asserting that the "transplantation of fact finding arrangements between common law and civil law systems would give rise to serious strains in the recipient justice system").

<sup>123</sup> 487 U.S. 815 (1988).

<sup>124</sup> 492 U.S. 361 (1989).

<sup>125</sup> 536 U.S. 304 (2002).

<sup>126</sup> *Stanford*, 492 U.S. at 389-90 (Brennan, J., dissenting).

<sup>127</sup> *Thompson*, 487 U.S. at 830-31 (plurality opinion).

law's relevance to the "fundamental beliefs of this nation."<sup>128</sup> In *Atkins*, a majority used comparative analysis to find that, "within the world community," execution of the mentally retarded is "overwhelmingly disapproved."<sup>129</sup> Finally, last Term, in *Lawrence v. Texas*, the Court held that the criminalization of sodomy violated a due process "liberty" by relying in part on European authority and on "values we share with a wider civilization."<sup>130</sup>

At present, there is an indisputable judicial consensus regarding comparativism in the law of humanity. Even those Justices opposing comparativism's uses in the rights-expanding decisions above have little hesitation to rely on such authority in other related rights areas, such as abortion and euthanasia, in which such analysis serves their position.<sup>131</sup> Converging understandings of human decency are now beginning to construct a fledgling global rule of law.<sup>132</sup>

### CONCLUSION

This Review analyzed *Comparative Constitutionalism* as a contemporary revival and extension of the functionalist school of thought. It discussed this extension's legitimacy and its implications for present global politics. It then turned to the contemporary claim for comparativism as judicial discourse and its potential for advancing cosmopolitan decisionmaking. Comparative constitutional interpretation's normative aims and effects were discussed over a continuum of constitutional change and development. Finally, the Review looked to present adjudicatory practices and concluded that they reflect an emerging normative use of comparative law in the area of constitutional rights, a development that supports a modest form of *Comparative Constitutionalism's* essential claim. Since the judiciary tends to be removed from politics, however, ultimately the advancement of global

<sup>128</sup> *Id.* at 868 n.4 (Scalia, J., dissenting).

<sup>129</sup> *Atkins*, 536 U.S. at 316 n.21 (2002). Once again, there was a vigorous dissent. *See id.* at 324–25 (Rehnquist, C.J., dissenting) (refusing to find other countries' views relevant to the judicial ascertaining of "contemporary American conceptions of decency").

<sup>130</sup> *See Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (referring to the right at issue "as an integral part of human freedom in many other countries").

<sup>131</sup> *See Washington v. Glucksberg*, 521 U.S. 702, 710 n.8, 718 n.16 (1997) (citing *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519) (discussing assisted suicide laws in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

<sup>132</sup> This process is also accelerated by international agreements that are themselves instantiations of comparative constitutionalism, such as the newly established International Criminal Court, whose charter provides for a new consensus on the international regulation and enforcement of certain baseline rule-of-law norms. *See Rome Statute of the International Criminal Court*, July 17, 1998, U.N. Doc. A/Conf. 183/9 (2002).

consensus will necessitate wider transnational dissemination. *Comparative Constitutionalism* provides a significant step in that direction.

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