Special Issue – *Law's Pluralities*

"It Isn't True that England Is the Moon": Comparative Constitutional Law as a Means of Constitutional Interpretation by the Courts?

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Abstract

This Article evaluates the merits and problems of comparative constitutional law as an interpretive means by the courts. It pleas for a nuanced perspective towards both agents and methods of comparative constitutional law. The Article is in favor of the use of comparative constitutional law by the courts. However, challenges as to the legitimation of comparison in court, functional limits of comparative constitutional law in the judiciary, and methodological questions remain to be solved. As far as constitutional and supreme courts are concerned, this Article argues that arguments derived from comparison should be regarded as a means of persuasive reasoning.

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"Law's pluralities" represent two distinct, yet intertwined concepts. The pluralistic approach highlights a plurality of methods when it comes to dealing with the law as well as the plurality of legal systems when they encounter one another. This Article seeks to combine both points of view by asking whether arguments derived from comparative constitutional law can be effectively applied in constitutional interpretation.

A. Legal Comparison—Learning about One's Own and Foreign Legal Cultures

The method of legal comparison makes at least two promises: First, it allows scholars to become acquainted with foreign legal cultures or, more modestly, to make a serious attempt to do so. This permits learning from one another[1]—for example, by incorporating suggestions and embracing solutions that only foreign legal systems can provide us with. This aim is even appreciated by strong opponents of comparative constitutional law as a means of constitutional interpretation.[2] Second, the method of legal comparison also helps us to understand our own legal culture more thoroughly.[3] As Justice Susanne Baer points out for the special case of the use of comparative constitutional law by the courts, comparative constitutional law provides a new point of view by creating a transparency of sources.[4] Avoiding to cite inspiring judgments from other systems could lead, for example, to incorrectly declaring a decision to be a national *Sonderweg*, meaning a case that follows a special jurisprudential path.

But can these learning experiences be methodologically integrated into constitutional interpretation? And if they can be, what is the best means to do so? From a technical point of view, one way of learning from foreign law is to accept legal comparison as a constructive method in the context of constitutional interpretation. While scholars disagree on how the legal construction of constitutions works,[5] four canonical methods of interpretation—based on the wording, the system, the spirit and purpose of the law, and historical interpretation—

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[1] As strongly recommended by Ruth Bader Ginsburg, *Looking Beyond Our Borders*, 22 YALE L. & POL'Y REV. 329, 329 (2004), who claims that "[w]e are the losers if we do not both share our experience with, and learn from others."

[2] As Posner puts it, "[t]he problem is not learning from abroad; it is treating foreign judicial decisions as authorities in U.S. cases, as if the world were a single legal community." Richard Posner, *No Thanks, We Already Have Our Own Laws*, *in* LEGAL AFFAIRS (2004), http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp.

[3] *See* Christoph Schönberger, *Verfassungsvergleichung heute*, 43 VRÜ 6, 7 (2010).

[4] Susanne Baer argues in favor of comparative constitutional law by the courts, which is not based on curiosity about the *foreign*, *unknown*, or *exotic,* but is employed because of the new insights the comparative approach provides. *See* Susanne Baer, *Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus,* 63 JöR 389, 398 (Susanne Baer et al. eds., 2015).

[5] On the German and US-American discussions, see FRANZ REIMER, JURISTISCHE METHODENLEHRE, 123–31 (2016). On the debate about the role of the interpreter, see also *id.* at 29; *id.* at 30; Dorsen *infra* note 48; Kommers & Miller *infra* note 49, at 91–92.

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still serve as a starting point for constitutional interpretation in Germany and remain pertinent in nearly all constitutional democracies. Carl Friedrich von Savigny initially suggested similar methods as early as the nineteenth century in his Roman Law studies[6] and other scholars modified and transferred them later to constitutional law. Peter Häberle built upon these methods as the first German scholar to suggest considering comparative law as a new, "fifth" method of interpretation.[7]

Yet, Häberle was also the first scholar in Germany to point out how complex the undertaking of comparative law actually is—emphasizing that it is impossible without a corresponding comparison of cultures. Along a similar vein, but drawing on the pertinence of cultural biases, Günter Frankenberg considered the problem of perspective to be a central element of discourse on comparative law.[8] Accordingly, scholars conducting comparative work must first become aware of their particular perspective. Second, scholars may not rely on the objectivity of the analysis of cultural patterns; they are guided by a *tertium comparationis*—and the choice of the criterion of comparability is itself starkly determined by specific cultural backgrounds. Yet, lastly, this does not imply that one's view is totally determined by history, social experience, perspective.[9] Other scholars, such as Rainer Wahl[10] and Susanne Baer,[11] have aligned themselves with the view that culture is pertinent for any comparison: They believe that comparative law that is conducted without a comparison of cultures is simply naïve. Wahl claims, "[T]o truly understand German law, for instance, one has to go far back in German and European intellectual history."[12]

This leads to the central question: What agent is actually capable of conducting this kind of demanding legal comparison? As far as comparative constitutional law is concerned, the focus is on constitutional and supreme courts. Discussion concerning the importance of comparative constitutional law in constitutional jurisprudence has further been accelerated

[6] Carl Friedrich von Savigny has, however, pointed out that his four "elements of interpretation" are not to be regarded as alternative methods, instead, they are to be regarded as four steps in a single process of interpretation. He also terms his "elements" slightly differently: grammatical, logical, historical, and systematic. CARL FRIEDRICH VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, 213–15 (1st ed. 1840).

[7] Peter Häberle, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat*, 44 JZ 913, 913 & 916–18 (1989).

[8] *See* Günter Frankenberg, *Critical Comparisons*, 26 HARV. INT'L L. J. 411, 411 (1985).

[9] *See id.* at 415.

[10] *See* Rainer Wahl, *Verfassungsvergleichung als Kulturvergleichung*, *in* VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG 96 (Rainer Wahl ed., 2003).

[11] *See* Susanne Baer, *Verfassungsvergleichung als reflexive Methode*, 64 ZaöRV 735, 736 (2004).

[12] Wahl, *supra* note 10, at 174.

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by the recent public disagreement between two U.S. Supreme Court justices on this very issue.[13] Whereas the conservative, and recently deceased, Justice Antonin Scalia opposed the idea of legal comparison as a method of constitutional interpretation, the more liberal Justice Stephen Breyer's position was in favor of it. Recently, a German equivalent of this debate has evolved between Susanne Baer, Justice of the German Federal Constitutional Court (FCC), and legal academic Christian Hillgruber.[14]

This Article invites the reader to reflect on the following issue: Should constitutional courts apply comparative constitutional law? And if so, how? In doing so, this Article adopts a comparative perspective. First, the Article addresses the extent to which the German FCC has dealt with arguments derived from comparative constitutional law, while attempting occasional sideways glances at the Supreme Court of the United States (SCOTUS). Second, this Article further explores the SCOTUS comparative constitutional debate between Justices Scalia and Breyer. In this context, attention will also be drawn to the parallel debate in the German academic sphere between Justice Baer and Hillgruber. Finally, the Article returns to the question of whether courts—or more specifically, constitutional courts—are appropriate agents for comparative constitutional legal practice. Although this Article generally supports the enhancement of comparative constitutional law, it pays special attention to the problems and shortcomings courts face when conducting comparisons of different legal systems. This Article agrees with Basil Markesinis's view that opponents to the use of foreign law by constitutional and supreme courts may have rendered a service to comparative law: In their "persistent negativism," they alert jurists to address methodology issues more cogently.[15]

B. Constitutional Courts as Agents of Comparison?

I. A Short Analysis of the German FCC and SCOTUS Jurisprudence

The German FCC seemingly seldom employs the method of comparative constitutional law.[16] As a new study shows, however, it has adopted a more welcoming approach towards

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[13] For a lightly edited version of the debate, approved by the Justices, see Norman Dorsen, *A Conversation Between U.S. Supreme Court Justices. The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L 519 (2005). Cause for this public disagreement was a triad of decisions. *See Printz v. United States*, 521 U.S. 898 (1997), *Lawrence v. Texas*, 539 U.S. 558 (2003), *Roper v. Simmons*, 543 U.S. 551 (2005). Justice Breyer's new book will most likely revive the discussion, STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 236 (2015).

[14] *See* Baer, *supra* note 4; Christian Hillgruber, *Die Bedeutung der Rechtsvergleichung für das deutsche Verfassungsrecht und die verfassungsgerichtliche Rechtsprechung in Deutschland*, 63 JöR 367 (Susanne Baer et al. eds., 2015).

[15] *See* Basil Markesinis, *National Self-Sufficiency or Intellectual Arrogance?*, 65.2 CAMBRIDGE J. INT'L L. 301, 315 (2006).

[16] *See* Heiko Sauer, *Verfassungsvergleichung durch das Bundesverfassungsgericht*, 18 JRP 194, 194, 202 (2010).

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comparative law in recent years.[17] Take, for example, the *Fraport* decision from 2011 that adopted U.S. and Canadian jurisprudence on the public forum in a case regarding the scope of freedom of assembly.[18] Nevertheless, there is still a certain hesitation towards comparative constitutional law, as the small number of FCC decisions that *explicitly* refer to foreign constitutional cases shows. Germany is not unique in this sense—this same reluctance can be observed in constitutional and supreme courts worldwide. However, two important caveats should be made.

First, not only do German judges regularly engage in institutionalized discussions with foreign colleagues,[19] but they also practice a considerable degree of comparative constitutional law. The results, however, do not always explicitly enter a judgment.[20] A famous example of such an implicit use of comparative constitutional law is the FCC's *Wunsiedel*[21] decision from 2009. In the decision, the Court takes a stand on the constitutionality of a then-newly adopted criminal law punishing incitement to hatred.[22] Applying its usual tests, the FCC would have had to declare this law unconstitutional. Free speech, the 'open marketplace of ideas upon which democracy depends,' is one of the most basic rights protected *inter alia* by both the U.S. and the German Constitution. The FCC then

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[17] AURA MARÍA CÁRDENAS PAULSEN, ÜBER DIE RECHTSVERGLEICHUNG IN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS 181–82 (2009). *See also* Tania Groppi & Marie-Claire Ponthoreau, *Conclusion: The Use of Foreign Precedents by Constitutional Judges*, in THE USE OF FOREIGN PRECEDENT BY CONSTITUTIONAL JUDGES 411, 416 (Tania Groppi & Marie-Claire Ponthoreau eds, 2013).

[18] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] 128, 226, 253, 1 BvR 699/06, Feb. 22 2011, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/02/rs20110222_1bvr069906en.html [last visited 15 February 2017]. *See* Baer, *supra* note 4, at 393.

[19] Baer, *supra* note 4, at 390; Andreas Voßkuhle, *Der europäische Verfassungsgerichtsverbund*, *in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1, 8 (2010).

[20] Peter Häberle, *Wechselwirkungen zwischen deutschen und ausländischen Verfassungen*, *in* 1 HANDBUCH DER GRUNDRECHTE, § 7, para. 24 (Detlef Merten & Hans-Jürgen Papier eds., 2004). BREYER, *supra* note 13, at 249–51, 253–80. Part IV of his book also deals with the advantages of informal exchange between justices from different jurisdictions.

[21] *See generally* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Nov. 4, 2009, 124 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 300.

[22] *See* STRAFGESETZBUCH [STGB] [PENAL CODE], § 130, para. 4. This law was adopted in the context of an increasing number of demonstrations glorifying the National Socialist regime in the city of Wunsiedel. The demonstrations took place near the grave of Rudolph Heß; Heß was Hitler's deputy from 1933 onwards. § 130 para. 4 of the German Criminal Code states the following: "Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine." Translation by MICHAEL BOHLANDER, BUNDESMINISTERIUM FÜR JUSTIZ UND VERBRAUCHERSCHUTZ (2015), available at: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1241.

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held, however, that there was an unwritten but narrowly formulated exception for laws that restrict populist approval of the arbitrary and tyrannical rule of the National Socialists.[23] It explains this exception with reference to Germany's particular history, stating that favoring this rule *in Germany* constitutes an attack on the internal identity of the community with peace-threatening potential.[24] The emphasis on Germany's exceptionalism especially shows that, in the view of the FCC, advocating Nazi rule may very well be protected by freedom of speech provisions in other countries.

Presumably, the FCC has used the exceptionalism argument not only to extract an unwritten exception from Article 5, paragraph 2 of the German Basic Law, but also to explain a possible divergence from other countries' jurisprudence.[25] The *Wunsiedel* decision illustrates that two stages in the process of decision-making can be distinguished: First, the process of discovery, the procedure by which the court reaches a conclusion (and that is not transparent to the public), and second, the process of justification of its judgment, the procedure by which the court justifies a specific conclusion which, by contrast, finds its expression in the text of the final judgment.[26] Thus, the interpreter of the court's judgment should be aware of this important differentiation.[27] It should not be assumed from a lack of references that the court did not compare its reasoning to those of other supreme or constitutional courts beforehand.

The second caveat concerns public international law. In this context, the FCC's work necessarily has a comparative aspect. The influence of the European Court of Human Rights (ECtHR) on the FCC vividly illustrates this point: by no means has the FCC proven to be

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[23] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Nov. 4, 2009, 124 Entscheidungen des Bundesverfassungsgerichts 300, http://www.bverfg.de/e/rs20091104_1bvr215008en.html. See also Uwe Volkmann, *Die Geistesfreiheit und der Ungeist: Der Wunsiedel-Beschluss des BVerfG*, 63 Neue Juristische Wochenschrift 417, 418–20 (2010).

[24] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Nov. 4, 2009, 124 Entscheidungen des Bundesverfassungsgerichts 300, 329, http://www.bverfg.de/e/rs20091104_1bvr215008en.html.

[25] *See* Mathias Hong, *Hassrede und extremistische Meinungsäußerungen in der Rechtsprechung des EGMR und nach dem Wunsiedel-Beschluss des BVerfG*, 70 ZaöRV 73, 116–17 (2010) (arguing that the jurisprudence of SCOTUS was generally more favorable to freedom of speech); *see also R v Zundel*, 2 S.C.R. 731 (S.C.C. 1992).

[26] For this classic differentiation, see Richard A. Wasserstrom, The Judicial Decision 27 (1961). For an account along a similar vein, German discourse differentiates between the decision-making process (*Herstellung*) on the one hand and the presentation of the decision (*Darstellung*) on the other, see, e.g., Baer, *supra* note 4, at 398.

[27] It may also be of importance to interpreters of FCC judgments that there is a period of protection for the FCC's files. For more about the period of protection—60 years for important documents such as draft judgments,—see Florian Meinel & Benjamin Kram, *Das Bundesverfassungsgericht als Gegenstand historischer Forschung: Leitfragen, Quellenzugang und Perspektiven nach der Reform des § 35b BVerfGG*, 69 JZ 913, 916–17. Justices also underlie the secrecy of deliberations. For the merits and demerits of this approach, see Baer's contribution in this volume.

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insular, but rather open-minded.[28] In various decisions, but especially in the *Görgülü*[29] and *Preventive Detention*[30] cases, the FCC has—at least to a certain degree—incorporated in its jurisprudence both the European Convention on Human Rights (ECHR) and its interpretation by the ECtHR. The FCC's approach was found to be an expression of the Basic Law's openness towards public international law.[31]

But this must not divert attention from the fundamental difference between comparative law in a wider sense on the one hand and comparative law in a more narrow, actual sense on the other.[32] While comparative law in its actual sense necessarily transcends the own legal order, this is different with comparative law in a wider sense. The latter concerns comparison within one's own legal order only and encompasses in particular applicable public international law. Comparative law's role as a means of constitutional interpretation is hardly ever contested for such cases, whereas the role of comparative law in a narrow sense is controversial as regards the interpretation of national law.[33] For example, the ECHR has the character of applicable law in Germany. Thus, it is part of the German legal order. When the FCC draws on ECtHR jurisprudence, it deals with applicable law of the German legal system. The same is true for European Union law—it has the character of applicable law in Germany. Conversely, it is a case of comparative law in its narrow sense when the FCC makes a comparison to law found in foreign legal systems, which is, of course, not applicable in Germany.[34] The situation is different if the SCOTUS refers to regional human rights treaties such as the ECHR, because the U.S. itself is not a party to this Convention.[35] When the SCOTUS refers to ECtHR cases, this is thus a case of comparative law in its actual, narrow

[28] BAER, *supra* note 27, holds the view that the FCC "indeed must . . . anchor its rulings in the European Court of Human Rights interpretation of the European Charter on Human Rights."

[29] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Oct. 14, 2004, 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 307, 317, http://www.bverfg.de/e/rs20041014_2bvr148104en.html.

[30] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], May 4, 2011, 128 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 326, 326, http://www.bverfg.de/e/rs20110504_2bvr236509en.html.

[31] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Oct. 14, 2004, 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 307, 317, http://www.bverfg.de/e/rs20041014_2bvr148104en.html.

[32] For a differentiation based on different criteria, see UWE KISCHEL, RECHTSVERGLEICHUNG 74–76 (2015).

[33] *See id.* at 74–75.

[34] BREYER, *supra* note 13, at 236–46 in his new book; Justice Breyer does not differentiate between these two accounts of comparative law—his argument applies to both necessary and merely optional comparison. *See* Markesinis, *supra* note 15, at 306. Markesinis, by contrast, neatly distinguishes two questions: First, whether national judges may seek inspiration from the practice of sister courts, and second, whether foreign law is used as public international law, or as supranational law, and foreign law application due to a rule of conflicts of laws.

[35] Robert Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 292 (2005).

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sense because the ECHR is not applicable in the U.S. legal system. Thus, the SCOTUS' comparisons in the case of the ECHR necessarily transcend the U.S. legal order.

In the U.S., the situation is comparable to Germany's insofar as the SCOTUS jurisprudence has shown that it also deals with foreign jurisprudence, albeit only sporadically.[36] However, the issue is debated fiercely, and not only in academia. Congress has even voted on a bill aimed at the prohibition of the use of foreign laws, policies, or other actions of a foreign state or international organization when interpreting and applying the U.S. Constitution.[37] Although this bill was argued to be unconstitutional,[38] and was ultimately unsuccessful, it shows how polarized the discussion remains. Justice Breyer, however, has adopted a welcoming approach towards comparative law.[39]

II. The Scalia/Breyer Debate in the United States, and the Hillgruber/Baer Debate in Germany

The methodological counterparts on the bench of the Supreme Court, Justices Scalia and Breyer, were invited to a public debate to discuss this very issue: Are Supreme Court Justices allowed to find guidance in, or to refer to, foreign legal systems?[40] Whereas Justice Breyer responds in the affirmative, Justice Scalia voices strong criticism. In his new book, Justice Breyer asserts that the debate is a political one.[41] But this Article's view is that the debate also clearly comprises a legally relevant problem about the use of comparative constitutional law by the courts. Indeed, there are valid legal arguments to be made both in favor of and against constitutional and supreme courts using comparative constitutional law.

Justice Scalia's opposition goes back to his preferred method of interpretation: originalism, which is the branch of interpretive theory focused on original meaning. This method of interpretation is interested in the original meaning as determined by a contemporaneous

[36] *See* Groppi & Ponthoreau, *supra* note 17, at 412.

[37] Constitution Restoration Act, H.R. 3799, 108th Cong. (2nd Session 2004); Section 520, 109th Cong. (1st Session 2005).

[38] *See*, *e.g.*, Elizabeth Bulat Turner, *The Relevancy of Foreign Law as Persuasive Authority and Congress's Response to its Use*, 23 GA. ST. U. L. REV. 455, 474 (2006).

[39] For example, this welcoming approach is seen in the above-mentioned cases. *See generally Printz v. United States*, 521 U.S. 898 (1997), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Roper v. Simmons*, 543 U.S. 551 (2005).

[40] *See* Dorsen, *supra* note 13, at 519.

[41] *See* BREYER, *supra* note 13, at 236. There certainly is a political debate in the U.S., as the unsuccessful bill in Congress aiming at the prohibition of citing foreign legal sources shows. *See* Constitution Restoration Act, *supra* note 37.

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understanding of the U.S. American society at the time of the law's introduction.[42] But in Scalia's view, even proponents of the antithetical "living constitution" approach to constitutional interpretation have to reject looking at foreign legal systems for guidance as "[the United States simply does not] have the same legal and moral framework as the rest of the world."[43] Indeed, one example of the different framework can be seen in the fact that the U.S. has only ratified a small number of human rights treaties.[44] Further, it has made significant reservations to those it has ratified. At least for opponents to the consultation of foreign law by the Supreme Court, this suggests that the American "We the People" might believe that their constitutional rights and distribution of powers should not be interpreted in light of foreign judicial decisions.[45] Moreover, Scalia claims, it is just not feasible for the court to contextualize single decisions. For him, the purpose of constitutional interpretation is not to arrive at the best decision,[46] but rather to arrive at the one and only decision for which the constitution provides.[47]

Justice Breyer's first response is modest: He counters with the argument that looking at foreign jurisprudence may strengthen foreign courts and give them a leg up.[48] His second argument is more important: He argues that comparative constitutional law leads to a

[42] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1988); ANTONIN SCALIA & AMY GUTMANN, A MATTER OF INTERPRETATION, 37-41 (1997). According to Mark Tushnet, a major part of the criticism of reference to non-U.S. law is based on the conviction that originalism is the only right way of interpreting the Constitution. *See* Mark Tushnet, *When Is Knowing Less Better than Knowing More?*, 90 MINN. L. REV. 1275, 1278–79 (2006).

[43] Dorsen *supra* note 13, at 521. Justice Scalia makes one exception to the purported irrelevance of foreign law for constitutional interpretation. Phrases like "due process" have to be understood in the light of the law they were taken from: old English law. *See* Dorsen, *supra* note 13, at 525.

[44] For an overview, *see Ratification of International Human Rights Treaties - USA*, UNIVERSITY OF MINNESOTA HUMAN RIGHTS, LIBRARY, http://hrlibrary.umn.edu/research/ratification-USA.html.

[45] Delahunty & Yoo, *supra* note 35, at 311.

[46] Konrad Zweigert, *Der Einfluss des Europäischen Gemeinschaftsrechts*, 28 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 601, 610–11 (1964); Zweigert, by contrast, recognizes that there are several possible solutions when interpreting a judicial provision. He argues, for the special case of ECJ case law, that to interpret general principles of EU law, the aim of comparison is to arrive at the best solution.

[47] Opponents of this opinion claim that constitutional texts do not have one true meaning. *See*, *e.g.*, Aharon Barak, *Constitutional Interpretation*, *in* L'INTERPRÉTATION CONSTITUTIONNELLE 91, 92 (Ferdinand Mélin-Soucramanien ed., 2005): there simply is no pre-exegetic understanding of a text. We can only access and understand a text—and this implies written constitutional texts—through an interpretive process.

[48] *See* Dorsen, *supra* note 13, at 523. More convincing than this "argument of pity" is Justice Ginsburg's approach. *See* Ruth Bader Ginsburg, *Gebührender Respekt vor den Meinungen der Menschheit: Der Wert einer vergleichenden Perspektive in der Verfassungsrechtspechung*, EuGRZ 341, 346 (2005) (comparative constitutional law is a question of comity and should be practiced with modesty because other legal orders constantly change).

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mutual learning process.[49] Indeed, this Article also makes the point that courts in different jurisdictions often face the same or similar problems. Why should other courts' reasoning in similar cases then be irrelevant?[50] This does not imply that there is an obligation to compare. Yet, arguments derived from comparison can be helpful in the decision-making process.

Justice Breyer's third argument is that foreign legal systems are not so different after all. He states:

> "Well, it's relevant in the sense that you have a person who's a judge, who has similar training, who's trying to, let's say, apply a similar document. And really, it isn't true that England is the moon, nor is India. I mean, there are human beings there just as there are here and there are differences and similarities. And so one is . . . trying to deal with their application."[51]

Yet, it remains unclear whether this argument is supposed to apply to the Constitution as a whole, or only as far as fundamental rights are concerned. In his recently published book, Justice Breyer takes up this third argument and elucidates it by relying on Jeremy Waldron's approach;[52] according to Waldron, comparative constitutional law aims at a Law of Nations, or *Ius Gentium*.[53] More specifically, Waldron argues that this *Ius Gentium* has a claim on us by virtue of an overlap between the positive law of certain states.[54] Yet, the question remains as to whether such a theory really takes seriously the importance and value of different constitutional cultures.[55]

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[49] With regard to SCOTUS' attention to FCC cases, Justice Ginsburg quotes U.S. Circuit Judge Guido Calabresi: "Wise parents do not hesitate to learn from their children." Ruth Bader Ginsburg, *Foreword to the Third Edition*, in XI THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (Donald P. Kommers & Russel A. Miller eds., 2012).

[50] For the hope that a comparative perspective opens up the possibility of constitutional change within this mutual process of learning from new and innovative solutions found in other legal systems, see Ginsburg, *supra* note 1, at 337.

[51] AU News Media Relations, *Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer*, AU Washington College of Law, http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument.

[52] *See* BREYER, *supra* note 13, at 239.

[53] *See* JEREMY WALDRON, PARTLY LAWS COMMON TO ALL MANKIND: FOREIGN LAW IN AMERICAN COURTS 3 (2012).

[54] WALDRON, *supra* note 53, at 28.

[55] Critical of such a universalist stance is Sandra Fredman, *Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law*, 64 INT'L & COMPARATIVE L. Q. 631 (2015). Stefan Kadelbach, *Konstitutionalisierung und Rechtspluralismus*, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE (in press); Kadelbach argues that there is a context-

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In Germany, there is a parallel debate going on based on similar as well as new arguments. The 2015 issue of the German journal *Jahrbuch des öffentlichen Rechts der Gegenwart* (JöR) lucidly demonstrates the argument between Justice Susanne Baer and Christian Hillgruber.[56] While the latter pleas for a restrained approach, Justice Baer, with all due caution, argues along a similar vein as Justice Breyer in favor of comparative constitutional law applied by constitutional courts. The context of the debate is not so different either. Clearly, there is no recognized method called originalism in German jurisprudence. Yet, Hillgruber's approach shares important features with that of originalism, albeit in the version of originalism that focuses on the original intent.[57] These approaches share a historical dimension.[58] In particular, Hillgruber stresses that the Basic Law lacks an express norm providing for the consideration of foreign jurisprudence, such as Section 39, paragraph 1 of the South African constitution.[59] Similarly, as far as the European Court of Justice (ECJ) is concerned, there are provisions in the treaties, such as Article 6 (3) TEU and Article 340 (2), (3) TFEU, that expressly require legal comparison of constitutional traditions or laws of the Member States as a means to determine general principles. Cárdenas Paulsen calls this special case "communitarian interpretation."[60]

Conversely, Justice Baer, like Justice Breyer, exhibits a strong commitment to a universalism of human rights.[61] She also argues that comparative constitutional law is valuable heuristically; it introduces very specific scientific knowledge into the debate.[62] This, in turn, leads to a valuable contribution on the part of constitutional and supreme courts to the attempt to find criteria for constitutionalism.[63] As other authors point out, there may also—in the absence of an express constitutional provision—be textual demands to recur to

dependent adaptation of universal norm contents. In the abstract, their content may be universal, but applications will differ from case to case.

[56] 63 JöR (Susanne Baer et al. eds., 2015). For the articles, see Baer, *supra* note 4; Hillgruber, *supra* note 14.

[57] *See generally* Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 6–7, 10–12 (1988); Raoul Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 297–308 (1985–1986).

[58] Christian Hillgruber, *§ 15 Verfassungsinterpretation*, *in* VERFASSUNGSTHEORIE 505, 512–13 (Otto Depenheuer, Christoph Grabenwarter eds., 2010) limits his view to the German Basic Law.

[59] Section 39, para. 1: "When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law."

[60] Cárdenas Paulsen, *supra* note 17, at 141–45.

[61] *See* Baer, *supra* note 4, at 399.

[62] *See id.*

[63] *See id.*

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comparative constitutional law:[64] The Canadian constitution, for example, refers to "a free and democratic society" in a limitation clause.[65]

Justices Baer's and Breyer's position is more appealing than that of Justice Scalia. However, proponents of comparative constitutional law by the courts should not leave methodological criticism to their opponents. As Waldron points out in regard to the debate between Justice Scalia and Justice Breyer, critics like Justice Scalia often give a more clearheaded account of the proponents' views than the proponents themselves.[66] This is one more reason to practice methodological critique.

C. Comment: A Plea for an Agent-Specific Differentiation of Comparative Constitutional Law

On closer examination, comparative constitutional law, as practiced by constitutional courts, proves to be rather intricate, which is why this Article makes a plea for an agent-specific form of differentiation.

I. The Problem of Legitimacy

The usefulness of legal comparison depends mainly on the respective agent, the one who makes use of it. Scholars enjoy the liberty of comparing constitutional law on a theoretical level and may propose changes to the constitution, which may even subsequently cause a constitutional amendment to implement their proposals—at least in countries with constitutions that can be amended relatively easily, such as the German constitution. Yet, constitutional and supreme courts have to take the constitution as it stands. As a matter of legitimacy, a constitutional court must not exceed the legal powers the *pouvoir constituant* (constituent power) has bestowed upon it.[67] In contrast, foreign constitutions, constitutional traditions, and interpretations provide legitimacy only to a very limited extent.

Yet, the claim that the determination of a court decision by foreign precedents would undermine the separation of powers by implicitly transferring judicial powers outside the respective legal system[68] seems exaggerated; it implicitly assumes that there can be foreign precedents. Foreign judgments can never constitute precedents, however, because they can

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[64] *See* Vicki Jackson, *Comparative Constitutional Law: Methodologies*, *in* COMPARATIVE CONSTITUTIONAL LAW 54, 68 (Michel Rosenfeld & András Sajó eds., 2012).

[65] *See id.*

[66] *See* WALDRON, *supra* note 53, at 24.

[67] Provided one does not call the bestowal a fairy tale, as Isensee does. *See* JOSEF ISENSEE, DAS VOLK ALS GRUND DER VERFASSUNG 73 (1995).

[68] *See* Delahunty & Yoo, *supra* note 35, at 299–304.

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never have binding authority on constitutional and supreme courts. They can, of course, be based on persuasive reasoning, and the court in question can embrace this reasoning. The problem of legitimacy nevertheless shows that the usual arguments put forward in favor of comparative constitutional law are not as compelling when it comes to its application by constitutional courts. This is also why an agent-specific view is so urgently needed.[69]

II. Comparative Constitutional Law as a Method of Constitutional Interpretation?

As supreme and constitutional courts are bound by the constitution, comparative constitutional law can only be conducted by means of constitutional interpretation. This is not problematic if constitutions expressly provide for the possibility of considering foreign law for interpretative means.[70] As mentioned above, Section 39, paragraph 1 of the South African Constitution expressly provides for this.[71] The Basic Law lacks such an explicit provision[72]—which was precisely Hillgruber's point. Certainly, it may be worthwhile to consider comparative constitutional law as a method of interpretation. If comparative constitutional law had already been acknowledged as a fifth possible method of interpretation, the FCC could be expected to make recourse to comparative arguments more frequently.[73] But, has comparative constitutional law become an accepted method of interpretation?

Even though this seems to constitute an attractive and cosmopolitan concept, it has not attracted many proponents.[74] First and foremost, it is rather unclear which legal systems should be used as a standard of comparison.[75] Peter Häberle proposes using neighboring states as a starting point. But, which states should exactly be included? One might think of

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[69] For the triad of comparators—legislative, academic, and judicial comparison,—see NICK OBERHEIDEN, TYPOLOGIE UND GRENZEN DES RICHTERLICHEN VERFASSUNGSVERGLEICHS 11 (2011).

[70] *See* MATTHIAS JESTAEDT, GRUNDRECHTSENTFALTUNG IM GESETZ 104 (1999). Jestaedt raises a parallel to diachronic legal comparison. According to him, comparison over time is relevant only to the extent that an express approval or dismissal of the constituent assembly can be shown by way of interpretation.

[71] *See supra* note 59 and accompanying text.

[72] In particular, Article 1(2) of the German Basic Law is no such provision. *See* Horst Dreier, in 2 GRUNDGESETZ. KOMMENTAR Art. 1(2) recital 17 (Horst Dreier ed., 3d ed. 2013).

[73] One has to admit that this may not entirely resolve the problem of legitimacy. Allegations of illegitimacy would prevail. *See* Schönberger, *supra* note 3, at 20 ("As opposed to legislators who can, for instance, make and change laws, constitutional courts must confine themselves to a *more restrictive* development of the constitution by way of constitutional interpretation." (emphasis added)).

[74] *See* Häberle, *supra* note 7, at 913 (acting as its main proponent).

[75] *See* Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 357 (2005); Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 125 (2005).

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choosing states with a Western constitutional tradition. But this only entails further problems, as even states with "similar constitutional structures"[76] are, in part, distinctly different. An example is the death penalty, which is permitted in the United States, but expressly prohibited according to the Basic Law.[77] Further, the majority view in Germany perceives the death penalty to be a clear violation of human dignity, thereby violating the very core of the Basic Law. As a result, the abolition of the death penalty could not be undone, even by constitutional amendment.[78] From a methodological point of view, selecting which legal systems to compare will always be a problem, as is the case with all cherry-picking exercises. So far, no convincing proposal has been put forward to mitigate this concern.[79] Thus, further profound methodological reflection is needed in order to avoid an arbitrary selection of the foreign material used for comparison.[80]

Another problem is the role of legal comparison among other, more established, methods of constitutional interpretation. This also raises fundamental questions of legal consistency and tradition. It is highly debatable whether arguments derived from legal comparison ought to have the power to force constitutional courts to defy long-standing constitutional interpretations. How should one deal with the fact that, for instance, the German Basic Law has at times a very specific constitutional text? An example of this would be the term *allgemeine Gesetze* (general laws) in Article 5 (2) of the Basic Law, concerning freedom of expression: Over time, a doctrine has developed which, as in this example, can be traced back to the Weimar Republic and its constitution.[81] Hence, there is a certain path dependency in constitutional interpretation, which cannot simply be refuted by means of comparative arguments. These concerns explain why comparative constitutional law has not been established as a method of constitutional interpretation to this day.[82] It is thus no

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[76] Schönberger, *supra* note 3, at 21.

[77] Article 102 of the German Basic Law expressly provides for the abolition of the death penalty.

[78] For representative views, see Bodo *Pieroth, Hans D. Jarass* in GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND. KOMMENTAR, Art. 102 recital 1 (Hans D. Jarass & Bodo Pieroth eds., 14th ed. 2016) (providing a violation of Article 1 (1), human dignity). *But see* Matthias Herdegen, *in* GRUNDGESETZ. KOMMENTAR Art. 1(1) recital 99 (Theodor Maunz & Günter Dürig eds., 2009) (arguing against a violation of Article 1 (1)).

[79] *But see infra* note 89, at 634.

[80] *See* Tushnet, *supra* note 42, at 1280–84, who—in the U.S. context—is optimistic that more complete references to non-U.S. law can be expected and appropriate techniques for distinguishing adverse material, rather than not citing it at all, will develop when the practice of referring to non U.S. law matures.

[81] Article 118 of the Weimar Constitution.

[82] This does not, however, apply to concerns about comparative law in general. *See* Sebastian Müller-Franken, *§ 26 Verfassungsvergleichung*, *in* VERFASSUNGSTHEORIE 885, 908 (Otto Depenheuer & Christoph Grabenwarter eds., 2010). Müller-Franken argues that although comparative constitutional law may not itself be a method of interpretation, comparative arguments might be taken into account by applying the canonical four methods of interpretation, especially those of teleological and historical interpretation.

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wonder that Peter Häberle has recently mitigated his earlier thesis by placing greater emphasis on the role of legal comparison for the legislature and in constitution-making.[83]

However, concerns about the problematic use of foreign decisions as precedent can be diminished, given that no judge who relies on a foreign decision believes that she or he is actually bound by its findings.[84] Accordingly, comparison could play a role in constitutional interpretation by constitutional and supreme courts, if we see its function as contributing to the process of finding good reasons for either divergence or convergence, rather than to stubbornly aspiring to converge despite fundamental textual, institutional, or cultural differences.[85]

III. Functional Limits of Comparative Constitutional Law by Constitutional Courts

Even if one is of the opinion that constitutional comparison should be used as a method of interpretation, as this Article does, fresh problems arise with regard to the function of constitutional courts. Constitutional courts, like other courts, decide cases. They do not always have the time and the resources to engage in *comprehensive* comparative law studies, even if they were merely to consult selected foreign legal systems. This becomes even more apparent by considering the close relationship between constitutional theory and comparative constitutional law.[86] On a more practical level, a constitutional court would have to become acquainted with at least some different legal cultures to avoid allegations of being arbitrary.[87] It is to be doubted that a judicial decision could digest this amount of input, although the FCC, for example, could surely handle more input than lower courts in Germany.[88]

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[83] *See* Häberle, *supra* note 20, at para. 26. Schönberger, *supra* note 3, at 20 (stressing the difference between constitutional interpreters and constituent power when it comes to the use of comparative constitutional law).

[84] *See* Tushnet, *supra* note 42, at 1284.

[85] For this deliberative understanding of comparativism, see Sandra Fredman, *supra* note 55, at 634 (stating that "[o]nce it is recognized that the function of comparative law is deliberative rather than binding, the force of many of the criticisms fall away").

[86] *See* Schönberger, *supra* note 3, at 26.

[87] This might not be the case if the court's aim is just to make plausible empirical connections. An example would be the impact on society caused by criminal law's prohibition of incest.

[88] The FCC also has the possibility to request expert opinions from the Max Planck Institute for Comparative Public Law and International Law, as in BVerfGE 95, 335, 363–364—Überhangmandate, http://www.servat.unibe.ch/dfr/bv095335.html.

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D. Conclusion

To conclude, there are good reasons for constitutional courts' reluctance when it comes to using comparative constitutional law in their reasoning. Such reluctance may be traced back to legitimation problems, to the considerable shortcomings of comparative constitutional law as a method of interpretation, and to the functional limits of constitutional jurisprudence. Does this mean that comparative constitutional law by constitutional courts should be abandoned altogether? No. Comparative constitutional law might solidify its place in court decisions as a method of persuasive reasoning,[89] under the condition that differences in the respective textual, institutional, and cultural contexts are taken into account. To develop appropriate methods of comparison, efforts need to be made both in academic jurisprudence and in legal practice. Further, resources in the courts will be required. Rising to this challenge seems to be an especially promising venture in those areas of constitutional legal doctrine that do not seem to be bound to a particular constitution.[90] This challenge might for example take place within the paradigms of the horizontal effect of human rights, proportionality, and the scope of judicial review.

[89] If one accepts that arguments derived from foreign court opinions can only be deliberative and not authoritative, the cherry-picking concern loses much of its force. For more on this line of argument, *see* Fredman, *supra* note 55, at 634.

[90] *See* Sujit Choudhry, THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2007).

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