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Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation

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I. INTRODUCTION: THE GLOBALIZATION OF THE PRACTICE OF MODERN CONSTITUTIONALISM

Constitutional interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication. Indeed, American constitutional practice, still reflecting the view expressed by Justice Scalia that "comparative analysis [is] inappropriate to the task of interpreting a constitution,"[1] is out of step with the international mainstream. Extensive and detailed treatments of foreign materials have become familiar features of constitutional adjudication in many courts outside of the United States, most prominently the Constitutional Court of South Africa and the Supreme Court of Canada. Comparative case law, however, does not only figure prominently in judicial decisions; it also permeates constitutional argument and academic commentary.

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1. Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (dismissing the relevance of comparative constitutional experience to the question of whether federal law could command state and local officials to enforce a federal regulatory scheme). Justice Scalia went on to say that "our federalism is not Europe's." *Id.* Some rare examples where comparative constitutional experience has been referred to by Justices of the U.S. Supreme Court in constitutional cases are Justice Breyer's dissent in *Printz*, *id.* at 976-78 (referring to the structure of federalism in Switzerland, Germany, and the European Union as authority for the proposition that the federal power to command state officials to enforce a federal regulatory scheme is compatible with the democratic virtues of a federal system); Chief Justice Rehnquist's majority judgment in *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997) (discussing the constitutionality of prohibitions on assisted suicide in Canada and Colombia); and Justice Frankfurter's majority opinion in *New York v. United States*, 326 U.S. 572, 583 n.5 (1946) (referring to the Argentinean, Australian, Brazilian, and Canadian Constitutions and to Brazilian constitutional jurisprudence).

The growth in the use of comparative jurisprudence is part of a larger phenomenon: the globalization of the practice of modern constitutionalism.[2] Globalization does not simply mean that the commitment to constitutionalism is now widespread. Rather, as Louis Henkin observes, globalization implies additionally that "the spread of constitutionalism owes much to particular sources and models."[3] In other words, in this context, globalization has come to mean the reliance on comparative materials at all stages in the life cycle of modern constitutions. The use of comparative jurisprudence is but one example. Another is the use of foreign constitutions as models in the process of constitution-making. One prominent model has been the American Constitution, in particular its Bill of Rights;[4] however, the Canadian Charter of Rights and Freedoms[5] has, in recent years, become a leading alternative, and has influenced the drafting of the South

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2. Bruce Ackerman has referred to this phenomenon as the "rise of world constitutionalism." Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); *see also* Heinz Klug, *Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review*, 13 S. AFR. J. HUM. RTS. 185, 186 (1997) (describing "a globalization of the notion that individual rights, inscribed in written constitutions, are an essential component of democratic governance"). Although Ackerman and Klug seem to regard this phenomenon as relatively recent, as long ago as 1979 a leading casebook proclaimed "a worldwide explosion" in judicial review. MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS 12 (1979).

3. Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533, 533 (1993); *see also* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin et al. eds., 1990) [hereinafter CONSTITUTIONALISM AND RIGHTS].

4. *See generally* CONSTITUTIONALISM AND RIGHTS, *supra* note 3; Anthony Lester QC, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988). Although many new constitutions have incorporated bills of rights, I do not claim that such documents are part of the definition of a constitution. As Giovanni Sartori argues:

> Is a constitution without a bill of rights an incomplete constitution? I would agree with Madison and Hamilton that declarations of rights are not a necessary condition of constitutions. . . . [A] constitution without a declaration of rights still is a constitution, whereas a constitution whose core and centerpiece is not a frame of government is not a constitution.

GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING 197-98 (1st ed. 1994). *But cf.* Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 465 (1991) (stating that "[a] constitution, considered as a written document, serves three interrelated functions: [first] to define and protect the rights of the citizens").

5. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter Canadian Charter of Rights and Freedoms].

African Bill of Rights,[6] the Israeli Basic Laws,[7] the New Zealand Bill of Rights,[8] and the Hong Kong Bill of Rights.[9] Moreover, Jon Elster, commenting on the Eastern European experience with constitution-building, has observed that "[i]n constitutional debates, one invariably finds a large number of references to other constitutions" not only "as models to be imitated," but also "as disasters to be avoided, or simply as evidence for certain views about human nature."[10]

The globalization of the practice of modern constitutionalism generally, and the use of comparative jurisprudence in particular, raise difficult theoretical questions because they stand at odds with one of the dominant understandings of constitutionalism: that the constitution of a nation emerges from, embodies, and aspires to sustain or respond to that nation's particular history and political traditions. As Jürgen Habermas has explained, the citizens of a nation often use constitutional discourse as a means to "clarify the way they want to understand themselves as citizens of a specific republic, as inhabitants of a specific region, as heirs to a specific culture, which traditions they want to perpetuate and which they want to discontinue, [and] how they want to deal with their history."[11] Indeed, for

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6. S. AFR. CONST. ch. 2 (adopted May 8, 1996; amended Oct. 11, 1996). For a general overview of the South African Bill of Rights, see Richard J. Goldstone, *The South African Bill of Rights*, 32 TEX. INT'L L.J. 451 (1997).

7. Basic Law: Freedom of Occupation, 1992, S.H. 1387; Basic Law: Human Dignity and Liberty, 1992, S.H. 1391. For the influence of the Canadian Charter of Rights and Freedoms on the drafting of Israel's Basic Laws, see Adam M. Dodek, *The Charter . . . in the Holy Land?*, 8 CONST. F. 5 (1996); Lorraine Weinrib, *Canada's Charter: Rights Protection in the Cultural Mosaic*, 4 CARDOZO J. INT'L & COMP. L. 395 (1996); and Lorraine Weinrib, *The Canadian Charter As a Model for Israel's Basic Laws*, 4 CONST. F. 85 (1993). For the influence of Canadian jurisprudence on the interpretation of the *Basic Laws*, see generally Dodek, *supra*, and Zeev Segal, *The Israeli Constitutional Revolution: The Canadian Impact in the Midst of a Formative Period*, 8 CONST. F. 53 (1997).

8. Bill of Rights Act, 1990 (N.Z.). For a discussion of the influence of the Canadian Charter of Rights and Freedoms on the drafting of the New Zealand Bill of Rights, see Paul Rishworth, The *Birth and Rebirth of the Bill of Rights*, *in* RIGHTS AND FREEDOMS: THE NEW ZEALAND BILL OF RIGHTS ACT 1990 AND THE HUMAN RIGHTS ACT 1993, at 1, 12-18 (Grant Huscroft & Paul Kishworth eds., 1995). For a critical assessment of the New Zealand Bill of Rights, see Andrew S. Butler, *The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 Is a Bad Model for Britain*, 17 OXFORD J. LEGAL STUD. 323 (1997).

9. Hong Kong Bill of Rights Ordinance, No. 59 (1991). One of the authors of the Canadian Charter was involved in the drafting of the Hong Kong Bill of Rights. *See* James Allan, *A Bill of Rights for Hong Kong*, 1991 PUB. L. 175, 175.

10. Elster, *supra* note 4, at 476; *see also* Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 609-10 (1991) (describing the examination of American and German models for constitutional judicial review by the Constitutional Committee of the Polish Parliament).

11. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 107, 125 (Amy Guttman ed., 2d ed. 1994); *see also* RONALD I. CHEFFINS & RONALD. N. TUCKER, THE CONSTITUTIONAL PROCESS IN CANADA 4 (2d ed. 1975) (describing a constitution as "a mirror reflecting the national soul"); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 3 (1992) (stating that a Constitution "must recognize and protect the values of a nation").

some countries, constitutions are an integral component of national identity, and reflect one way in which those nations view themselves as different from others.

This traditional view of constitutions has important implications for the nature and structure of constitutional theories. By constitutional theories, I mean theories which simultaneously strive both to explain and to justify a particular nation's constitutional text and practice. Quite often, constitutional theories consist of or include theories of constitutional interpretation, which suggest how a constitutional text (or extra textual norms) should be applied to the resolution of concrete cases before courts of law. On the account of constitutionalism I have offered above, theories of constitutional interpretation are situated or particular, in that they are located in both professional and academic discourse in terms that are meant to be internal to specific political and legal systems.

American theories of constitutional interpretation, despite fundamental differences in methodology and outlook, share this common premise. Bruce Ackerman, for example, has written,

> America is a world power, but does it have the strength to understand itself? Is it content, even now, to remain an intellectual colony, borrowing European categories to decode the meaning of its national identity? . . . To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern of constitutional thought and practice.[12]

Similarly, originalists such as Robert Bork assert that the American Constitution should be interpreted according to "what the public . . . [at the time of the framing] would have understood the words to mean."[13] John Hart Ely, by contrast, looks not to original understanding, but to the structure of the American Constitution as reflected in the jurisprudence of the Warren Court, and asserts that the Constitution reflects a commitment to "ensuring broad participation in the processes and distributions of government."[14] Liberal republicans like Frank Michelman can be understood in one respect as occupying a middle position between Bork and Ely, because they find a commitment to self-determination through representative institutions deep within American political and legal history.[15] Nor is the theme of constitutional nationalism confined to America. Chief Justice Ahron Barak of the Supreme Court of Israel has written, for example, that the interpretation of the

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12. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3 (1991). *But see* David A.J. Richards, *Revolution and Constitutionalism in America*, 14 CARDOZO L. REV. 577, 584-86 (1993) (discussing the use of comparative political science—through the works of Machiavelli, Harrington, Montesquieu, Hume, Smith, Ferguson, and Millar—by the Founders in 1787).

13. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

14. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).

15. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

Basic Laws must "crystallize the modern self-understanding of Israeli society; in other words, its very identity."[16]

It is fair to say that constitutions continue to be widely understood in this particular and local way. However, the globalization of the practice of modern constitutionalism is a force with which constitutional theories, and hence theories of constitutional interpretation, must come to terms. What seems to be needed is an understanding of modern constitutions that is simultaneously global and local—a difficult but not impossible task. My goal, though, is somewhat narrower: to describe and explain the interpretive methodologies used, and the normative justifications offered, by courts for their use of comparative jurisprudence in constitutional interpretation.

The impetus to make sense of comparative constitutional interpretation is the premise that law is the source of, and the means for the exercise of, the coercive power of the state. Conventionally, executives and legislatures have been viewed as the wielders of that power. The role of the courts has been understood quite differently; as the authoritative interpreters of law, particularly in constitutional cases, courts validate and legitimize the exercise of power by executives and legislatures. In recent years, the validating role of the courts has been refined through the renewed emphasis, in legal and political theory, on the link between the legitimacy of public authority and public justification.[17] On this account, the exercise of public power, in order to be legitimate, must be justified according to some language or discourse of reason. Contemporary legal theorists often argue, in this vein, that courts should legitimize public power by serving as vehicles through which legislatures and executives engage in a process of reason giving.[18]

However, courts themselves, because of their central role in the validation of public power, are equally under an obligation to engage in a process of public justification for their own decisions. For some jurists, this duty means, in the constitutional context, that the substantive principles of constitutional law must cohere with and further a particular vision of political morality. That is certainly true, although the manner in which, and the extent to which, courts can fulfill that goal are complex.[19] However, the important point here is that courts are equally obliged to justify their interpretive methodologies. The various features of legal reasoning—the doctrine of stare decisis, for example—are more than just the means through which courts arrive at decisions; they define and constitute the institutional identity of courts. As a consequence, the very legitimacy of judicial institutions hinges on interpretive methodology.

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16. Ahron Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4 CONST. F. 83, 84 (1993).

17. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996); JOHN RAWLS, POLITICAL LIBERALISM (1993); David Dyzenhaus, *The Legitimacy of Legality*, 46 U. TORONTO L.J. 129, 162 (1996).

18. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION ch. 2 (1993) (describing a "Republic of Reasons").

19. *See generally* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

In this light, the tendency of American constitutional theorists to rely on local and particular sources as aids to interpretation is revealing, for two reasons. Positively, this tendency suggests that the use of local and particular sources in constitutional reasoning secures the legitimacy of judicial review. Negatively, it suggests that reliance on foreign sources is prima facie illegitimate, because those sources are drawn from outside the legal system at hand.[20] Presumptively, then, courts must justify *why* comparative law should count.

In this Article, I argue that the answer to this question lies embedded in the actual practice of comparative constitutional interpretation. Through a discussion of case studies, I claim that comparative jurisprudence is used in three different ways in constitutional adjudication, and that each of these interpretive methodologies, in turn, articulates distinct normative justifications for the use of comparative law. The first interpretive mode, universalist interpretation, holds that constitutional guarantees are cut from a universal cloth, and, hence, that all constitutional courts are engaged in the identification, interpretation, and application of the same set of norms. Those norms are comprehended as transcendent legal principles that are logically prior to positive rules of law and legal doctrines.

The second mode, genealogical interpretation, holds that constitutions are often tied together by complicated relationships of descent and history, and that those relationships are sufficient justification to import and apply entire areas of constitutional doctrine. In stark contrast to universalist interpretation, genealogical argument is positivist in structure, because genealogical relationships confer sufficient authority and validity on comparative sources to make them legally binding.

In the third mode, dialogical interpretation, courts identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions. Through a process of interpretive self-reflection, courts may conclude that domestic and foreign assumptions are sufficiently similar to one another to warrant the use of comparative law. Conversely, courts may conclude that comparative jurisprudence has emerged from a fundamentally different constitutional order; this realization may sharpen an awareness of constitutional difference or distinctiveness. Dialogical

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20. Bruce Ackerman's comments, *see supra* text accompanying note 12, capture this attitude. So do the comments of Justice Scalia dissenting in *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988). In dismissing the relevance of an Amnesty International report discussing the prevalence of the death penalty for minors in foreign jurisdictions to the constitutionality of the death penalty for persons under age 16 in the United States, Justice Scalia stated:

> We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.

Id. (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (citation omitted).

interpretation appears to make no normative claims; it is more a legal technique than a theory of legal interpretation.

Once the normative skeleton of comparative constitutional interpretation is laid bare, a much needed and long overdue constitutional conversation on this practice can begin. That conversation should revolve around three different issues: the scope of each mode of comparative constitutional interpretation, the effect of each mode on domestic constitutional culture, and the legitimacy of the normative claims that each mode entails. By illustrating how that conversation could unfold, I hope to clarify what is at stake when courts weave comparative jurisprudence into constitutional discourse.[21]

My analysis proceeds as follows. In Part II, I review the critical literature, outline the approach of this study, and introduce the three different modes of comparative constitutional interpretation. As an expository aid, I characterize the key features of each of these interpretive modes by reference to a corresponding school of comparative legal studies. In Parts III, IV, and V, I explore each of these modes in turn, through the use of concrete case studies. For the most part, these are drawn from the jurisprudence of the Constitutional Court of South Africa (Parts III and IV), although one section is devoted almost exclusively to Canadian constitutional case law (Part V). Finally, in Part VI, I attempt to draw some general conclusions, and suggest what significance those conclusions have for the ongoing use of comparative jurisprudence in constitutional adjudication.

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21. At the outset, I wish to clarify that I will not be examining the use of comparative jurisprudence by national courts in order to give effect to the norms of an international legal system. The most prominent example of this sort of legal regime is the European Union, where national courts are under an obligation to interpret and apply European Union legal norms, and to give them supremacy over any conflicting national law. *See* DEREK WYATT & ALAN DASHWOOD, WYATT AND DASHWOOD'S EUROPEAN COMMUNITY LAW (3d ed. 1993). When applying Union law, national courts of the various member states often refer to the decisions of the European Court of Justice ("ECJ"), the judicial body charged with the responsibility of interpreting the various treaties, legislation, and regulations that comprise the corpus of European law. They cite the ECJ in the way that a state court would cite a decision of the U.S. Supreme Court, as *binding* authority. Anne-Marie Slaughter has appropriately termed this use of comparative jurisprudence as "vertical communication." Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 106-11 (1994). What interests me, however, is the reliance on foreign jurisprudence that is *not* legally binding. In these situations, a court is faced with an interpretive choice, and consciously decides to refer to and engage with foreign jurisprudence, even though it is not legally compelled to do so.

It is possible to imagine a situation where the authoritativeness of a comparative source stands somewhere between being "vertical" or binding, and nonbinding. One example is the influence of U.S. Supreme Court interpretations of the U.S. Constitution on the interpretation of similar or analogous provisions in *state* constitutions by state supreme courts. In a strictly positivist sense, the interpretation of the Federal Constitution has no legal bearing on the interpretation of state constitutions, because they are distinct documents. Nevertheless, given the position of both the Federal Constitution and the Supreme Court within the culture of American constitutionalism, the construction that the latter body puts on the former document may exert a precedential force that, although not legally binding, is rather powerful.

II. THE MODES OF COMPARATIVE CONSTITUTIONAL INTERPRETATION INTRODUCED

A. The State of the Literature and the Approach of this Study

Although there is a large and growing body of scholarship on comparative constitutional law, very little of it deals with the questions I explore. For example, a great deal of scholarly attention has been devoted to identifying the structural similarities between various constitutional documents.[22] However, such analyses do not address questions of constitutional interpretation, let alone the use of comparative case law. A number of scholars, meanwhile, have compared the jurisprudence of different jurisdictions. Some merely describe differences in case law between countries at the level of doctrine.[23] Others go further and scrutinize the jurisprudence of one jurisdiction in the light of arguments of principle drawn from another.[24] The most ambitious scholars use comparative law as a vehicle to both identify and explore the assumptions, both factual and normative, underlying constitutional argument in different countries.[25] Sometimes, they seek to expose and compare these assumptions as a means of provoking fundamental legal change.[26] However, none of these scholars have examined the use of comparative law in actual constitutional interpretation.

Those few scholars who have turned their attention to this legal phenomenon have done so in ways that fail to shed light on some important questions. Some articles, for example, simply describe the use of comparative jurisprudence in a relatively superficial manner, without unpacking the different ways in which comparative case law is used, and without reflecting on the implications of the use of foreign case law for theories of constitutional interpretation.[27] Those commentators who have turned

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22. *See, e.g.*, Paul Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison*, 28 MCGILL L.J. 811 (1983).

23. *See, e.g.*, KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH (1995).

24. *See, e.g.*, Andrew S. Butler, *Constitutional Rights in Private Litigation: A Critique and Comparative Analysis*, 22 ANGLO-AM. L. REV. 1 (1993); Gerald L. Neuman, Casey *in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273 (1995).

25. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 152-63 (1991); Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837 (1991); Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980); Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425.

26. *See, e.g.*, GLENDON, *supra* note 25, at 146-58; and Moran, *supra* note 25, at 1497-1514.

27. *See, e.g.*, Peter McCormick, *The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview*, 8 SUP. CT. L. REV. (2d) 527 (1997); Christopher P. Manfredi, *The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms*, 40 AM. J. COMP. L. 213

their attention to theoretical questions, moreover, sometimes explain comparative constitutional interpretation by reference to international relations theory.[28] But a fuller account must give sufficient weight to the facts that courts are interpreting domestic constitutions which may not give effect to international legal obligations, that those courts do not always evince an express intention to give effect to international legal norms, and that those courts often rely on comparative sources which are not necessarily part of international law.

Most recently, some authors have sought to explain why the Constitutional Court of South Africa has relied to such a great extent on foreign jurisprudence, but they continue to leave many important questions unanswered. One author, for example, simply states that comparative jurisprudence was regarded by the court in *State v. Makwanyane*[29] as a "guiding force[] in its interpretation of the South African Bill of Rights," but does not fully explain what kind of guidance foreign jurisprudence provided in that case.[30]

A suitable account of the use of comparative jurisprudence in constitutional interpretation should address two central questions, one empirical, the other more normative. First, it should accurately and analytically describe the practice of comparative constitutional interpretation. Although comparative jurisprudence can be and often is used as judicial "window-dressing"—consisting merely of citations to foreign judgments without much discussion or analysis—in other circumstances, courts examine and engage with foreign jurisprudence in complex and different ways. As a merely descriptive matter, then, academic study should explore the interpretive methodologies employed by courts. Second, an informative account of comparative constitutional interpretation should outline the normative justifications, both explicit and implicit, offered by courts when relying on comparative case law. Again, these normative justifications are diverse.

The answers to these two questions, although analytically distinct, are related in a fundamentally important way. The interpretive methodologies of comparative constitutional interpretation point to deeper normative premises regarding the justifications for the use of comparative jurisprudence. That is, the *way* a court reasons with foreign sources reflects *why* it thinks foreign sources are worth discussing. Moreover, courts have been less than forthcoming about justifying their use of comparative materials, which has made these normative premises somewhat inaccessible. This suggests that we may instead gaze at those normative premises through the lens of interpretive style.[31] The task at hand is to first set out these

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(1992).

28. *See generally, e.g.*, Slaughter, *supra* note 21.

29. 1995 (3) SALR 391 (CC).

30. Peter Norbert Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT'L L. 287, 304-05 (1996). A similar point is made by Bernard E. Harcourt, Comment, *Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases*, 9 HARV. HUM. RTS. J. 255, 257, 266 (1996).

31. For a similar suggestion, see Mitchel de S.-O.-l'E. Lasser, *Comparative Law and Comparative Literature: A Project in Progress*, 1997 UTAH L. REV. 471, 481; Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1326-27 (1995).

interpretive methodologies, in order to then identify the normative premises underlying each one.

B. The Relevance of Comparative Legal Studies

Comparative jurisprudence is used in three different ways in constitutional interpretation, each of which points to a different understanding of the relationship between national constitutions and constitutions worldwide. In this part, I briefly introduce these modes of comparative constitutional interpretation. Later, I examine them through the lens of case studies that bring out, in sharp relief, the differences among them.

These modes of interpretation map onto different conceptions of the academic discipline of comparative law, which is broadly defined as the study of how and why legal rules and systems differ or are the same. In its "pure" form, comparative law asks these questions for their own sake. However, the field of comparative legal studies has a significant applied dimension as well. Typically, the study of foreign legal systems is an important tool for legislators interested in law reform and the harmonization of legislation across different jurisdictions.[32] Increasingly, though, comparative law is of practical use not just to legislators, but also to courts interested in looking to foreign solutions for help in resolving nettlesome problems in domestic law.[33]

Beyond these broad generalities, however, comparative law scholars differ sharply on the aims and purposes of their discipline. One leading casebook has gone so far as to say that "comparative law . . . is experiencing something of an identity crisis."[34] Various visions for comparative law correspond to different ways of using (or refusing to use) comparative jurisprudence in constitutional adjudication. In the parts that follow, I will use these different conceptions as explanatory aids to illuminate the actual practice of courts, because they either make explicit many of the normative claims that courts implicitly rely on, or help to flesh out the normative claims that courts explicitly advance.[35]

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32. For a general discussion, see Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101 (1989). Perhaps the best known example of the use of comparative law as a tool in law reform is the reliance on the French and German civil codes as models by countries around the world.

33. *See, e.g.*, T. Koopmans, *Comparative Law and the Courts*, 45 INT'L & COMP. L.Q. 545 (1996).

34. MARY A. GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 8 (2d ed. 1994).

35. For other attempts to describe different schools of comparative legal studies, see Günter Frankenberg, *Stranger than Paradise: Identity & Politics in Comparative Law*, 1997 UTAH L. REV. 259, 262-74; David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 595-606.

C. Legal Particularism, Legal Hegemony, and the Refusal to Use Comparative Jurisprudence

I begin by amplifying the case *against* the use of comparative jurisprudence in constitutional adjudication. One such interpretive attitude is "legal particularism," which emphasizes that legal norms and institutions generally, and constitutions in particular, both emerge from and reflect particular national circumstances, most centrally a nation's history and political culture. In its strongest formulation, legal particularism asserts that constitutions are important aspects of national identity. Comparative jurisprudence is of no assistance at all, precisely because it comes from outside a given legal system. At best, it represents a foreign curiosity of strictly academic interest and little practical relevance. At worst, its use is a foreign imposition or even a form of legal imperialism.[36]

Legal particularism underlies most American theories of constitutional interpretation. But the refusal to use comparative case law also finds intellectual support in a school of comparative legal studies represented by scholars like William Alford,[37] George Fletcher,[38] and Frederick Schauer.[39] These scholars take seriously divergences among legal systems, and give them normative bite. But their starting point is to emphasize differences where there appear to be none—that is, where different legal systems appear very similar because they employ the same terminology, such as rights, duties, liberties, powers, and so on. On their account, these similarities are rather superficial, and conceal profound differences not apparent at first glance. Alford, for example, discussing the use of familiar vocabulary (rights, liberties) to frame constitutional guarantees in China, states that one cannot thereby conclude that "the Chinese are finally adopting a legal system that contains at least the beginnings of a rule of law ideal," because such a conclusion would assume that the use of familiar language indicates "that the Chinese mean to and will, in fact, be acting as we believe we do when we use it."[40]

Particularists' common argument is that in a post-Realist world, it is beyond dispute that legal texts are inherently ambiguous and require reference to extra-textual sources for their interpretation and application in concrete cases. Moreover, although "overarching principles of political morality" provide some assistance,

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36. For a discussion of legal imperialism, see Frankenberg, *supra* note 35, at 262 (describing comparative law as "a postmodern form of conquest executed through legal transplants and harmonization strategies"). *See also* John R. Schmidhauser, *Power, Legal Imperialism, and Dependency*, 23 L. & SOC'Y REV. 857, 858 (1989) (discussing "[t]he significance of domestic revolution, transnational military conquest, economic penetration, or cultural imperialism as key variables in the relationship of a nation or territory to a particular family of law").

37. William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986).

38. George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737 (1993) [hereinafter Fletcher, *Constitutional Identity*]; George P. Fletcher, *The Universal and the Particular in Legal Discourse*, 1987 BYU L. REV. 335 [hereinafter Fletcher, *Legal Discourse*].

39. Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865 (1993).

40. Alford, *supra* note 37, at 954.

"these arguments quickly run dry" because the question then arises of which political morality to choose.[41] Significantly, particularists claim that courts, as a matter of empirical fact, do not look outward to foreign experiences; rather, they turn inward to sources which are internal to a particular country.

Particularists characterize the nature of internal sources in slightly different ways. Alford, for example, describes them in terms of the "rhetoric and consciousness of those abroad . . . [i.e.,] what people believe that they are doing," or the "self-characterizations and self-perceptions" of actors within those legal systems,[42] turning comparative law into a branch of cultural anthropology. Schauer emphasizes the importance of cultural and political history. He views constitutional adjudication as a "process of descriptive generalization," which he defines as "the way in which certain events are seen [by a court] as (or as not) members of some larger class or category,"[43] such as protected or unprotected expression. The actual process of categorization of a particular event is a function not of the constitutional text, but rather of "cultural experience and cultural history."[44] Thus, a German court may be able to distinguish between Nazi sympathizers and other peripheral political actors, and uphold severe restrictions on the political activities of only the former, whereas an American court could not. Fletcher, although he agrees with Schauer on the centrality of history, incorporates history into the structure of legal argument in various legal systems, which he defines as "the ideas, concepts, arguments and doctrinal forms by which lawyers make sense of what they are doing and with which they seek to persuade officials and each other of the justice of their cause."[45] Those arguments, in turn, reflect the accumulated experience of a system. Constitutional decisions, therefore, "reflect . . . the legal culture in which the dispute is embedded," and, as such, are "expressions of the decision makers' constitutional identities."[46]

The reliance on internal sources—cultural and political history, the structure of legal argument, or the "rhetoric and consciousness" of persons in a given society—leads particularists to be skeptical of the viability of transplanting constitutional doctrine from one country to another. Thus, Schauer "doubt[s] the recent ease with which constitutional transplantation seem now to be embraced," because "so long as cultural differences are reflected in categorical differences, . . . [there are] likely to be pressures militating against the cross-cultural assimilation of cultural categories."[47] Fletcher frames the difficulty as one of translation. A concept central to the interpretation of the Fourth Amendment, such as "reasonable" or "trespass," cannot be transferred wholesale into the Russian Constitution, either because those terms have no equivalent, or legal equivalent, in the Russian language, or because those terms do not carry the same legal significance in the Russian legal system as they do in American constitutional jurisprudence.[48]

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41. Fletcher, *Constitutional Identity*, *supra* note 38, at 739.
42. Alford, *supra* note 37, at 947.
43. Schauer, *supra* note 39, at 867 (parenthetical in the original).
44. *Id.* at 877.
45. Fletcher, *Legal Discourse*, *supra* note 38, at 336-39.
46. Fletcher, *Constitutional Identity*, *supra* note 38, at 737.
47. Schauer, *supra* note 39, at 867, 879.
48. *See* Fletcher, *Legal Discourse*, *supra* note 38, at 345-46.

Alford's implicit point, meanwhile, is somewhat different: for him, transplants are impossible because one cannot fully comprehend a foreign legal system "precisely as would someone living" in that legal system.[49]

Arguably, legal particularism accounts for the steadfast refusal of American courts to rely on foreign case law when interpreting the United States Constitution. Thus, Justice Scalia has admonished his colleagues to remember that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding"[50] and that "comparative analysis [is] inappropriate to the task of interpreting a constitution."[51] However, a more convincing explanation for the unwillingness of American courts to look at foreign jurisprudence may not be legal particularism, but rather an attitude of legal hegemony. Committed particularists hold the view that no country can learn from any other. While hegemonists would agree that American courts cannot learn from foreign jurisprudence, they would nevertheless believe that courts *abroad* could learn a great deal from American case law. This attitude is premised on the belief that all systems of judicial review are derivative on American constitutionalism.[52] On this account, Americans invented judicial review, have engaged in it more frequently, and for longer than any other country in the world. Other jurisdictions are younger and relatively inexperienced. Accordingly, the direction of comparative insight flows from America outward, and not the other way around.

This interpretation of the place of American constitutional experience in the global practice of constitutionalism is inadvertently reflected in recent well-intentioned suggestions that American courts rely to a greater extent on comparative materials. Thus, Justice Calabresi has endorsed the use of comparative jurisprudence because other countries are its "constitutional offspring," and has urged that "[w]ise parents do not hesitate to learn from their children."[53] Similarly, Carol Steiker has suggested that American constitutional scholars look closely at the decision of the Constitutional Court of South Africa in *Makwanyane*, because "[i]n some loosely metaphorical ways, South Africa is both a mirror for and the child of the American legal system, or at least American constitutionalism."[54]

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49. Alford, *supra* note 37, at 948.

50. Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988).

51. Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

52. *See, e.g.*, RONALD M. DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

> François Furet said recently, in a bicentennial lecture on the French Revolution, that the most important development in democratic theory since World War II was the continuing change, not only in Europe but in democracies across the world, from a majoritarian to a communal democratic system, in which the basic rights of men and women are adjudicated by judges under an abstract written constitution. *He rightly credited that most important development to the ideas of the American rather than the French Revolution.* . . . [I]t would be a historic shame if we begin now to abandon our most distinctive and valuable contribution to democratic theory.

Id. at 71 (emphasis added).

53. United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

54. Carol S. Steiker, *Pretoria, Not Peoria:* FCIS S v. Makwanyane and Another, *1995 (3) SA 391*, 74 TEX. L. REV. 1285, 1285 (1996).

These attitudes, however, are not universal in the American academy. Thus, Mark Tushnet has

D. Three Modes of Comparative Constitutional Interpretation

1. Mode 1: Universalist Interpretation

At the opposite end of the spectrum from particularists stand scholars who posit that constitutional guarantees are cut from a universal cloth, and that all constitutional courts are engaged in the identification, interpretation, and application of the same set of principles. Unlike particularists, who emphasize the differences among legal systems, these scholars see unity in the midst of diversity. This mode of comparative constitutional interpretation is "universalist," because it exhorts courts to pay no heed to national legal particularities when engaging in constitutional interpretation. Courts working in this interpretive mode regard themselves "as giving meaning to liberties that transcend national boundaries."[55]

A universalist view of the law is an important strain in comparative law scholarship. A leading textbook, for example, makes the descriptive claim that the "basic rule of comparative law" is that "different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation."[56] This descriptive claim exists alongside a normative one—that systems

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suggested that "[w]ith the spread of constitutional review throughout the world, we now have a larger base of information on which to rest judgments about" the potential threats to democratic decisionmaking raised by judicial review. Mark V. Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 249 (1995). Similarly, in stark contrast to his admonition of the apparent xenophilia of American constitutional theorists in WE THE PEOPLE: FOUNDATIONS, *supra* note 12, Bruce Ackerman now derides the "emphatic provincialism" of American constitutional thought, and claims that comparative jurisprudence offers "a formidable fund of experience for comparative investigation," Ackerman, *supra* note 2, at 772-75. Most recently, J.M. Balkin and Sanford Levinson have advocated the inclusion of comparative materials in American constitutional law casebooks, noting that "[j]ust as there is more than one way to design a democracy, there is surely more than one way to interpret a constitutional provision." J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1005 (1998).

55. GREENAWALT, *supra* note 23, at 12 (describing the Canadian constitutional jurisprudence on free expression).

This style of reasoning has been evident in numerous aspects of South African constitutional jurisprudence. Universalist interpretation played a dominant role in the striking down of the death penalty in *Makwanyane*; moreover, and more interestingly, it did so even though most of the decisions that the Constitutional Court relied on *upheld* the legality of capital punishment. Universalist interpretation has also played a critical role in the development of the South African jurisprudence on the presumption of innocence, which has relied extensively on Canadian case law to strike down provisions reversing the onus of proof in criminal proceedings. The cases I will focus on are *State v. Zuma*, 1995 (2) SALR 642 (CC), and *State v. Coetzee*, 1997 (3) BCLR 437 (CC). *See infra* Part III.

56. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 36 (Tony Weir trans., Oxford Univ. Press 2d ed. 1987). Basil Markensinis has expressed the same view: "Unashamedly, therefore, the series and the book, while not ignoring the differences, were aimed

ought to be similar. It follows that "[e]very legal system in the world is open to the same questions and subject to the same standards,"[57] so that when systems do differ, it is often the result of "historical accident or temporary or contingent circumstances."[58] Thus, comparative law enables one to rank, compare, and evaluate differing approaches taken by various jurisdictions, and "to discover which solution of a problem is the best" or "clearly superior."[59]

The obvious objection to this approach is that such a comparison is impossible, precisely because legal systems differ widely and deeply in their conceptual structure. The response of comparative lawyers of this school is that one must look beyond legal doctrine to the actual *function* of legal rules. As Otto Kahn-Freund famously put it, "what is being compared is not that which is formulated and said but that which is being done."[60] Legal doctrines, on this account, are no more than "man-made classifications" which should be "seen as what they are: intellectual tools to be used and, if necessary, to be cast aside."[61] In its strongest form, then, the universalist strain of comparative legal scholarship dismisses the importance of legal argument. It would apparently have little insight to shed on the migration of constitutional *jurisprudence* across national borders.

However, universalist arguments need not be so deeply skeptical. It can be argued that the underlying functional similarities between the problems faced, and the solutions proposed, by different legal systems can in fact become the foundation for the grammar and theoretical concepts of a universal legal language. David Beatty forcefully puts forth this view in a comparative study of constitutional adjudication, claiming that "the basic principles of constitutional law are essentially the same around the world, even though there is considerable variation in what guarantees

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at underlying and underlining similarities, common problems, and the advantages of searching together for similar or common answers." Basil Markensinis, *Learning from Europe and Learning in Europe*, *in* THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY 2 (Basil Markensinis ed., 1994).

57. ZWEIGERT & KÖTZ, *supra* note 56, at 45.

58. *Id.* at 3.

59. *Id.* at 8, 46.

60. OTTO KAHN-FREUND, COMPARATIVE LAW AS AN ACADEMIC SUBJECT 21 (1965).

61. *Id.* at 22. Traditionally, the functionalist approach has been deployed most effectively in the study of private law. "[C]omparative private law" is "the heartland of all comparative law." ZWEIGERT & KÖTZ, *supra* note 56, at 4. Public law (i.e., constitutional and administrative law) has always been set to one side, because it has been viewed as difficult to transplant from one country to another; private law, by comparison, can be transplanted with relative ease. Kahn-Freund, in a famous article, explained the difference in the "degrees of transferability" of public and private law as a function of economic, cultural, and political environments. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6-7 (1974). The transferability of private law from one country to another was a function of the degree of similarity between their economic and cultural environments; Kahn-Freund asserted that economic and cultural convergence between different countries therefore accounted for the ease with which private law could move across national borders. *See id.* at 6. By contrast, the profound differences between the political environments of countries suggested that the rules of public law are the ones most resistant to transplantation. *See id.* at 8-13. On a strictly functional analysis, the globalization of the practice of modern constitutionalism would suggest a degree of political convergence not present in Kahn-Freund's day.

constitutions contain and in the language that they employ."[62] He finds such a unity of approach notwithstanding that each of the courts he examines "has developed its own unique style of review."[63]

Beatty's universal principles are in fact principles of justification or limitation, which reduce the task of judicial review to the scrutiny of the infringement of rights. But universalist interpretation may instead focus on the interpretation of constitutional rights. Particular rights, such as freedom of expression, freedom of religion, or freedom of association, could each be based on political theories of what interests those rights are designed to protect. Universalists would hold that those theories are the same for every constitution in which those rights are found.[64] Comparative jurisprudence becomes a "repository of principles"[65] to be relied on as valuable articulations, explanations, and commentaries on the political theories underlying particular constitutional rights. Additionally, foreign judgments suggest how those rights are to be applied in concrete cases. A court no longer has to engage in the burdensome and time-consuming task of formulating those ideals itself, since comparative case law offers a convenient shortcut to attaining the same goal.[66]

2. Mode 2: Dialogical Interpretation

In its strongest form, legal particularism regards the mutual unintelligibility or incompatibility of legal systems as a fundamental barrier to the use of comparative jurisprudence. Fletcher asserts, in this vein, that "there are differences in detail [between legal systems] that are so profound they call into question the extent of a shared foundation of legal thought."[67] However, this position stands against the conventionally expressed view that comparative law is an important tool for understanding one's *own* legal system. Authors of comparative law textbooks frequently express this position, albeit in slightly different ways. De Cruz, for example, claims that the study of comparative law "encourages the student to be more critical about the functions and purposes of the rules he is studying and to learn not to accept their validity purely because they belong to his own system of

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62. DAVID M. BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 10 (1995) [hereinafter BEATTY, CONSTITUTIONAL LAW]. Beatty's claims are also advanced in David M. Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131 (1996); and David M. Beatty, *Constitutional Rights in Japan and Canada*, 41 AM. J. COMP. L. 535 (1993).

63. BEATTY, CONSTITUTIONAL LAW, *supra* note 62, at 105.

64. Along these lines, Mauro Cappelletti has asserted that "[i]t seems indisputable that behind and beyond the many and often profound differences, there is in Western societies an essentially common cultural heritage, a sharing of basic individual and societal values, and a pervasive similarity in the evolution of approaches to fundamental values." Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 412 (1980).

65. I borrow the term "repository of principles" from Alfred Cockrell, *Rainbow Jurisprudence*, 12 S. AFR. J. HUM. RTS. 1, 27 (1996); Cockrell also uses the phrase "store-house of principles," to express the same idea. *Id.* at 26.

66. *See* Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 557 (1991) (stating that "the general theory of sound governance travels well abroad").

67. Fletcher, *Legal Discourse*, *supra* note 38, at 342.

law."[68] Comparative law, in other words, exposes the practices of one's own legal system as contingent and circumstantial, not transcendent and timeless. Glendon and her co-authors emphasize how comparison forces one to explain features of one's own legal system that one takes as a given, because "[c]omparison often picks up issues or makes connections that remain invisible."[69] In other words, comparative jurisprudence can be an important stimulus to legal self-reflection. The mode of comparative constitutional interpretation that these scholars point to is "dialogical," because courts that take this interpretive approach engage in dialogue with comparative jurisprudence in order to better understand their own constitutional systems and jurisprudence.[70]

The dialogical use of comparative legal materials has been advocated by Mary Ann Glendon,[71] William Ewald,[72] and Günter Frankenberg.[73] Like particularists, Glendon, Ewald, and Frankenberg hold the view that the legal doctrine found within a legal system is best understood as expressing the underlying values or even the identity of that system. The task of the comparative legal scholar is to peer through the black-letter rules and discover the foundation of normative and factual assumptions that undergirds constitutional argument. Glendon, for example,

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68. PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 15 (1995). For a similar view, see BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 111 (1990).

69. GLENDON ET AL., *supra* note 34, at 10. The following quotation from Fernand Braudel makes the same point:

> Live in London for a year, and you will not get to know much about the English. But through comparison, and in the light of your surprise, you will suddenly come to understand some of the more profound and individual characteristics of France, which you did not previously understand because you know them too well.

Id. at 12 (quoting Fernand Braudel, *Histoire et Sciences Sociales: La Longue Dureé*, *in* ANNALES: ECONOMIES, SOCIÉTÉS, CIVILISATIONS 725, 737 (1958)).

70. South African constitutional case law provides a number of vivid examples of dialogical interpretation. The South African Constitutional Court has engaged in a thoughtful analysis of American jurisprudence in defining the division of powers between the national and provincial governments, *see Ex Parte* Speaker of the National Assembly: *In Re* Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 84 of 1995, 1996 (3) SALR 289 (CC), under the Interim Constitution, *see* INTERIM S. AFR. CONST. (Constitution of the Republic of South Africa Act 200 of 1993) [hereinafter INTERIM S. AFR. CONST.]. Dialogical reasoning also played a pivotal role in the dissenting judgments of a decision on the scope of the State Action Doctrine, again under the Interim Constitution. *See* Du Plessis v. De Klerk, 1996 (3) SALR 850 (CC). Finally, comparative jurisprudence served as a stimulus to self-reflection in South African decisions on religious freedom, *see* State v. Solberg, 1997 (10) BCLR 1348 (CC), and the permissible scope of constitutional amendments, *see* Premier, Kwazulu-Natal v. President of the Republic of South Africa, 1996 (1) SALR 769 (CC). *See also infra* Part IV.

71. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987) [hereinafter GLENDON, ABORTION AND DIVORCE]; Mary Ann Glendon, *A Beau Mentir Qui Vient de Loin: The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569 (1989) [hereinafter Glendon, *Canadian Abortion Decision*].

72. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995).

73. Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985).

describes comparative law as the study of "the rhetorical activity of law," and writes,

> Whether meant to or not, law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going. . . . [I]t may be that law affects our lives at least as much by these stories as it does by the specific rules, standards, institutions, and procedures of which it is composed. Thus it is not an unworthy task for scholars to ask how law interprets the world around it, what analogies and images it employs, what segments of history and what aspects of human experience it treats as relevant.[74]

Ewald, by contrast, characterizes the task of the comparative lawyer not as a form of cultural studies, but as a form of applied moral philosophy. Nevertheless, he describes the deep structure of a legal system in similar terms:

> [T]he broad internal principles that underlie the fundamental institutions of the positive law are characteristically principles of political and moral philosophy: principles about the nature of law, the extent of the justified power of the state, the political responsibilities of courts and legislatures, the legitimacy of private property, the nature of contractual obligation, the justification of punishment, and so on.[75]

Comprehending a foreign legal system as being organized around a core set of normative and factual assumptions leads to a deeper understanding of that system. But it also furthers legal self-understanding, because it invites the comparative lawyer, or the judge, to compare those assumptions against the assumptions that legal doctrine in her own system both reflects and constitutes. She may discover that two legal systems, in Frankenberg's words, embody "competing political visions and contradictory normative ideals."[76] Comparative jurisprudence, then, may sharpen our awareness of constitutional difference.[77] But the converse may be true as well. A foreign legal identity may prove to be astonishingly similar to our own, or, more likely, similar in relevant respects. If the particular legal point which prompted this course of comparison and self-reflection were open, a court would be justified in "making a legal transfer or reception from the foreign country concerned."[78] If the point were settled, the consequences could be even more dramatic. Comparative jurisprudence could serve as a destabilizing force that would

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74. GLENDON, ABORTION AND DIVORCE, *supra* note 71, at 8-9.

75. Ewald, *supra* note 72, at 2144.

76. Frankenberg, *supra* note 73, at 452.

77. *See* GLENDON, ABORTION AND DIVORCE, *supra* note 71, at 142. "Comparative law does not provide blueprints or solutions. But awareness of foreign experiences does lead to the kind of self-understanding that constitutes a necessary first step on the way toward working out our own approaches to our own problems." *Id.*

In a similar vein, Richard Primus has argued that a desire to "articulate principles that distinguished America from the Soviet Union and Nazi Germany contributed to a long line of liberal Supreme Court decisions from the Second World War through the Warren era." Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423 (1996). In my terminology, the Court reasoned dialogically not with foreign jurisprudence, but with the Court's own understanding of the Nazi and Soviet legal regimes.

78. Edward McWhinney, *The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence*, 61 CAN. B. REV. 55, 64 (1983).

help us "to imagine the road not taken, to think and explore counterfactual trajectories"; it "may allow us a vantage—in uncertainty—from which to re-evaluate the givens of our legal world."[79]

3. Mode 3: Genealogical Interpretation

The third mode of comparative constitutional interpretation holds that constitutions are often tied together by complicated relationships of genealogy and history, and that those relationships themselves offer sufficient justification to import and apply entire areas of constitutional doctrine. I use the term "genealogical relationships" rather deliberately, in order to distinguish them from Henkin's "genetic relationships." For Henkin, constitutions are genetically related if one influenced the framing of the other, or if both were framed under the influence of a third.[80] A genealogical relationship, on the other hand, describes a rather different phenomenon—literally, the *birth* of one constitutional order from another. Constitutions tied together by genealogy are related either like parent and child, or like siblings who have emerged from the same parent legal system.[81]

Genealogical themes have been infrequently explored in the critical literature on comparative law, because genealogical relationships, narrowly defined, are relatively rare. Alan Watson has come closest to elaborating a genealogical theory of comparative law, centered on the idea that comparative law is best understood as "the study of the relationship of one legal system and its rules with another."[82] Watson's theory of comparative law has two dimensions, one of which follows from the other. First, he defines the relationships among legal systems strictly in historical terms. A historical relationship exists "where one system or one of its

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79. Frankenberg, *supra* note 73, at 454-55.

80. Henkin, *supra* note 3, at 536-38.

81. As I develop below, the case study that vividly illustrates genealogical interpretation is the complicated relationship between the guarantees for aboriginal rights found in the Canadian Constitution, the (now-diluted) status of Indian tribes as domestic dependent nations in the United States, and British imperial constitutional law. The Canadian Constitution, in contrast to the American Constitution, explicitly affirms and recognizes "existing aboriginal . . . rights." CAN. CONST. (Constitution Act, 1982) pt. II (Rights of the Aboriginal Peoples of Canada), § 35(1). What is most unclear in this formulation is what *existing* rights aboriginal peoples have. It is widely acknowledged that the answer to this interpretive question requires a consideration of the normative foundations of and justifications for aboriginal rights. Canadian jurisprudence, reflecting its sources in British imperial constitutional law, has tended to ground the legitimacy of aboriginal rights in the prior occupation of land. However, in the United States, Chief Justice John Marshall derived a radically different principle from the practice of British colonizers: that the source of aboriginal rights is to be found in the prior sovereignty of aboriginal nations. The judgments of Chief Justice Marshall have haunted Canadian constitutional jurisprudence for over a century, and to this day figure prominently in judicial decisions, legal argument, and academic commentary. When it is invoked, I will argue, Canadian courts, lawyers, and scholars implicitly make a genealogical claim—namely, that American jurisprudence is directly relevant because of its common origins in the law of the British empire. *See infra* Part V.

82. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 6 (2d ed. 1993). For a recent assessment of Watson's contributions to comparative law theory, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 *passim* (1995).

rules derives from another system, probably with modifications; where more than one system or rules of such systems derive from a further system; or (where derive is too strong a term) when one system exerts influence on another."[83] The second dimension of Watson's theory follows from the first. Given the prevalence of "legal transplants" from one system to another, Watson asks what role they have played in legal development.

Watson's theory is at best only an approximation of the genealogical mode of comparative constitutional interpretation, but it is a useful one nevertheless. His category of historical relationships embraces much more than relationships of genealogy in the strict sense. But the notion that historical relationships are a threshold constraint on the subject of comparisons is important, because it identifies which systems can be the sources of genealogical arguments, and, more importantly, which ones cannot. Where there is no historical relationship—for example, where systems are similar but have had no historical contact—those systems are not appropriate for comparative legal study. In this respect, the sources of genealogical arguments are much narrower that those of universalist and dialogical interpretation.

The second dimension of Watson's theory also finds expression in the genealogical interpretive method. For him, legal transplants between systems are a significant engine of legal change.[84] Watson's focus on transplants is distinctly historical and retrospective—he looks to transplants to explain what has already come to pass. Genealogical interpretation also looks to the past, but for a different reason. It aims to rediscover forgotten historical relationships not to better understand them, but to identify interpretive resources that may enable courts to chart a new constitutional future.

E. Conclusion

In sum, courts use three different interpretive modes—universalist, dialogical, and genealogical—when relying on comparative jurisprudence in constitutional adjudication. In the next three sections of this Article, I explore each of these modes through the use of case-studies. Although I have cast the three modes of comparative constitutional interpretation as alternatives, they are not mutually exclusive. Despite the fact that they are analytically distinct, they can in principle be employed by the same judges, on the same courts, and with respect to the same issues. Thus, as I suggest below, a Canadian court adjudicating an aboriginal rights claim could look to the American jurisprudence on aboriginal rights both because of its genealogical authority, and because it is substantively appealing. Indeed, in the future, should the Supreme Court of Canada adopt a narrow view of the nature and extent of the aboriginal right to self-government (if it accepts that such a right exists), a dialogical interpretation of Chief Justice Marshall's judgment in *Worcester v. Georgia*[85] might assist the court in shaping the contours of that right.

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83. WATSON, *supra* note 82, at 7 (parenthetical in original).

84. *See* Alan Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79 (1976).

85. 31 U.S. (6 Pet.) 515 (1832).

The modes of comparative constitutional interpretation can also be used in response to one another. This is most evident in the South African case law. Thus, in *Du Plessis v. De Klerk*,[86] as I explain, the dissenting judges employed dialogical reasoning to suggest that the South African Bill of Rights applied horizontally between private parties. Their choice of interpretive methodology was a response, in part, to universalist elements in the majority reasons and the trial judgment. The latter judges had sought to assimilate the South African Bill of Rights into the larger tradition of liberal constitutionalism, within which constitutional rights only operate against the state.

Before turning to the case-studies, I address a methodological point concerning the strength of my claim that the interpretive modes make sense of the use of comparative materials in constitutional law. A critic could argue that these models imply that comparative case law can be a determinative force in constitutional adjudication. According to this critic, for a theory of comparative constitutional interpretation to accurately reflect court practice, it would have to deny the reliance on other interpretive methodologies (e.g., originalist, purposivist, etc.) in constitutional adjudication. In other words, for my argument to stand, comparative law would have to be an exclusionary reason for legal decisionmaking.[87] An exclusionary reason, in the context of constitutional adjudication, is a reason for resolving a legal point in a certain manner, and for disregarding reasons for resolving that point differently.

However, despite a recent suggestion that exclusionary reasons play an important role in constitutional interpretation,[88] the better view is that constitutional adjudication is based upon a plural conception of authoritative reasons—that is, that the tapestry of constitutional jurisprudence is woven out of a diverse set of values which often operate simultaneously in particular legal disputes. These values arise from a variety of sources. Constitutional adjudication, for example, draws on a number of different sources for its legitimacy (e.g., political morality, constitutional structure, or original intent), and these sources form the foundation of a diverse set of interpretive styles. Moreover, constitutions contain provisions that incorporate principles of political morality which are rather different (e.g., individual autonomy and democratic governance), and are on occasion in tension with one another (e.g., freedom of expression and the right to a fair trial), which judges must interpret, apply, and reconcile. Michelman gestures to the plural nature of authoritative reasons in constitutional interpretation when he states that various interpretive approaches "are multiple poles in a complex field of forces, among which judges

86. 1996 (3) SALR 850 (CC).

87. *See* JOSEPH RAZ, *The Claims of Law*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 28, 32-33 (1979) [hereinafter THE AUTHORITY OF LAW].

88. *See* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 714 (1994).

navigate and negotiate."[89] To extend Michelman's analogy, my goal is only to ensure that comparative jurisprudence is recognized as a pole in that field.[90]

III. UNIVERSALIST INTERPRETATION

A. Introduction

The interpretive methodology and the normative premises of universalist interpretation are best exemplified by a series of judgments of the South African Constitutional Court. These decisions, for the most part, revolve around the interpretation and application of constitutional rights in the criminal process. For example, the court has found that the death penalty amounts to "cruel, inhuman and degrading punishment,"[91] and that the reversal of the onus of proof with respect to both an essential element of an offense and a collateral fact violates the presumption of innocence.[92]

A series of phrases in a number of the court's judgments gesture to the court's interpretive approach in these decisions.[93] For example, prefacing his extensive discussion of comparative materials in *Makwanyane*, the President of the Constitutional Court, Justice Chaskalson stated that "international and foreign authorities are of value because they analy[z]e arguments for and against the death sentence."[94] Similarly, Justice Sachs wrote in another judgment that foreign jurisprudence should be examined "with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules."[95] Justice Ackermann echoed this theme in a third decision, stating that foreign jurisprudence was relevant "not in order to draw direct analogies, but to identify the underlying reasoning with a view to establishing the norms that apply in other open and democratic societies."[96]

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89. Frank I. Michelman, *A Constitutional Conversation with Professor Frank Michelman*, 11 S. AFR. J. HUM. RTS. 477, 483 (1995).

90. An additional methodological point relates to the selection of materials for inclusion in this study. Comparative jurisprudence figures into literally hundreds, if not thousands, of constitutional decisions. I make no claim to comprehensiveness. Nor do I claim to be representative in selecting areas of law, courts and jurisdictions, and the dates of decisions. I selected the case-studies I will now discuss because they provide vivid examples of the three different modes of comparative constitutional argument I have identified. The most serious limitation of this approach is that the models I will examine may not portray a completely accurate or realistic picture of the actual use of comparative law in constitutional adjudication worldwide. However, my claim is not so ambitious. I only take the narrow position that these models help to explain concrete instances of comparative constitutional interpretation.

91. State v. Makwanyane, 1995 (3) SALR 391, 434 (CC).

92. *See* State v. Coetzee, 1997 (3) SALR 527, 535 (CC); State v. Zuma, 1995 (2) SALR 642, 655 (CC).

93. These cites have been identified by Cockrell, *supra* note 65, at 28, as well.

94. *Makwanyane*, 1995 (3) SALR at 413.

95. Coetzee v. Government of the Republic of South Africa, 1995 (4) SALR 631, 662 (CC).

96. Ferreira v. Levin, 1996 (1) SALR 984, 1025 (CC).

These compact phrases, and the jurisprudence based on them, contain three main ideas. The first is a philosophical claim about the nature of law—that is, that law is best understood as consisting of a body of *principles*, rather than as a collection (or even a system) of formal legal *rules*. This claim is reflected in the distinction consistently drawn by the court between "arguments," "principles," and "reasoning," on the one hand, and "rigid formulae" and "rules" on the other. For the court, merely applying the latter would be a serious misuse of foreign jurisprudence, whereas relying on the former is not only acceptable, but even strongly advised.

The claim that the law should be viewed as a body of principles, not as a collection of rules, was first and most famously made by Ronald Dworkin.[97] It is useful to examine Dworkin's theory briefly in order to better understand universalist methodology. Although Dworkin's arguments have shifted over the years, his theory of law and adjudication contains a core set of ideas, the distinction between principles and rules holding a central place amongst them. Dworkin's first move in differentiating between rules and principles is an empirical one—namely, a claim that legal argumentation and adjudication involve the use of standards that have not been enacted into law according to formal criteria, but which courts nevertheless regard as being law. Dworkin terms those standards principles, and distinguishes them from formally enacted legal rules.[98] The first dimension of the distinction between principles and rules, then, is a difference in their relationships to a positivist theory of legal *sources*.[99]

However, there are other dimensions to the distinction. (Indeed, in more recent writings, Dworkin throws into question the importance of the positivist difference between rules and principles, by noting that legal rules may "incorporate"

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97. *See generally* RONALD M. DWORKIN, LAW'S EMPIRE (1986); RONALD M. DWORKIN, A MATTER OF PRINCIPLE (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE]; RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1978) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]; DWORKIN, *supra* note 52.

98. *E.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 97, at 22.

99. A critic of this interpretation of the Constitutional Court's jurisprudence could argue that this distinction between rules and principles merely reflects the idea that the former, as positive rules of law, can only legitimately come from *within* a country's legal system, whereas the latter, which are merely legal arguments, can be drawn from any source. Arguments of principle are indistinguishable whether drawn from foreign case law or philosophical texts, for in neither instance do they represent law. But this criticism fails to account for the fact that the court clearly believes it is relying on foreign *law* when it extracts arguments of principle from comparative jurisprudence. Thus, as a purely descriptive matter, the court seems to reject the positivist distinction between rules on the one hand, and principles on the other.

Positivists, like Joseph Raz, have responded to Dworkin's critique of legal positivism by pointing out that principles can be regarded as law, even without being formally enacted, if the basic legal rule within a legal system that recognizes legal sources so specifies. Joseph Raz, *Legal Principles and the Limits of the Law*, 81 YALE L.J. 823, 853 (1972). With this embellishment, the distinction between positivists and Dworkin turns on whether judges make new law when they decide hard cases, that is, cases which are not definitively governed by existing legal rules and precedents. Dworkin answers this question in the negative. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 97, at 81. Positivists, on the other hand, would answer it in the affirmative.

principles "by reference."[100]) For Dworkin, other dimensions of the difference between principles and rules, especially in the constitutional context, are captured by the contrast Richard Fallon has recently drawn between "first principles" and "doctrine."[101] Principles, or first principles, represent the basic or fundamental ideas that both underlie and transcend formally enacted legal rules; legal rules, or doctrine, are the means by which principles are implemented for the resolution of concrete legal cases. Moreover, since principles constitute the intellectual foundations of any legal order, they are often framed in extremely general terms. As a consequence, they "are too vague to serve as rules of law" and "their effective implementation requires the crafting" of precise rules or doctrine.[102] Rules and principles differ, then, not only in terms of whether they have been formally enacted, but also in terms of their *function*, and the level of *abstraction* at which they operate.

Dworkin's principles, for example, are extremely abstract. Thus, he takes the "root principle" of the American Constitution to be the egalitarian idea "that government must treat people as equals,"[103] or that "government must treat all those subject to its dominion as having equal moral and political status."[104] The specific doctrines or rules of American constitutional law implement or actualize this basic principle. This abstract egalitarian ideal points to the final and perhaps the most important implication of Dworkin's understanding of the nature of law: that legal principles often "invoke *moral principles about political decency and justice.*"[105] Adjudication, in other words, "brings political morality into the heart of constitutional law."[106] Constitutional interpretation thus becomes an exercise in applied political philosophy.[107]

Universalist interpretation does not follow Dworkin entirely, however. Dworkin holds that principles protect the rights of individuals and are trumps against the

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100. DWORKIN, *supra* note 52, at 7.

101. Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 60, 61 (1997).

102. *Id.* at 57.

103. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 97, at 70.

104. DWORKIN, *supra* note 52, at 8.

105. *Id.* at 2 (emphasis added).

106. *Id.*

107. The link between legality and morality in Dworkin's legal theory was extremely influential in South Africa, and it should therefore come as no surprise that the South African court's use of comparative sources reflects that influence. Apartheid relied heavily on legal institutions in order to effectuate its racist policies, which, for some, had irretrievably undermined the legitimacy of the law. For South African jurists and scholars, Dworkin's writings offered a way to re-imagine the idea of legality and the role of law in the post-apartheid era. *See, e.g.*, DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY 21-24 (1991); Etienne Mureinik, *Security and Integrity*, *in* LAW UNDER STRESS: SOUTH AFRICAN LAW IN THE 1980S 197, 199-200 (T.W. Bennett et al. eds., 1988); Etienne Mureinik, *Dworkin and Apartheid*, *in* ESSAYS ON LAW AND SOCIAL PRACTICE IN SOUTH AFRICA 181 (Hugh Corder ed., 1988); David Dyzenhaus, *Law As Justification: Etienne Mureinik's Conception of Legal Culture*, 14 S. AFR. J. HUM. RTS. 11, 14-18 (1998). *See generally* Edwin Cameron, *Legal Chauvinism, Executive-Mindedness and Justice—L.C. Steyn's Impact on South African Law*, 99 S. AFR. L.J. 38 (1982).

interests of the community.[108] Universalist interpretation, however, conceives of principles more broadly. Alfred Cockrell, describing the resort to principle by the Constitutional Court of South Africa, puts the point extremely well when he argues that principles should be regarded as equivalent to "substantive reasons." He defines substantive reasons as "content-oriented standards of validity, such that for a legal rule to be valid it will be required to conform in some degree with notions of what is substantively right, just or good."[109] Substantive reasons include principles as Dworkin has defined them. However, they need not be so limited; it is possible to imagine a substantive reason that appeals to a community interest, for example, such as *ubuntu* or forgiveness.[110]

The second of the three ideas embedded in the South African Constitutional Court's jurisprudence is that the principles of law it identifies in and draws from foreign jurisprudence are *transcendent.* A transcendent principle is found within more than one legal system. I use the term transcendent deliberately, in order to clarify that although the court is engaging in "universalist interpretation," it is not making the more extravagant claim that these principles are universal. This distinction makes sense of the court's assertion that the legitimacy of the principles expressed in foreign jurisprudence is made evident by the fact that they are found elsewhere. Indeed, it may be that the legitimacy of these principles exists in proportion to the extent to which they are found abroad. However, proof of the legitimacy of these principles does not require their existence in *all* legal systems.

Notwithstanding the modesty of this claim, transcendence is based on an ambitious philosophical view of the nature of law. Transcendence represents more than an empirical assertion that legal principles are prevalent. It also embodies the proposition that prevalence is proof of a legal principle's truth or rightness. Taken to its logical conclusion, then, transcendence gestures to an understanding of legal norms based on the natural law tradition, which holds that "[l]aw precedes the state and continues to surround it."[111] The law is something to be discovered or apprehended through a process of interpretive reflection; comparative jurisprudence offers a fund of similar reflections by courts and tribunals worldwide as an aid in that process.

The court's desire to both appeal to, and situate its decisions within, a global body of jurisprudence is palpable. Justice Sachs, for example, has argued that South African constitutional jurisprudence must acknowledge "its existence as part of a global development of constitutionalism and human rights."[112] Justice Langa,

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108. *See generally* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 97.

109. Cockrell, *supra* note 65, at 5 (citing PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 412-13 (1987)).

110. The notion of *ubuntu* played a role in some of the concurring judgments in *Makwanyane.* Justice Langa, for example, explained that *ubuntu* was "a culture which places some emphasis on communality and on the interdependence of the members of a community." State v. Makwanyane, 1995 (3) SALR 391, 481 (CC). He and Justice Mokgoro relied on this concept to strike down the death penalty, because capital punishment undermined a community's sense of unity. *See id.* at 480-83, 501-04.

111. H. Patrick Glenn, *Persuasive Authority,* 32 MCGILL L.J. 261, 289 (1987).

112. State v. Mhlungu, 1995 (3) SALR 867, 917 (CC).

speaking for the court, has expressed a similar idea. Portraying South Africa as an international outcast, he has claimed that the Constitution, and hence its interpretation, "offers an opportunity for South Africans to join the mainstream."[113] Likewise, Justice Ackermann has written that "[i]n construing and applying our Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character."[114] Margaret Burnham captures this strain within the court's jurisprudence well when she argues that the use of comparative jurisprudence is the court's vehicle for enabling South Africa to "claim[] its place among the world's constitutional democracies."[115]

The final idea animating universalist jurisprudence is the notion that transcendent principles cannot be legitimate sources of law unless they are *legal* principles—that is, principles whose existence is evinced by their presence in legal systems in other countries. The importance of identifying these principles as legal is, at first blush, puzzling. It appears to represent a concession to a positivist theory of legal sources. However, positivist understandings of the nature of the law do not sit comfortably with universalist interpretation, with respect to both the role of principles, and the natural law claims implicit in transcendence. More importantly, a positivist theory of sources carries the greatest force in the context of sorting out legal from non-legal sources *within* a legal system. Once it is acknowledged that a source is foreign, the concern that it be identified as legal seems out of place, because a foreign source cannot be a formal legal source.

What seems to be driving the court's insistence on the use of *legal* sources from foreign jurisdictions is its understanding of its own constitutional role. A persistent theme in the court's jurisprudence is the effort to distinguish legal decisionmaking from political decisionmaking and philosophical rumination.[116] In this light, relying on foreign jurisprudence as a source of ideas, rather than relying on extra-legal sources such as philosophical treatises or even academic articles, anchors the legitimacy of the court's decisions. It counters the impression that by looking to foreign sources, the court is looking outside the law. In countries beginning their experience with constitutional judicial review, the use of comparative law makes normal and routine what would otherwise appear revolutionary and dramatically new.

The court's reliance on legal sources deliberately situates it as part of a transnational discussion among legal tribunals about the interpretation and application of transcendent legal norms. The implicit image here is that of an

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113. State v. Williams, 1995 (3) SALR 632, 648 (CC).

114. Ferreira v. Levine, 1996 (1) SALR 984, 1025 (CC).

115. Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution*, 3 MICH. J. RACE & L. 29, 44 (1997).

116. *See, e.g.*, State v. Makwanyane, 1995 (3) SALR 391, 476 (CC).

> In answering that question [(i.e., the constitutionality of the death penalty)] the methods to be used are essentially legal, not moral or philosophical. . . . The "Court of final instance over all matters relating to the interpretation, protection and enforcement" of [the] provisions [of the Constitution] is this Court, appointment to which is reserved for lawyers. The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.

Id. (Kriegler, J.) (quoting INTERIM S. AFR. CONST., *supra* note 70, § 98(2)) (footnotes omitted).

international community of states and citizens that shares a basic commitment to a vision of constitutionalism based on the rule of law and the rights of individuals. The legal principles of universalist interpretation are the principles which animate constitutionalism in this community of nations. However, many nations within this community are at different points along the path to constitutionalism, progress, and liberal democracy. Comparative jurisprudence offers guidance and wisdom to nations beginning that journey as to how best to proceed down the road ahead.[117]

These three basic ideas—that the law is best understood as a body of *principles*, that those principles *transcend* national boundaries, and that those principles are *legal* principles—combine together in two different variations of the South African Constitutional Court's universalist interpretive methodology, as I discuss below. The first version deploys arguments of principle culled from comparative case law to develop the contours of specific guarantees in the South African Bill of Rights. The second version has been utilized by the Constitutional Court when discussing comparative jurisprudence that points to a conclusion different than that of the court. Although that jurisprudence may be, at best, irrelevant to the interpretation of the South African Constitution, or, at worst, proof that a legal principle is not transcendent, the court nonetheless engages in a complex argument to show that the law still consists of transcendent legal principles.

B. Universalism As Arguments of Principle: The Presumption of Innocence in Zuma *and* Coetzee

Universalist interpretation played an important role in two of the court's decisions on the presumption of innocence, *State v. Zuma*[118] and *State v. Coetzee*.[119] In *Zuma*, the court considered the constitutionality of a provision reversing the onus of proof in criminal proceedings.[120] Under South African criminal law, confessions are only admissible if proven to be free and voluntary; the provision at issue, however, presumed that confessions to magistrates met this standard, and hence imposed a burden on the accused to provide otherwise.

The court held that the provision violated the presumption of innocence guaranteed by the Interim Constitution.[121] This conclusion required the court to determine both (i) the nature of the protection provided by the guarantee of the presumption of innocence, and (ii) how the guarantee was engaged by reverse onus provisions. After noting that the presumption of innocence had long been a principle of South African common law, the court (per Justice Kentridge) turned to a discussion of American and Canadian decisions which had "grappled with the problem of reconciling presumptions reversing the onus of proof with the constitutional presumption of innocence."[122] The court reviewed these decisions in search of a set of principles for interpreting the South African provision. Thus, it

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117. For a similar view on the development of a community of liberal democratic nations, see Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT'L L.J. 393 (1992).

118. 1995 (2) SALR 642 (CC).

119. 1997 (3) SALR 527 (CC).

120. *Zuma*, 1995 (2) SALR at 647.

121. INTERIM S. AFR. CONST., *supra* note 70, § 25(3)(c).

122. *Zuma*, 1995 (2) SALR at 653 (emphasis omitted).

noted that the U.S. Supreme Court had "over many years attempted to enunciate a governing principle" concerning the constitutionality of reverse onus provisions.[123] However, it rejected the American approach as "useful," but not "conclusive."[124] Instead, it found the Canadian jurisprudence "particularly helpful," not only because of the structural similarities between the Canadian Charter of Rights and Freedoms and the South African Bill of Rights, but because of the Supreme Court of Canada's "persuasive reasoning."[125]

Justice Kentridge discussed three decisions of the Canadian Supreme Court in some detail, and drew three propositions out of them.[126] First, he quoted a lengthy passage from one judgment which articulated the central purposes underlying the presumption of innocence and the nature of the protection it provides: given the grave social and personal consequences which befall an individual accused of a crime, the accused ought to be presumed innocent until proven guilty beyond a reasonable doubt.[127] Second, Justice Kentridge noted that the Canadian decisions had reasoned that reverse onus provisions created the danger of convicting an accused despite a reasonable doubt, because a presumption could only be rebutted by proof on a balance of probabilities.[128] Third, he remarked that the Canadian decisions had rejected the American standard for the constitutionality of reverse onus provisions—that there be a rational connection between the facts proved and presumed—on the ground that that standard would still permit convictions despite a reasonable doubt (this likely explains why he summarily rejected the American approach earlier in his reasons).[129]

Concluding his discussion of the Canadian material, Justice Kentridge simply stated, "[a]ccordingly, I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court."[130] He then proceeded to apply those principles to the impugned South African provision. The South African Bill of Rights, like the Canadian Charter of Rights and Freedoms, required the state to prove an accused guilty beyond a reasonable doubt. The impugned provision violated the presumption of innocence, because an accused could only displace the onus by disproving the voluntariness of his or her confession on the balance of probabilities.[131]

Justice Kentridge's reliance on legal principles articulated by a foreign court is all the more striking when one considers what he did *not* say. Earlier in his reasons, Justice Kentridge had pointed to the erosion of the presumption of innocence under apartheid, by both statute and judicial decisions.[132] But he did not exploit the interpretive opportunity that his historical observation opened up—that is, he did

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123. *Id.*

124. *Id.* at 654.

125. *Id.*

126. *See id.* at 654-56. These decisions are *Regina v. Downey* [1992] 2 S.C.R. 10; *Regina v. Whyte* [1988] 2 S.C.R. 3; and *Regina v. Oakes* [1986] 1 S.C.R. 103.

127. *See Zuma*, 1995 (2) SALR at 655 (citing *Regina v.Oakes* [1986] 1 S.C.R. 103, 115-16).

128. *See id.*

129. *See id.*

130. *Id.* at 656.

131. *See id.*

132. *See id.* at 650.

not urge that the South African Bill of Rights be interpreted so as to never repeat the errors of the past. Justice Kentridge could have charted the effect of the erosion of the presumption of innocence on the quality of justice under apartheid.[133] Based on that historical experience, he could have fashioned an interpretation of both the purposes behind, and the content of, the guarantee of the presumption of innocence that would ensure that that chapter of South African legal history would never be repeated. However, instead of looking inward to South Africa's historical experience, Justice Kentridge looked outward, and bound South African jurisprudence into a web of principle transcending national boundaries.

Zuma dealt with the constitutionality of provisions that reversed the onus of proof for the essential element of an offense. However, it expressly left open the question of whether the right to be presumed innocent was violated by provisions that reversed the onus of proof for an exemption or exception for a defense. This point later provoked a lively debate in *Coetzee*, in which a divided court held that the latter class of reverse onus provisions did violate the South African Bill of Rights.[134] Interestingly, the Canadian Supreme Court had divided on the very same issue, although it eventually came to the position later taken in South Africa. The Constitutional Court, once again, engaged in a detailed discussion of the Canadian case law.[135] Its stated reason for doing so was that the parties had relied extensively on competing strands of the Canadian jurisprudence.[136] However, the divided nature of the Canadian authorities would have been a good reason to ignore them altogether. The better explanation for the court's comparative approach is that it viewed the Canadian jurisprudence as a repository of transcendent legal principles.

Speaking for the majority in *Coetzee*, Justice Langa largely confined his analysis to a detailed discussion of the two lines of Canadian authority. One set of cases stood for the proposition that the presumption of innocence was not violated by reverse onus provisions which applied to defenses,[137] while the second, and later, set of decisions came to the opposite conclusion.[138] Neither line of cases had been overruled. Justice Langa made two moves to align himself with the latter body of cases. First, he distinguished the earlier decisions on their facts, noting that the Supreme Court of Canada, in those decisions, had concluded that the impugned provisions did not reverse the onus of proof. Strictly speaking, the constitutional issue had not arisen in those cases, and as a consequence, they were not on point.[139] Second, and more importantly, he stated that he "preferred" the approach of the

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133. David Dyzenhaus has recently argued that the unwillingness of South African judges to criticize the courts' role under apartheid is in large part motivated by a desire to maintain collegiality among members of the current bench, who were appointed both during and after the apartheid era. DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER 38-39 (1998).

134. State v. Coetzee, 1997 (3) SALR 527 (CC).

135. *See id.* at 545.

136. *See id.*

137. *See* Regina v. Schwartz [1988] 2 S.C.R. 443, 469; Regina v. Holmes [1988] 1 S.C.R. 914, 948.

138. *See generally* Regina v. Keegstra [1990] 3 S.C.R. 697; Regina v. Whyte [1988] 2 S.C.R. 3.

139. *See* Coetzee, 1997 (3) SALR at 545.

later decisions.[140] It seems that his preference was based on the reasoning of the later decisions. Justice Langa quoted at length from a Supreme Court of Canada judgment in which the court explained that for the purposes of the presumption of innocence, whether a reverse onus attached to the essential element of an offense or a defense, etc., was of no constitutional consequence. Rather, "'[i]t is the final effect of [the] provision on the verdict that is decisive.'"[141] Thus, for the Supreme Court of Canada, the possibility of conviction despite a reasonable doubt was dispositive. Justice Langa found this reasoning convincing, and applied it *mutas mutatis* to the interpretation of the South African Bill of Rights:

> What matters in the end is the substance of the [offense] . . . . The fact that section 332(5) [(the impugned provision)] requires that the accused director should, on pain of conviction, prove that he or she did not take part in the commission of the [offense] and could not have prevented others from doing so, even if it is formulated as an exception, has the same consequences as a reverse onus provision which relates to an essential element of the offence.[142]

The dissent's response (per Justice Kentridge) is revealing, because it too relied on Canadian jurisprudence as a source of interpretive principle. Discussing the Supreme Court of Canada judgments that Justice Langa had distinguished, Justice Kentridge drew from them a proposition diametrically opposed to the one applied by Justice Langa—that the presumption of innocence was not violated by a provision reversing the onus of proof for a defense. According to Justice Kentridge, the reason for this conclusion offered by these Canadian decisions was that the prosecution was required to prove its case beyond a reasonable doubt without the benefit of the presumption, *before* any defenses could be raised.[143] Justice Kentridge quoted a Canadian judge's view that if an individual accused under such a provision "is convicted in the face of such a defence, it is not because he has been presumed guilty or because the commission of the crime has not been shown, but because his excuse was rejected after proof of the commission of the offence."[144] Justice Kentridge simply added that he found "this approach highly convincing and very much in point."[145]

The significance of *Coetzee* lies in the structure, rather than in the subject-matter, of the disagreement between the majority and the dissent. Given the divided nature of the Canadian case law, one could have expected both the judges and the parties to avoid it altogether. Yet the majority regarded the Canadian judgments as a valuable interpretive resource, because they articulated legal principles that, although framed in connection with the construction of the Canadian Charter of Rights and Freedoms, were of direct legal relevance to the South African Bill of Rights. Similarly, the fact that Justice Kentridge in dissent chose to attack the majority's reasoning with legal principles drawn from another line of Canadian case law demonstrates how he joined battle with the majority on the terrain of universalist interpretation. He felt that legal principles could best be countered with

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140. *Id.*
141. *Id.* at 544 (quoting *Whyte* [1988] 2 S.C.R. at 18).
142. *Id.* at 545 (emphasis omitted).
143. *See id.* at 566.
144. *Id.* (quoting Regina v. Holmes [1988] 1 S.C.R. 914, 948.)
145. *Id.*

competing legal principles. This explains why Justice Kentridge chose neither to emphasize the inapplicability of Canadian jurisprudence to the interpretation of the South African Constitution, nor to attack the Canadian cases relied on by the majority with arguments of principle from academic commentators. Both the majority and dissenting judgments in *Coetzee* are vivid examples of universalist interpretation.[146]

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146. Universalist interpretation also played an important role in the South African Constitutional Court's unanimous decision in *Shabalala v. Attorney-General, Transvaal*, 1996 (1) SALR 725 (CC). The narrow legal issue in that case was whether a common law privilege enjoyed by criminal prosecutors over witnesses' statements violated an accused's right to a fair trial. Deputy President Mahomed, speaking for the court, began his analysis by outlining the content of the right to a fair trial. *See id.* at 732-33. His reasons make clear that he believed the court to be interpreting a right that South Africa shared with other countries, and hence whose interpretation was governed by a seamless body of principles that transcended national borders. For instance, he referred to foreign jurisprudence, very matter-of-factly, as "cases [which] illustrate the application of the right to a fair trial." *Id.* at 743 n.56. Deputy President Mahomed then cited a series of judgments decided under, inter alia, the Canadian Charter of Rights and Freedoms, *supra* note 5, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention], without even a perfunctory caution that those were foreign decisions, *see Shabalala*, 1996 (1) SALR at 743 n.56.

Deputy President Mahomed concluded that the right to a fair trial granted a right of access to information held by the police (called the "police docket"); however, the extent of the right of access depended on the facts of the case. *See id.* at 743. He then analyzed the constitutionality of the blanket common law privilege attaching to witnesses' statements. The structure and the sources of his argument are significant. He scrutinized the common law rule through arguments of principle, pro and con. Moreover, these arguments, and his responses to them, were to a great extent drawn from foreign judgments, which Deputy President Mahomed again simply referred to as "cases." *Id.* at 746. For example, Deputy President Mahomed cited a Supreme Court of Canada judgment for the objection that a duty of disclosure would impose too onerous a burden on the prosecution, and cause delays in bringing the accused to a trial. *See id.* at 747 (citing *Regina v. Stinchcombe* [1991] 3 S.C.R. 326, 334). But he then rejected this argument by relying on arguments drawn from, inter alia, the same judgment of the Supreme Court of Canada, noting, for example, that comprehensive disclosure might in fact reduce trial delay by inducing more guilty pleas. *See id.* at 748 (citing *Stinchcombe* [1991] 3 S.C.R. at 334). In conclusion, *Shabalala* is another good example of the use of universalist methodology. Its reliance on arguments of principle from foreign jurisprudence, and its implicit claim that those principles are transcendent, are both central tenets of universalist methodology.

Another example of the reliance on foreign jurisprudence through universalist interpretation can be found in Justice Ackermann's judgment in *Bernstein v. Bester*, 1996 (2) SALR 751, 758-808 (CC). The issue there was a challenge to the constitutionality of a provision of South African bankruptcy legislation governing inquiries to be made in the wake of a declaration of bankruptcy. *See id.* at 758. The legislation (1) authorized the official conducting the inquiry to summon, inter alia, any officer or director, and (2) placed persons so summoned under a legal duty to answer any question and to disclose any relevant documentary information. The relevant provision was challenged as a violation of the right to privacy, guaranteed by section 13 of the Interim Constitution. *See id.* at 764.

Given the absence of a complete factual record, none of the members of the court reached the constitutional issue. Nevertheless, Justice Ackermann offered "some preliminary observations on the scope of" the right to privacy. *Id.* at 787. After dealing with philosophical literature on the right to privacy, and the protection of privacy interests by South African common law, Justice Ackermann moved seamlessly, and without precautionary comment, to a discussion of the

C. *Complex Universalism:* Makwanyane

Courts which employ the universalist mode of comparative constitutional interpretation face considerable difficulty when they encounter foreign judgments that have arrived at conclusions which differ from the one they propose. The natural response would be to distinguish those decisions in some way, so as to undermine their precedential force. However, some rationales for distinguishing comparative case law may be in tension with the central tenets of universalist methodology. Rather than merely limiting the relevance of those contrary decisions, distinguishing them may potentially throw into question the justification for looking to comparative law at all.

One possible rationale for distinguishing comparative jurisprudence would be that the foreign court relied on legal principles which differ from those applicable to the interpretation of the constitution at hand. This would certainly be consistent with the notion of transcendence, because universalist interpretation (despite its name) makes no claim to universality. However, acknowledging that foreign courts can coherently rely on arguments of principle that go the other way would make the

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jurisprudence of the European Court of Human Rights, the United States Supreme Court, and the Supreme Court of Canada. *See id.* at 790-98. The right to privacy in the South African Constitution is textually unqualified. However, Ackermann drew out of the foreign jurisprudence the proposition that the right to privacy only protected a reasonable expectation of privacy, a principle which he believed should govern the interpretation of the South African provision as well. *See id.* at 793.

Justice Ackermann's discussion of the foreign jurisprudence in *Bernstein* is notable for two reasons. The first is that Justice Ackermann used comparative case law not only to introduce the notion of reasonable expectation into the heart of the privacy guarantee, but also to give texture to that notion in a careful and step-by-step fashion. Thus, from the European jurisprudence, he derived the idea that persons who voluntarily enter the public realm have no reasonable expectation of privacy; from the American case law, the notion that the test of reasonableness was both subjective and objective; and finally, from the judgment of the Supreme Court of Canada, the principle that the objective test for reasonableness should take into account the state's interest in law enforcement. *See id.* at 787-94. *Bernstein* provides a vivid example of how a complex web of doctrine can add subtlety and depth to a textually unembellished guarantee.

But *Bernstein* is also important for another reason, which is best understood by looking at the placement of Justice Ackermann's discussion of comparative case law within the body of his opinion. He first turned to philosophical writings on privacy, citing Rainer Forst, *How Not to Speak About Identity: The Concept of a Person in a Theory of Justice*, 18 PHIL. & SOC. CRITIQUE 1 (1992), and Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984), and then turned to comparative jurisprudence. He brought these two sources together, when he stated that comparative jurisprudence "seems to accord with" the analysis derived from an examination of philosophical texts, namely that "the nature of the privacy implicated by the 'right to privacy' relates only to the most personal aspects of a person's [experience], and not to every aspect within his [or] her personal knowledge and experience." *Bernstein*, 1996 (2) SALR at 787, 795. What is critical here is not Justice Ackermann's substantive conclusion so much as his interpretive methodology. The unarticulated premise of his argument is that principles drawn from philosophy have little authoritative force on their own, but when shown to be legal principles, they take on legal significance, and, as a consequence, can be woven into constitutional interpretation as sources of comparative insight. Once again, this aspect of Justice Ackermann's opinion applies and reflects a commitment to the tenets of universalist methodology.

claim of transcendence less convincing. Emphasizing constitutional difference contributes to the impression that principles are particular and local, rather than global and transnational.

One way to avoid this uncomfortable implication would be to offer another rationale for distinguishing foreign jurisprudence. The claim here would be that those contrary judgments were arrived at under constitutions that differ textually (either explicitly or implicitly) from the one under consideration, and that those textual differences dictate legal outcomes for questions which are textually open under the constitution at hand. But this rationale raises problems of its own. It sits uncomfortably with the idea that the law is best understood as a body of principles, rather than as a collection or even a system of formal rules of law. As a consequence, it undermines the idea that foreign jurisprudence is a valuable source of legal insight because it articulates legal principles; retreating into text contradicts the anti-positivist tendencies of universalist jurisprudence.

Perhaps unwittingly, the Constitutional Court of South Africa has, on at least one occasion, distinguished foreign precedents in a manner that avoids these difficulties. Indeed, not only did the court's approach not erode the tenets of universalist interpretation, it actually reinforced them. The court's strategy consisted of two interpretive moves. The first move was to explain foreign judgments which were opposed to the court's desired course as solely a function of text; at the outset, this ruled out the possibility that differences in outcome were a product of differences in principle. That initial assertion was made alongside another: that text operated as a limit on the underlying principles which constituted the heart of the law, and did not eliminate the presence of principle altogether. Text, in other words, *derogated* from principle, but did not supplant it. Moreover, those legal principles were transcendent. These premises forced the conclusion that "but for" textual differences, the law would have been the same across the jurisdictions being compared. Thus, rather than throwing into question both the existence and the importance of transcendent legal principles, the court explained foreign decisions in a way that preserved, but qualified, principle's role.

The most contentious premise in the above argument is that transcendent principles exist alongside constitutional text. That premise was supplied by the second interpretive move, which demonstrated that notwithstanding textual language which appeared to preclude recourse to transcendent legal principles, those principles had had concrete legal effects. The ability of principles to overcome textual language illustrated two points: first, that principles mattered to legal reasoning, and second, that those principles were sufficiently important to be regarded as transcendent.

The Constitutional Court made both of these moves in *Makwanyane*, in which the court held the imposition of the death penalty to be unconstitutional.[147] The leading judgment, concurred in by all members of the court, was given by President Chaskalson. President Chaskalson framed the issue as whether the death penalty amounted to cruel, inhuman, or degrading punishment, though, in the interpretation

147. State v. Makwanyane, 1995 (3) SALR 391 (CC).

of that provision, he also considered related guarantees such as the right to life.[148] A great deal of the judgment dealt with comparative jurisprudence, not only from other constitutional democracies, but also from bodies adjudicating upon international and regional human rights instruments. That body of case law posed a problem for the Constitutional Court, because in general, it had upheld the legality or constitutionality of the death penalty. However, rather than ignoring those decisions altogether, the court dealt with that jurisprudence in enormous detail, through the two interpretive moves I have described.

First, when discussing comparative jurisprudence, the court was careful to emphasize that it was the texts of the various constitutional and international documents it considered that had led foreign courts and international tribunals to uphold the death penalty. The court's unstated implication throughout is that had those texts been the same as in the South African Bill of Rights, those tribunals or courts would have ruled capital punishment illegal.[149] For example, in his extensive discussion of American constitutional jurisprudence, President Chaskalson's central point was that "[f]rom the beginning, the U.S. Constitution recognized capital punishment as lawful."[150] This authorization was implied, and was reflected in a number of different provisions. Thus, the Fifth Amendment "refers in specific terms to capital punishment and impliedly recognizes its validity," and the Fourteenth Amendment also "impliedly recognizes the rights of states to make laws for such purposes."[151] President Chaskalson also noted that the question of textual authorization was "stressed in some of the judgments of the United States Supreme Court,"[152] and had led to the conclusion that the death penalty did not amount to cruel and unusual punishment for the purposes of the Eighth Amendment. The notion of implied authorization also predominated in President Chaskalson's explanation of the Indian Supreme Court's jurisprudence, which dealt with the right to life. He noted in particular the provisions of the Indian Constitution dealing with the commuting of death sentences and the powers of the Supreme Court in death

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148. The right not to be subjected to cruel, inhuman, or degrading punishment was found in section 11(2) of the Interim Constitution; the right to life was guaranteed by section 9. INTERIM S. AFR. CONST., *supra* note 70, §§ 9, 11(2).

149. An important component in the court's decision was that the drafters of the Interim Constitution had declined to resolve the constitutionality of the death penalty, and left this question for the Constitutional Court to resolve.

> In the constitutional negotiations which followed, the issue was not resolved. Instead, the "Solomonic solution" was adopted. The death sentence was, in terms, neither sanctioned nor excluded, and it was left to the Constitutional Court to decide whether the provisions of the pre-constitutional law making the death penalty a competent sentence for murder and other crimes are consistent with chap[ter] 3 of the Constitution [(i.e., the Bill of Rights)].

Makwanyane, 1995 (3) SALR at 409 (Chaskalson, P.) (footnote omitted). This distinguished the South African Constitution from the various documents, both foreign and international, considered by President Chaskalson in his judgment, which had resolved the constitutionality of the death penalty. *See id.* at 412-14.

150. *Id.* at 415.

151. *Id.*

152. *Id.* at 416 (citing Callins v. Collins, 510 U.S. 1141 (1994); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972)).

penalty appeals.[153] President Chaskalson also emphasized that the "wording of the relevant provisions of our Constitution are different."[154]

In some of the instruments President Chaskalson looked at, the authorization for the death penalty was in fact express. The International Covenant on Civil and Political Rights ("ICCPR"), for example, explicitly authorizes the death penalty,[155] and for President Chaskalson, it was "in view of" and "because of" these provisions that the United Nations Human Rights Committee found that the extradition of a suspected murderer to a jurisdiction where he might face the death penalty did not violate the right to life.[156] Likewise, the express provisions in the European Convention authorizing capital punishment explained, for President Chaskalson, why the European Court of Human Rights could not find the death penalty per se illegal simply because it contravened the right not to be subjected to torture or inhuman or degrading treatment or punishment.[157]

However, despite the implied and express textual authorizations for the death penalty in other constitutions and in international human rights instruments, President Chaskalson identified a consistent tendency to provide some legal protection to persons facing the death penalty. Thus, he noted that "notwithstanding the sanction given to capital punishment" in the express terms of the ICCPR, the United Nations Human Rights Committee nevertheless evaluated the *manner* of execution to determine whether it amounted to cruel and unusual punishment.[158] Similarly, the European Court of Human Rights assessed "the manner in which [the death penalty] is imposed or executed, the personal circumstances of the condemned person and the disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution" to find particular impositions of capital punishment to constitute torture or inhuman or degrading treatment or punishment.[159] Likewise, the Indian Supreme Court has set aside a death sentence because the delay in carrying it out was too great.[160] President Chaskalson also noted that the United States Supreme Court continued to police the

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153. The leading Indian judgment is *Bachan Singh v. State of Punjab*, A.I.R. 1980 S.C. 898.

154. *Makwanyane*, 1995 (3) SALR at 428.

155. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

156. *Makwanyane*, 1995 (3) SALR at 424, 425. The decisions of the United Nations Human Rights Committee discussed by President Chaskalson are *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), and *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1994). The relevant articles of the International Covenant on Civil and Political Rights are articles 6 (the right to life) and 7 (the right to not be subjected to torture or cruel, inhuman, or degrading punishment). ICCPR, *supra* note 155, arts. 6, 7.

157. *See Makwanyane*, 1995 (3) SALR at 425 (discussing articles 2 and 3 of the European Convention, *supra* note 146). The decision of the European Court of Human Rights is *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

158. *Makwanyane*, 1995 (3) SALR at 424.

159. *Id.* at 425-26.

160. *See id.* at 429. President Chaskalson cited the decisions of the Indian Supreme Court in *Daya Singh v. Union of India*, A.I.R. 1991 S.C. 1548, and *Triveniben v. State of Gujarat*, A.I.R. 1989 S.C. 1335.

death penalty constitutionally, by requiring that sentencing discretion be neither too broad and unstructured nor entirely absent.[161]

The lesson President Chaskalson drew from this comparative experience is summarized in the following passage of his judgment:

> The fact that in both the United States and India, which sanction capital punishment, the highest Courts have intervened on constitutional grounds in particular cases to prevent the carrying out of death sentences, because in the particular circumstances of such cases, it would have been cruel to do so, *evidences the importance attached to the protection of life and the strict scrutiny to which the imposition and carrying out of death sentences are subjected when a constitutional challenge is raised. The same concern is apparent in the decisions of the European Court of Human Rights and the United Nations Committee on Human Rights.*[162]

A number of points emerge from this passage. First, President Chaskalson identified an overarching principle, "the protection of life."[163] Second, he noted that that principle had played a critical role in all the judgments he had discussed, which made it both a legal principle and a transcendent one. Third, this principle existed alongside and even in tension with textual provisions which had not eliminated or supplanted it; this was proof of how principles not tied to formal legal sources could nevertheless remain important and integral components of the law. Substantively, the existence of "the protection of life" as a transcendent legal principle helped President Chaskalson conclude that the death penalty amounted to cruel, inhuman, or degrading punishment.[164] But taken together, these points also show how President Chaskalson's careful discussion of conflicting comparative jurisprudence ultimately reinforced universalist methodology instead of undermining it.

IV. DIALOGICAL INTERPRETATION

A. Introduction

Although universalist interpretation plays an important role in the use of comparative jurisprudence in constitutional interpretation, it is not the only way in which comparative law is used. In this Part, I discuss dialogical interpretation, a second interpretive methodology also well exemplified by a series of judgments of the Constitutional Court of South Africa, though by no means limited to that jurisdiction. Engaging in dialogical interpretation, the court held that the Bill of

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161. *See Makwanyane*, 1995 (3) SALR at 416. President Chaskalson cited the following United States Supreme Court judgments which struck down death penalty statutes for imposing mandatory death sentences, and/or for not considering any mitigating factors: Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). He also cited *Green v. Georgia*, 442 U.S. 95 (1979), as an example of the Court striking down a death penalty statute where the sentencing discretion was too broad.

162. *Makwanyane*, 1995 (3) SALR at 430 (emphasis added).

163. *Id.*

164. *See id.* at 451-52.

Rights under the Interim Constitution did not apply to litigation between private parties pursuant to the common law.[165] The court also found that the Interim Constitution permitted the National Parliament to require provincial executives to implement national legislation.[166] Dialogical interpretation also played an important role in Justice Sachs's dissent in a decision upholding the prohibition of liquor sales on the Christian Sabbath,[167] and in *obiter dicta* comments in another case suggesting that some provisions of the Interim Constitution may have been beyond constitutional amendment.[168]

Dialogical interpretation is intriguing, because it has been used in cases in which the Constitutional Court emphasized that the South African Constitution is a unique document that requires a unique interpretation, yet in the same breath discussed foreign jurisprudence in considerable detail. Thus, while Justice Kriegler asserted that "when all is said and done, the answer to the question before us is to be sought, first and last, in the Constitution,"[169] and President Chaskalson proclaimed that the powers of the South African Parliament depended ultimately upon "'the language of the Constitution, construed in the light of [our] own history,'"[170] they nevertheless looked to foreign constitutional experiences, and comparative jurisprudence, in order to better understand particular provisions in the South African Constitution.

Dialogical interpretation is all the more intriguing when one appreciates that it is a reaction against universalist interpretation, which is characterized by the free and easy use of comparative jurisprudence. In *Bernstein v. Bester*, for example, although he concurred with Justice Ackermann in the result, Justice Kriegler went out of his way to "discourage the frequent—and, I suspect, often facile—resort to foreign 'authorities'" and the "blithe adoption of alien concepts or inapposite precedents."[171] Justice Kriegler's comments could be read to suggest that comparative case law should not play any role in constitutional adjudication, yet in some of his judgments it does, and in a very significant way.

The heart of dialogical interpretation lies in a recognition of what a claim to constitutional difference actually means. Difference is an inherently relative concept; a constitution is only unique by comparison to other constitutions that share some feature or characteristic which that constitution does not. The inclusion of a general limitations clause, for example, was a distinct feature of the Canadian Charter of Rights and Freedoms[172] only because other constitutions had *not* been

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165. *See* Du Plessis v. De Klerk, 1996 (3) SALR 850 (CC).

166. *See Ex Parte* Speaker of the National Assembly: *In Re* Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995, 1996 (3) SALR 289 (CC).

167. *See* State v. Solberg, 1997 (4) SALR 1176, 1220-42 (CC).

168. *See* Premier, Kwazulu-Natal v. President of the Republic of South Africa, 1996 (1) SALR 769, 784 (CC).

169. *Du Plessis*, 1996 (3) SALR at 911.

170. *National Education Policy Bill*, 1996 (3) SALR at 301 (quoting Executive Council, Western Cape Legislature v. President of the Republic of South Africa, 1995 (4) SALR 877, 904 (CC) (alteration in original)).

171. 1996 (2) SALR 751, 811-12 (CC).

172. *See* Canadian Charter of Rights and Freedoms, *supra* note 5, § 1.

drafted in that way. Moreover, since difference is defined in comparative terms, it follows that a keener awareness and a better understanding of difference can be achieved through a process of comparison. In this way, the use of comparative jurisprudence, far from being in tension with a commitment to constitutional difference, may in fact both acknowledge it and even enhance an awareness of it, if it is used in the correct way.

Dialogical interpretation achieves this goal through three interpretive steps.[173] The first step is to use comparative jurisprudence as a means to identify important assumptions, both factual and normative, that underlie the interpreting court's *own* constitutional order. There are a number of moves to this argument. The court examines comparative case law and doctrine, not primarily to gain an accurate picture of the state of the law in the other jurisdiction, but rather to identify the assumptions that lie underneath it. Mayo Moran has perceptively argued, for example, that beneath the American case law on hate speech lies a fear of a totalitarian state and a highly individualistic conception of the meaning of freedom.[174] In the process of articulating the assumptions of foreign jurisprudence, though, a court will inevitably uncover its own. By asking why foreign courts have reasoned a certain way, a court will surely ask itself why *it* reasons the way *it* does; comparative jurisprudence serves as an interpretive foil. As Brenda Cossman suggests, "[T]he flow of analysis and comparison can begin to shift . . . by turning the gaze of comparison back on itself."[175]

At the second step, the court compares the assumptions underlying domestic and comparative jurisprudence, and engages in a process of justification. As Moran states, "[o]ur own rhetorical choices, which inevitably privilege certain points of view and make others implausible, become matters to be discussed and justified rather than simply assumed."[176] If the assumptions are different, the question becomes *why* they are different. It is now possible to ask this question because the court's own constitution and case law has been made "strange" to it, by contrasting it with a different constitutional world.[177] The types of reasons offered will be diverse, ranging from constitutional structure and history to the "substantive reasons" familiar to courts employing the universalist methodology. Glendon, for example, suggests that Canadian courts should be reluctant to rely on American jurisprudence on the right to abortion, because the latter reflects an "extreme form[] of individualism and neutrality" which stands at odds with Canadian understandings of the relationship between the individual and the community.[178] A court must ask whether that is a fair claim to make. Although the starting point of dialogical interpretation is constitutional difference, a court must also be open to the possibility that it will instead discover constitutional similarity. But nevertheless, even if the assumptions are similar, one can still ask why—that is, whether those

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173. I owe a particular debt to Mayo Moran's article, *supra* note 25, for helping me to identify the moves in this argument.

174. *Id.* at 1442-51.

175. Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525, 536.

176. Moran, *supra* note 25, at 1498.

177. *See* Balkin & Levinson, *supra* note 54, at 1005.

178. Glendon, *Canadian Abortion Decision*, *supra* note 71, at 571, 590.

assumptions *ought* to be shared. A similarity in constitutional assumptions should not be considered fixed and immutable.

At the final stage, the court is faced with a set of interpretive choices. After reflection, a court may be able to justify either the similarity with, or the difference between, the factual and normative assumptions at the base of its constitutional regime, and the corresponding assumptions it identifies in comparative jurisprudence. Dialogical interpretation, then, leads to a heightened sense of legal self-awareness through interpretive confrontation and clarification. In cases of constitutional difference, if the court rejects foreign assumptions and affirms its own, the value of this exercise has been to heighten its awareness and understanding of constitutional difference, which in turn, will shape and guide constitutional interpretation. Conversely, in cases of constitutional similarity, if similarity once identified is embraced, dialogical interpretation grounds the legitimacy of importing comparative jurisprudence and applying it as law.

But the identification and attempted justification of constitutional assumptions through comparison may lead a court to challenge and reject those assumptions and search for new ones. In cases of constitutional similarity, a court may reject shared assumptions and stake out a new interpretive approach proceeding from radically different premises. Dialogical interpretation precipitates a shift from constitutional similarity to constitutional difference. In cases of constitutional difference, meanwhile, a court may determine that difference to be unfounded. Comparison with a different constitutional perspective exposes one's assumptions as contingent, a first step to interpretive change.[179] This new-found similarity, in turn, makes comparative jurisprudence a resource for constitutional interpretation. In either case, if the legal point is settled, the process of dialogic interpretation can lead the court to fundamentally re-assess its previous judgments, and to use comparative jurisprudence as a means to initiate radical legal change.

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179. The power of comparative constitutional experience to prompt a re-evaluation of constitutional assumptions is illustrated by Justice Breyer's dissenting reasons in *Printz v. United States*, 521 U.S. 898, 976-78 (1997). The issue in that appeal was whether federal law could compel state and local government officials to implement federal regulatory policy. *See id.* at 902. The majority of the Court, per Justice Scalia, answered this question in the negative, arguing, inter alia, that the federal structure of the American Constitution contemplated a regime of dual sovereignty, with states and the federal government regulating citizens, not each other. *See id.* at 918-22. According to Justice Scalia, this understanding of the nature of the federal scheme followed ineluctably from the premise underlying American federalism—the protection of individual liberty by dividing sovereignty. *See id.* at 919-22. Justice Breyer accepted this premise, but disputed the conclusion that the majority drew from it. He reviewed constitutional arrangements in federations such as Germany, Switzerland, and the European Union, where constituent states implement many federal laws. *See id.* at 976. From this comparative experience, Justice Breyer drew the conclusion that "the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent government entity" could be better addressed by utilizing existing local bureaucracies to implement federal schemes, rather than creating new federal bureaucracies, as the majority judgment implicitly demanded. *Id.* at 977.

B. Confronting and Clarifying Constitutional Assumptions

1. *Du Plessis*: The Application of the Bill of Rights

Dialogical reasoning played a pivotal role in the dissenting judgments of the Constitutional Court of South Africa in *Du Plessis v. De Klerk.*[180] One of the issues in that case was the fundamental question of whether the Bill of Rights in the Interim Constitution applied to the common law governing relationships between private parties. The court divided deeply on this issue, and by a narrow majority held that the Bill of Rights did not apply. The dissents are worth examining because of the way in which they used comparative jurisprudence to argue that the Bill of Rights should have applied.

The leading dissent was filed by Justice Kriegler. He began by characterizing the judgment of the majority in a very careful way. According to Justice Kriegler, the majority had followed the analysis of the judge below, who in turn had based his interpretation of the relevant provisions in the South African Bill of Rights on an "extensive review of the constitutions of other countries."[181] According to the judge below, the general trend among liberal democracies was for bills of rights to bind the state, but not to apply "horizontally" against private parties, and therefore "'[i]t would . . . be the correct approach to the interpretation of the Bill of Rights provisions in chap[ter] 3 of our Constitution to take the view that our Constitution is a conventional constitution unless there are clear indications to the contrary.'"[182]

Justice Kriegler's immediate and strong reaction was to reject that methodology as wholly illegitimate, and he did so in language that resonated with legal particularism. Stating that "my approach differs radically from" that of the courts below and his colleagues, he made "no apology for starting the exercise by examining the document with which we are concerned, the Constitution."[183] However, upon closer examination, it becomes clear that his reasoning was driven by a dialogical engagement with comparative constitutional experience.

Justice Kriegler began by identifying the assumption underlying the "conventional" approach to bill of rights application.[184] Those documents only bind the state because they are based on the assumption that the principal danger they protect individuals against is the "repressive use of State power."[185] Although Justice Kriegler did not develop the point, his comment gestured to the theory and practice of liberal constitutionalism, which historically arose as a response to the arbitrary use of public authority.[186] However, Justice Kriegler noted, the assumption underlying the South African Bill of Rights was different, because the sources of

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180. 1996 (3) SALR 850 (CC).
181. *Id.* at 911.
182. *Id.* (quoting De Klerk v. Du Plessis, 1995 (2) SALR 40, 48 (T) (alteration added)).
183. *Id.*
184. *Id.*
185. *Id.*
186. *See id.*

historic oppression in South Africa were both private *and* public.[187] He identified that assumption by reference to the Interim Constitution's preamble and postscript, the significance of which he defined in comparative terms.[188] Those provisions of the Interim Constitution gestured to a South African past which was not "merely one of repressive use of State power[,] . . . [but] one of persistent, institutionalized subjugation and exploitation of a voiceless and largely defenseless majority by a determined and privileged minority."[189] The postscript made no reference to governmental oppression, but rather referred more broadly to "untold suffering and injustice."[190] Taken together with the very presence of the Bill of Rights at the beginning of the Interim Constitution, and its enumeration of equality as the very first right, Justice Kriegler concluded that "the fundamental rights and freedoms have a poignancy and depth of meaning not echoed in any other national constitution I have seen."[191]

In the process of identifying those assumptions, Justice Kriegler also engaged in their justification. In brief, he justified horizontal application by reference to South Africa's racist past, as well as the present "stark reality of South Africa and the power relationships in its society."[192] As a consequence, the interpretive choice was clear: "The fine line drawn by the Canadian Supreme Court . . . and by the U.S. Supreme Court . . . between private relationships involving organs of State and those which do not, have no place in our constitutional jurisprudence."[193] But even though Justice Kriegler's interpretation of the Bill of Rights properly recognized that the South African Interim Constitution was unique or different, he defined this distinctiveness in comparative terms.[194]

2. *National Education Policy Bill*: Federal/Provincial Relations

Dialogical reasoning as a tool to heightening awareness of constitutional difference played a pivotal role in the Court's decision in *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* ("*National Education*

187. *See id.*
188. *See id.*
189. *Id.*
190. *Id.* (quoting INTERIM S. AFR. CONST., *supra* note 70, postscript).
191. *Id.* at 912.
192. *Id.* at 918.
193. *Id.* (citations omitted).
194. The dialogical mode of reasoning appears in two other dissents in *Du Plessis*. Justice Madala emphasized that the absence of horizontal application was a function of the fact that "there were no problems in the relationships of the citizens *inter se*." *Id.* at 926 (Madala, J., dissenting). However, since "[t]he extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations," horizontal application was appropriate in South Africa. *Id.* at 927. Likewise, Justice Sachs pointed out that "[w]hatever function constitutions may serve in other countries, in ours it cannot properly be understood as acting simply as a limitation on governmental powers and action[,] . . . [g]iven the divisions and injustices referred to in the postscript." *Id.* at 931 (Sachs, J., dissenting). Again, comparative illumination played a key role in constitutional adjudication.

Policy Bill").[195] In that case, a provincial government alleged that a national law was unconstitutional because it obliged the provinces to adhere to and implement national education policy.[196] On the facts, the court, per President Chaskalson, found that the law imposed no such obligation on provincial governments.[197] Strictly speaking, then, the court did not reach the constitutional issue. Nevertheless, the court addressed the question of principle, and found, through a dialogic engagement with American constitutional jurisprudence, that legislation imposing such an obligation would have been constitutional.[198]

The province put a great deal of weight on the judgment of the United States Supreme Court in *New York v. United States*.[199] In that decision, the Court had held, in the context of legislation dealing with the disposal of radioactive waste, that it was unconstitutional for Congress to compel the states to implement a federal regulatory scheme.[200] President Chaskalson made a threshold objection to the reliance on American jurisprudence, citing an earlier judgment in which he stated that Parliament's powers depended upon "'the language of the Constitution, construed in the light of [our] own history'";[201] he later noted that "[d]ecisions of the courts of the United States dealing with state rights are not a safe guide" for South Africa.[202] Despite these apparently particularistic views, however, he then reasoned dialogically to define South African federalism in juxtaposition to American experience.

President Chaskalson explained the American decision on the basis of a certain conception of the American founding. At a basic level, the American "Constitution addressed a situation in which several sovereign states were brought together in a federation."[203] Starting as sovereigns, the states retained powers which they did not specifically surrender to the federal government. President Chaskalson justified this theory of American federalism by reference to specific features of the United States Constitutional text. Most centrally, Congress was vested with specific powers, and the Tenth Amendment reserved powers not so vested to the states. President Chaskalson then noted that the assumptions underlying the South African division of powers were radically different. The South African provinces "are not sovereign states"; rather, they are creatures of "the Constitution and have only those powers that are specifically conferred on them under the Constitution."[204] By implication, the objection that the national government could not compel the provinces to implement federal policy seemed to lose its force.

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195. 1996 (3) SALR 289 (CC).
196. *See id.* at 291-94.
197. *See id.* at 304.
198. *See id.* at 301-02.
199. 505 U.S. 144 (1992).
200. *See id.* at 149.
201. *National Education Policy Bill*, 1996 (3) SALR at 301 (quoting Executive Council, Western Cape Legislature v. President of the Republic of South Africa, 1995 (4) SALR 877, 904 (CC) (alteration in original)).
202. *Id.* at 302.
203. *Id.*
204. *Id.*

The justification of these assumptions was implicit, albeit underdeveloped, in President Chaskalson's decision. He seemed to argue that these assumptions were justified in the light of South African constitutional history. Thus, the interpretive choice was clear—American jurisprudence was "not a safe guide" for the South African courts. This conclusion was ironic, though, because American case law had sharpened the Court's understanding of the nature of the *South African* division of powers.

3. *Solberg*: Religious Freedom

The issue in *State v. Solberg* was whether the prohibition of liquor sales on Sundays violated freedom of religion.[205] One party to the litigation challenged the law, inter alia, on the basis that it amounted to an unconstitutional endorsement of Christianity.[206] That party relied on the American jurisprudence under the Establishment Clause,[207] contending that that case law stood for the proposition that freedom of religion encompassed the notion of state non-endorsement.[208] The court divided on this issue, the majority holding (per President Chaskalson) that anti-establishment principles did not constitute part of South African constitutional law.[209] My focus here is on Justice Sachs's dissent, and its dialogic use of American case law to arrive at the conclusion that the *same* constitutional assumptions operated both in the United States and South Africa.

Justice Sachs's dissent is best approached through the majority judgment of President Chaskalson. President Chaskalson refused to "read into" the religious freedom guarantee "principles pertaining to the advancement or inhibition of religion by the State," for a number of distinct reasons.[210] One reason was an express provision in the Bill of Rights permitting religious services to be held in public facilities; another was the discipline imposed by the equality rights guarantee on government activity; a third was a fear of the "far-reaching implications" of applying anti-establishment doctrine, given the great deal of interaction between religions and state institutions in South Africa.[211] But both unifying and underlying these reasons, President Chaskalson seemed to make one simple if underdeveloped point. Although anti-establishment doctrine may be appropriate for the United States, in South Africa, the wall of separation between church and state did not seem to carry the same political force. South Africa would instead endorse a policy of religious pluralism rather than neutrality, and as a consequence, a simple policy of non-preferentialism would do.

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205. 1997 (4) SALR 1176 (CC).

206. *See id.* at 1206. The parties also argued that the law violated freedom of religion because it compelled persons to observe the Christian Sabbath. *See id.* Although the court unanimously held that compelled observance would violate the right to freedom of religion, on the facts, it found that no such compulsion existed. *See id.* at 1209.

207. U.S. CONST. amend. I.

208. *See Solberg*, 1997 (4) SALR at 1210.

209. *See id.* at 1210-11.

210. *Id.* at 1210.

211. *Id.* at 1210-11.

Justice Sachs's dissent is instructive, because it used American constitutional doctrine to challenge this unstated but central assumption behind President Chaskalson's majority judgment. Justice Sachs relied most heavily on the decision of Justice O'Connor in *Lynch v. Donnelly*,[212] and, in particular, on the following passage:

> "The second and more direct infringement [of the Establishment Clause] is government endorsement or disapproval of religion. Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[213]

Justice Sachs used this passage to articulate the normative claim underlying non-endorsement: that it conflicts with a basic commitment to political equality. Thus understood, the constitutional question was as follows: "[W]hether the prohibition of the sale of liquor by grocery stores on Sundays amounts to such an endorsement, thereby sending out a message that is inclusionary for some and exclusionary for others."[214] However, Justice Sachs did not accept this principle in the manner of universalist interpretation, that is, as a transcendent norm applying across societies. Instead, he used *Lynch* as an invitation to peer into South African history and determine whether political equality was bound up with freedom of religion in a way that justified its adoption as a constitutional principle for South Africa today.

Justice Sachs began this inquiry by noting that "[i]n the pre-constitutional era there were a number of statutory provisions with a religious foundation that in no way purported to maintain neutrality in relation to 'different confessional alignments.'"[215] One set of laws involved the imposition of Christian morality, for example, through Sunday observance laws and laws dictating the content of education.[216] But of critical importance to his analysis was the "marginalisation of communities of Hindu and Muslim persuasion" by the South African courts.[217] He described, referring to the writings of Mohandas K. Gandhi, the non-recognition of Hindu and Muslim marriages, and of Muslim property law, by the South African common law.[218] The effect of these judgments was "for Hindu and Muslim norms to be relegated to the space of the deviant [o]ther."[219] Summarizing this historical experience, Justice Sachs concluded that "[a]ny echo today of the superior status in public law once enjoyed by Christianity must therefore be understood as a reminder of the subordinate position to which followers of other faiths were formerly subjected."[220] Moreover, the close association of "[r]eligious

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212. 465 U.S. 668 (1984).

213. *Solberg*, 1997 (4) SALR at 1221 (Sachs, J., dissenting) (quoting Lynch v. Donnelly, 465 U.S. at 688 (O'Connor, J., concurring) (alteration added)).

214. *Id.*

215. *Id.* at 1226 (quoting F. D. Van der Vyver, *Religion*, 23 THE LAW OF SOUTH AFRIKA 197 (Joubert ed. 1986)).

216. *See id.* at 1226-27.

217. *Id.* at 1229.

218. *See id.* at 1227-28.

219. *Id.* at 1229 (internal quotation marks omitted).

220. *Id.*

marginalization" and "racial discrimination" made these reminders even more painful.[221]

As a consequence, prohibiting state endorsement as a means to political equality, though an idea drawn from American jurisprudence, was a South African constitutional assumption too. The dialogic use of American case law is clear throughout his opinion; as Justice Sachs concluded, "the concern expressed by [Justice O'Connor in *Lynch*] about the message sent by State endorsement of religion to non-adherents to the effect that they are outsiders and not full members of the political community *has special resonance in South Africa.*"[222]

C. Challenging and Rejecting Assumptions: Premier of KwaZulu-Natal *and the Power of Constitutional Amendment*

As I mentioned above, dialogical reasoning can destabilize well-established assumptions that seem beyond legal dispute, thus precipitating a shift from constitutional difference to constitutional similarity. An example of this power of dialogical reasoning is the judgment of the Constitutional Court in *Premier, KwaZulu-Natal v. President of the Republic of South Africa.*[223] At issue there was the legality of amendments to provisions of the Interim Constitution governing the transitional arrangements for local government.[224] In addressing this question, the court examined a controversial line of Indian jurisprudence which forced it to re-examine the exhaustiveness of the text of the Interim Constitution.[225]

The constitutional amendments had been enacted in accordance with the procedures laid down in the Interim Constitution.[226] The basis of the constitutional attack was that despite the compliance with formal procedures, the amendments were unconstitutional because they had not been made "within the 'spirit' of the Constitution."[227] This attack was based on a line of Indian decisions which had struck down amendments to the Indian Constitution enacted through the correct procedures.[228] The test laid down by the Indian Supreme Court was whether the amendment would "damage or destroy the essential elements or basic features of the Constitution."[229] The assumption underlying this line of cases was that "the power of amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution."[230] But this principle only makes sense if one accepts the existence of extra-textual norms that exist both alongside and

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221. *Id.*

222. *Id.* (emphasis added). Justice Sachs went on to hold that the law had been enacted for religious purposes and hence violated freedom of religion, but was justified because it promoted a public interest in safety. *See id.* at 1241-42.

223. 1996 (1) SALR 769 (CC).

224. *See id.* at 772.

225. *See id.* at 784.

226. *See id.* at 783-84.

227. *Id.* at 783.

228. *See id.* at 784.

229. Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299, 2461.

230. *Id.* (Chandrachud, J.).

prior to the written Indian Constitution. The Indian Supreme Court has found that "the supremacy of the Constitution itself, the rule of law, the principle of equality, the independence of the judiciary and judicial review are all basic features of the Indian Constitution which cannot be so amended."[231]

The response to this argument of Deputy President Mahomed, speaking for the court, was revealing. On the one hand, he expressed some skepticism that there were implied limits on the power of constitutional amendment. Deputy President Mahomed simply stated that "[t]here is a procedure which is prescribed for amendments to the Constitution."[232] The assumption underlying this statement is that the textual provisions of the Interim Constitution were exhaustive. This, in turn, was most likely based on the belief in the supremacy of the written constitution, which itself probably recognized two important ideas: the sanctity of the agreement arrived at by the parties to the constitutional negotiations, and the anchoring of the legitimacy of the judicial role through the interpretation of a set of written norms.

On the other hand, Deputy President Mahomed did not rule out the possibility of adopting the Indian approach in a future case. Thus, he stated that, on the facts, it was unnecessary to pursue the matter further, because the impugned amendment could not "conceivably fall within this category of amendments so basic to the Constitution as effectively to abrogate or destroy it."[233] Another member of the court, speaking extra-judicially, has stated that the question remains open.[234] It seems that the Indian jurisprudence has forced the Constitutional Court to question a basic assumption—that is, that the Constitution solely consists of written, and not unwritten, norms.[235]

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231. *Premier, KwaZulu-Natal*, 1996 (1) SALR at 784 (internal quotation marks and footnotes omitted) (citing Gupta v. President of India, A.I.R. 1982 S.C. 149; State of Rajasthan v. Union of India, A.I.R. 1977 S.C. 1361; Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299; Kesavanada Bharati Sripadagalvaru v. State of Kerala, A.I.R. 1973 S.C. 1461).

232. *Id.* at 783.

233. *Id.* at 784.

234. *See* Justice Albie Sachs, The Creation of South Africa's Constitution, A Discussion with the Audience (Oct. 1996), *in* 41 N.Y.L. SCH. L. REV. 685, 691-92 (1997) (The Federalist Society Conference: Civil Justice and the Litigation Process: Do the Merits and the Search for Truth Matter Anymore?).

235. Dialogical reasoning played a prominent role in the majority judgment in *Executive Council, Western Cape Legislature v. President of the Republic of South Africa*, 1995 (4) SALR 877 (CC). There, the narrow question was whether the National Parliament could delegate to the President the authority to amend and even repeal legislation. *See id.* at 884. The court, per President Chaskalson, answered the question in the negative, relying on the separation of powers. *See id.* at 904-05. However, it defined the version of that concept that operated in South Africa through a lengthy discussion of comparative jurisprudence. *See id.* at 898-905.

President Chaskalson's strategy was to sketch two different constitutional traditions with respect to the separation of powers, and then to align South Africa with one and not the other. *See id.* Thus, his use of dialogical reasoning simultaneously heightened an awareness of both constitutional difference *and* constitutional similarities. On the one hand, were jurisdictions like the United States and Ireland, which policed the separation of powers between the legislative and executive branches rather strictly. President Chaskalson examined the case law of those jurisdictions, and drew out the proposition that delegations of legislative power were permissible but subject to two principal constraints: a delegated authority could not make law, and it had to work within the principles and policies of the statute. *See id.* at 900. On the other hand, were

V. GENEALOGICAL INTERPRETATION

A. Introduction

Finally, I turn to the genealogical mode of comparative constitutional interpretation. I explore this type of reasoning through the use by Canadian courts of American jurisprudence on both the constitutional status of Indian nations and Indian rights to land.[236] At present, the most relevant site for the Canadian use of American jurisprudence is section 35(1) of Canada's Constitution Act, 1982.[237] That provision explicitly affirms and recognizes "existing aboriginal rights."[238] On its face, it does not provide any guidance on identifying and defining *which* existing rights aboriginal peoples have. However, a series of decisions written by Chief Justice Marshall of the United States Supreme Court in the early nineteenth century has offered answers to that very question, and as a result has heavily influenced the

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Commonwealth jurisdictions like Australia and Canada, which "seem to take a broader view of the power to delegate legislative authority." *Id.* Reviewing the case law of those jurisdictions, President Chaskalson concluded that under those constitutional documents, legislatures could "delegate plenary law-making powers to the Executive, including the power to amend Acts of Parliament." *Id.*

President Chaskalson then discussed the assumptions underlying the two strains of jurisprudence. *See id.* In the United States Constitution, there was a clear separation of powers, and government was subject to the discipline of a written constitution. *See id.* at 899-900. The constitutional structure in Commonwealth jurisdictions differed in two basic respects. First, because of the English tradition of responsible government, whereby ministers of the Crown were also members of the legislature, there was no clear separation of powers between the legislative and executive branches. *See id.* at 900. Second, in Commonwealth jurisdictions, legislative bodies are supreme, *see id.* at 900-01; thus President Chaskalson's implicit point is that a supreme body is competent to delegate its powers if it so chooses.

By thus re-framing the narrow legal question before the court as a choice between two competing and inconsistent sets of constitutional assumptions, President Chaskalson set the stage for his decision. President Chaskalson rejected the latter set of assumptions, and by implication, identified the South African Constitution with the former. His justification was historical and textual. South Africa's "history, like the history of Commonwealth countries such as Australia, India and Canada was a history of parliamentary supremacy." *Id.* at 904. However, the adoption of the Interim Constitution evinced "a clear intention to break away from that history" in two respects: first, through the adoption of a constitution which proclaimed its supremacy, and second, through the express vesting of legislative authority with the National Parliament. *Id.*

Doctrinally, this choice of assumptions manifested itself in the following way: although Parliament could delegate the power to enact subordinate legislation, it could not delegate the power to amend or repeal Acts of Parliament. Dialogical interpretation had led President Chaskalson to adopt an American-style separation of powers for South Africa.

236. In Canadian legal and political discourse, the terms "aboriginal peoples" and "First Nations" correspond to the terms "Indian" and "Native American" in the United States. I shall use the two sets of terms interchangeably.

237. Constitution Act, R.S.C., No. 44, § 35(1) (1982) (Can.).

238. *Id.*

development of Canadian constitutional doctrine in this area.[239] Moreover, those decisions figure prominently in academic commentary.[240]

As I discuss below, the origins of the Canadian jurisprudence on aboriginal rights precede the entrenchment of section 35(1) in 1982. The Supreme Court of Canada has recently acknowledged that the "doctrine of aboriginal rights" existed at common law prior to 1982, and that section 35(1) had the effect, inter alia, of

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239. The two decisions I shall focus on are *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

240. *See, e.g.*, BRIAN SLATTERY, ANCESTRAL LANDS, ALIEN LAWS: JUDICIAL PERSPECTIVES ON ABORIGINAL TITLE 38 (1983) [hereinafter SLATTERY, ANCESTRAL LANDS] (arguing that the Marshall decisions "rest ultimately upon . . . British colonial law and practice" and "[a]s such . . . transcend[their] immediate American context [and have] considerable significance for Canada"); Catherine Bell, *Metis Constitutional Rights in Section 35(1)*, 36 ALTA. L. REV. 180, 210 (1997) (relying on "early United States decisions applying British colonial laws" to argue that section 35(1) protects "a vast array of rights to land use and governance"); David W. Elliott, *Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship*, 24 MAN. L.J. 137, 164 (1996) (justifying the reliance on American jurisprudence to flesh out the scope and extent of the Crown's fiduciary duty to aboriginal peoples because Canada and the United States share "[a] common [i]mperial parent"); Hamar Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, 21 MAN. L.J. 343, 363 (1992) (approving the empiricism of the Marshall decisions); Peter W. Hutchins et al., *The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine*, 29 U.B.C. L. REV. 251, 254, 269 (1995) (citing *Worcester v. Georgia*, as authority for the proposition that aboriginal peoples in Canada possess an inherent right of self-government); Patrick Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, 36 MCGILL L.J. 382, 406-07 (1991) [hereinafter Macklem, *First Nations*] (referring to *Johnson v. M'Intosh*'s influence on the Canadian law of aboriginal title, and suggesting that *Worcester v. Georgia* is preferable); Patrick Macklem, *Normative Dimensions of an Aboriginal Right to Self-Government*, 21 QUEEN'S L.J. 173, 187 n.35 (1995) [hereinafter Macklem, *Normative Dimensions*] (making the same point); Alan Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, 2 NAT'L J. CONST. L. 163, 193 (1992) (arguing that *Worcester*'s inference of the recognition of inherent rights of self-government by the treaty-making process applied equally to Canada); Brian Slattery, *Aboriginal Sovereignty and Imperial Claims*, 29 OSGOODE HALL L.J. 681, 701 (1991) (noting that since American courts have accepted that aboriginal peoples retain a degree of prior sovereignty, "[i]n Canada, [this conclusion] should come as no great novelty"); Brian Slattery, *First Nations and the Constitution: A Question of Trust*, 71 CAN. B. REV. 261, 262 (1992) (citing *Worcester* for a proposition of Canadian constitutional law); Brian Slattery, *The Hidden Constitution: Aboriginal Rights in Canada*, 32 AM. J. COMP. L. 361, 366 (1984) (locating the source of the common law doctrine of aboriginal rights in the Marshall decisions); Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727, 739 (1987) [hereinafter Slattery, *Understanding Aboriginal Rights*] (discussed *infra* text accompanying notes 255-56); Mark D. Walters, Mohegan Indians v. Connecticut *(1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America*, 33 OSGOODE HALL L.J. 785, 786 (1995) (noting that the Marshall decisions accepted that "Crown and native sovereignty might have co-existed in British North American colonies from the British legal perspective"); Jeremy Webber, *Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples*, 33 OSGOODE HALL L.J. 623, 651 (1995) (noting that "[t]he Canadian law of aboriginal title is directly descended from" the Marshall decisions).

constitutionalizing those common law rights.[241] The court has accordingly, and self-consciously, established an interpretive continuity between those earlier common law decisions and present constitutional doctrine. For that reason alone, those decisions require examination.[242] Moreover, the Marshall decisions figured prominently in those earlier decisions as well. Looking past section 35(1) into Canada's constitutional history, therefore, further highlights how the Marshall decisions have haunted, and continue to haunt, Canadian constitutional jurisprudence for over a century.

The starting point for the genealogical use of comparative case law is a family relationship between two legal systems, one of which is the source of comparative insight for the other. However, it is possible to imagine two versions of genealogical argument which differ in their conceptions of a familial relationship, and as a consequence differ in the strength of the genealogical claims they put forth. The first—the "strong" genealogical claim—asserts that the two related legal systems are in fact part of a larger legal order, interpreting and applying the same set of legal norms that are equally binding in both legal systems. What unites these jurisdictions and courts is their emergence from a parent legal order that still exists, and which plays a legally significant role. The decisions of courts in the one jurisdiction have the same status as those of courts of the same level in the other jurisdiction. Furthermore, if one court sits atop this transjurisdictional legal order, its decisions bind all courts below.

The House of Lords and the various "national" courts of appeal in the legal system of the British Empire exemplify this kind of claim.[243] The national legal systems within the Empire were nominally independent of England's courts and applied their own laws.[244] However, appeal lay from national courts of appeal (e.g., the Supreme Court of Canada, the High Court of Australia, and the Appellate Division of the South African Supreme Court) to the House of Lords, sitting in its capacity as the Privy Council.[245] Furthermore, when ruling on legal questions that arose from one member state of the empire, but which concerned more than one jurisdiction—for example, the scope of inherent executive powers—the House of Lords lay down the law for the *entire* British Empire.[246]

As this example makes apparent, the strong version of the genealogical claim is hard to make; somewhat more common is the "weak" genealogical claim that arises

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241. Van der Peet v. The Queen [1996] 2 S.C.R. 507, 538.

242. Indeed, since they are the source of the legal principles governing the relationship between the Canadian state and Canada's aboriginal peoples, they can be understood as constitutional decisions in their own right as well, even though they preceded the entrenchment of section 35(1) by several decades. At least one of these decisions was constitutional in another sense, because the status of aboriginal rights at common law affected the interpretation of constitutional provisions governing both the ownership of Crown property and the division of powers. *See* St. Catherine's Milling & Lumber Co. v. The Queen, 14 App. Cas. 46 (P.C. 1888) (appeal taken from Can.).

243. *See generally* E.C.S. WADE, CONSTITUTIONAL LAW: AN OUTLINE OF THE LAW AND PRACTICE OF THE CONSTITUTION, INCLUDING CENTRAL AND LOCAL GOVERNMENT AND THE CONSTITUTIONAL RELATIONS OF THE BRITISH COMMONWEALTH AND EMPIRE (4th ed. 1950).

244. *See id.* at 406-07.

245. *See id.* at 449.

246. *See id.*

among legal systems embodying a different conception of familial relationship. Specifically, these various national legal orders are related to one another to the extent that they trace their origins, and the origins of important legal rules, to a common legal "parent." However, they are legally independent from one another in a way that the national legal orders in the British Empire were not. This distinctiveness is clearest when the "parent" legal order no longer exists. As I discuss below, the use of the Marshall decisions in the Canadian law of aboriginal rights relies on the weak version of genealogical argument.

The weak version of genealogical interpretation consists of three interpretive moves. First, the interpreting court makes an *ancestral* claim—that is, it identifies a parent legal order that is the source of both its own legal system, and of the system on whose case law it wishes to rely. Second, that court establishes that both systems share a common *inheritance*. In legal terms, this means that both systems share a legal rule, or a body of legal rules, that originate in the ancestral legal order. Third, and finally, the claims of ancestry and inheritance combine to establish the prima facie relevance and the legitimacy of the interpreting court's recourse to comparative jurisprudence. The development, interpretation, and application of inherited legal principles in one legal system become directly relevant to the resolution of concrete legal disputes in the other.

It is worth reflecting on the normative premises underlying genealogical argumentation. Both the strong and weak versions of genealogical argumentation are positivist claims. At its core, legal positivism is concerned with the nature of and the connection between the notions of validity and authority.[247] Validity, for the positivist, is what distinguishes legal rules from non-legal rules; it is the criterion for differentiating law from other realms, such as moral and political philosophy, which may use similar concepts and terminology (rights, duty, obligation, etc.). The centrality of validity to the definition of law has led some positivists to construct legal theories around that notion. H.L.A. Hart, with his "rule of recognition,"[248] and Hans Kelsen, with his "grundnorm," are two famous examples.[249] It follows that a positivist approach to questions of legal validity involves the identification of the criteria of validity, both within and across legal systems.

Alongside legal validity, a central preoccupation of positivists is the nature of legal authority.[250] This general concern usually arises in the context of a specific question: whether there is a duty to obey the law. Positivists typically address this issue by sharply distinguishing between the moral and legal dimensions of that question. They argue that neither dimension has a bearing on the other; the questions of legal and moral duty are entirely separate. Typically, commentators have only focused on one half of this argument, emphasizing that morality may dictate disobedience of the law.[251] But for the purposes of my discussion, it is

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247. My account of legal positivism is drawn from H.L.A. HART, THE CONCEPT OF LAW 195 (1961), and RAZ, *supra* note 87.

248. HART, *supra* note 247, at 92-93.

249. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 29-40 (1945).

250. *See, e.g.*, RAZ, *supra* note 87, at 28.

251. *See, e.g.*, JOSEPH RAZ, *A Right to Dissent? I. Civil Disobedience*, *in* THE AUTHORITY OF LAW, *supra* note 87, at 262.

important to emphasize the other half of the positivist view—that is, that questions of moral obligation should not contaminate the existence of a legal duty to obey the law. For the positivist, the notion of legal duty only makes sense in light of, and is in fact a function of, a certain feature of law: its claim to authority. Raz captures the notion of authority well when he states that "the law claims that the existence of legal rules is a reason for conforming behaviour," and a "reason[] for disregarding reasons for non-conformity."[252] Finally, for the positivist, validity and authority are linked in a fundamentally important way. Law's claim to authority asserts that legal rules ought to be followed because they are legal rules; the positivist theory of validity identifies the rules which are the objects of law's claim to authority.

Genealogical interpretation fits the positivist mold. Consider the weak version of genealogical interpretation, which is most relevant to my argument. The first two moves in weak genealogical argument, *ancestry* and *inheritance*, are claims about legal validity. They provide criteria for identifying legal rules from one legal system that can play a role in constitutional interpretation in another. Moreover, the third move in weak genealogical argument—that the rules so identified are prima facie relevant to constitutional interpretation—is a claim of legal authority. That is, the fact that legal rules meet the criteria of ancestry and inheritance, understood in this context as criteria of validity, is *reason enough* to follow them.

An important corollary of the fact that genealogical claims are positivist is that they are capable of being content-independent. Content-independence, for the positivist, means that criteria of legal validity need not incorporate substantive principles of political morality. Needless to say, criteria of validity *may* incorporate such principles; this is how a positivist would explain the nature and function of a bill of rights.[253] But for weak genealogical interpretation, the criteria of legal validity are strictly formal; weak genealogical argument, in other words, is content-independent. As I have characterized the moves in weak genealogical interpretation, none of them make the actual content of the legal rules a condition of the validity and authority of those rules. Substantive claims are absent from genealogical argument.

In this respect, genealogical interpretation differs from both universalist and dialogical interpretation. For universalism, the value of comparative jurisprudence lies precisely in its appeal to substantive principles of political morality. A foreign decision is a valuable source of insight in large part because of its substantive appeal. Thus, it is content-*dependent*, and for this reason, to a great extent, anti-positivist in orientation. Dialogical interpretation is also driven by directly engaging with substantive questions of political morality, but in a different way. Under this approach, legal rules found in foreign jurisprudence are useful vehicles for constitutional self-reflection because of the manner in which they reflect and gesture to factual and normative assumptions that lie underneath black-letter doctrine. Unlike the case with universalist interpretation, though, here, the underlying and organizing principles to be found in comparative jurisprudence need not be substantively appealing. But the process of constitutional self-reflection still

252. RAZ, *supra* note 87, at 30.

253. I take this to be Frederick Schauer's positivist explanation of constitutional interpretation. Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295 (1997).

requires a court to make sense of foreign jurisprudence—that is, to explain it in coherent terms. Genealogical interpretation, by comparison, does not require an interpreting court to come to a nuanced understanding of the rationales underlying comparative jurisprudence. Rather, once that case law is identified, its prima facie relevance is established.

B. Genealogical Arguments in the Canadian Law of Aboriginal Rights

The genealogical use of American jurisprudence in the Canadian law of aboriginal rights is aptly summarized and advocated by Brian Slattery:

> From its origin in British imperial law, the doctrine of aboriginal rights has passed into Canadian common law, and, subject to statutory modifications, operates uniformly across Canada. The doctrine was inherited not only by Canada but also by the United States after the American Revolution. A series of decisions written by Chief Justice Marshall of the United States Supreme Court in the early nineteenth century review the history of British dealings with native peoples in America, and articulate certain principles implicit in those dealings. These decisions . . . provid[e] structure and coherence to an untidy and diffuse body of customary law based on official practice. The Marshall decisions are as relevant to Canada as they are to the United States . . . .[254]

This paragraph contains each of the interpretive moves I described above. First, Slattery asserts that the United States and Canada can both trace their *ancestry* to British imperial law ("[f]rom its origin in British imperial law"). Second, he states that British imperial law contained legal principles governing aboriginal rights ("the history of British dealings with native peoples in America, and . . . certain principles implicit in those dealings"), and that these principles were "inherited not only by Canada but also by the United States." Finally, and as a consequence of the previous two moves, he argues that the identification, interpretation, and application of those principles by Chief Justice Marshall ("[t]he Marshall decisions") is prima facie relevant to the interpretation of the Canadian Constitution, in particular section 35(1)'s recognition and affirmation of existing aboriginal rights; indeed, those principles "are as relevant to Canada as they are to the United States."[255]

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254. Slattery, *Understanding Aboriginal Rights*, *supra* note 240, at 739 (footnotes omitted). The Supreme Court of Canada approved and adopted Slattery's characterization of the relevance of the Marshall decisions to the interpretation of section 35(1) of the Constitution Act, 1982, in *Van der Peet v. The Queen* [1996] 2 S.C.R. 507, 541.

255. Slattery, *Understanding Aboriginal Rights*, *supra* note 240, at 739. An additional point emerges from Slattery's paragraph, when read in light of the jurisprudence we will consider: The legal principles governing the rights of aboriginal peoples are unwritten. In the Anglo-American legal imagination, they are therefore principles that exist at common law. For example, the American version of the law of aboriginal rights imagines Indian nations as being "domestic dependent sovereigns" with considerable powers of self-government, who deal directly with the federal government, and who have immunity from the application of state laws. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 245-46 (Rennard Strickland et al. eds., 1982). However, neither that phrase, nor the important idea it embodies, are to be found anywhere in the written text of the United States Constitution. Rather, they are an unwritten part of the

Slattery's comments show that the genealogical influences of the Marshall decisions on Canadian constitutional jurisprudence touch on the normative justification for aboriginal rights. Normative questions are central to the interpretation of section 35(1), because the determination of *what* special legal rights aboriginal peoples have requires a consideration of *why* they have them. In this respect, Canadian law has evolved considerably over the last hundred years, from grounding aboriginal rights in imperial enactments, to justifying them on the basis of long-standing aboriginal occupation of lands, to basing them in pre-existing systems of aboriginal social organization, including aboriginal law. This evolution within Canadian law has been driven by the Marshall decisions. Moreover, the Marshall decisions present two different justifications for aboriginal rights—prior occupancy and prior sovereignty—and Canadian jurisprudence has evolved from relying on the former to the latter.[256]

C. British Imperial Law and the Acquisition of Territorial Sovereignty

Genealogical arguments in the Canadian law of aboriginal rights rely on a claim of *ancestry*—namely, that the law of aboriginal rights in both Canada and the United States originates in British imperial law. A full comprehension of those arguments therefore requires that we understand the relevant principles of British imperial law.[257] The rights of aboriginal peoples under British imperial law

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Constitution, that exist alongside the written portions of that document. It has the same status as the written provisions, and conditions their interpretation. Indeed, applied to Canada through genealogical interpretation, the implications are dramatic—North America is cloaked by unwritten common law rules that originally governed the relations between the British Crown and aboriginal peoples, and, through inheritance, now constitute part of the constitutional orders of both the United States and Canada.

256. I argue in the passages that follow that the Marshall decisions offer a reinterpretation of the doctrine of discovery. However, this is not the only way that the decisions have been read. Some American scholars have taken the position that *Johnson* and *Worcester* actually rely on the law of conquest, not the doctrine of discovery. This, for example, is the view of Felix Cohen. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942).

The second way in which the Marshall decisions have influenced the Canadian jurisprudence on aboriginal rights is in their methodological approach. The Marshall decisions derived the legal principles governing aboriginal rights from the practice of the British Crown in its dealings with aboriginal peoples. The Marshall decisions converted those practices, born out of political compromise, into justiciable rules of law. In so doing, the Marshall decisions are anti-positivist in their take on legal sources, in the sense that they do not rely on formal sources of law. Although academic commentators have devoted a great deal of attention to this aspect of the Marshall decisions, *see supra* note 240, this aspect has had less of an influence on Canadian aboriginal rights jurisprudence. I will accordingly not discuss it.

It is important to note that the decisions *are* positivist in two other senses, though: first, Chief Justice Marshall's style of adjudication is thoroughly positivist, applying legal doctrine and eschewing recourse to political or moral principle, and second, the legal principles Chief Justice Marshall derives from imperial practice are exercises of sovereign political power.

257. I draw this account from Mark Walters, *British Imperial Constitutional Law and Aboriginal Rights: A Comment on* Delgamuukw v. British Columbia, 17 QUEEN'S L.J. 350 (1992), and the sources cited *infra* notes 260-74.

developed out of the corpus of legal principles governing the acquisition of new territories by the British Crown. Those common law principles took shape in the era of colonization, when European powers extended their control over large parts of the globe, and accordingly developed under the shadow and influence of international law governing the same questions. International law drew a fundamental distinction between two types of territories: inhabited and uninhabited lands.[258] A territory's classification determined the manner in which a nation could acquire sovereignty over it. Inhabited territories were presumed to be under the control of a sovereign power. As a consequence, sovereignty could only change through conquest or a treaty of cession concluded with that sovereign. Uninhabited territories, by contrast, were not under the control of a sovereign power. International law accordingly provided that sovereignty over them could be acquired through settlement by colonists from the country asserting sovereignty.[259]

The distinction between uninhabited (or settled) lands and inhabited (or conquered or ceded) lands had a number of important consequences under English law. Most significantly, it determined which body of legal principles applied in the new territory. In inhabited lands, notwithstanding the Crown's acquisition of territorial sovereignty, the pre-existing system of law continued to exist, and rights under it were generally enforceable in the common law courts.[260] By contrast, since uninhabited lands had no legal system, the common law, and with it, applicable Acts of Parliament, were assumed to have entered uninhabited territories with the first English settler.[261]

Under the traditional body of legal principles governing the acquisition of sovereignty, at the moment of European contact, North America should have been classified as an inhabited territory, because aboriginal peoples also had highly developed systems of law and governance through which they exercised sovereignty over themselves and their territories. However, European powers evaded the constraints of international law by adopting a new legal principle for the acquisition of territory in North America: the doctrine of discovery.[262] Under the doctrine of discovery, it was possible to deem inhabited lands to be legally vacant, or *terra nullius*.[263] The precise criteria for invoking this legal fiction, and as a result the

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258. *See id.* at 358-66.

259. *See id.*

260. Brian Slattery has referred to this as the "doctrine of continuity." SLATTERY, ANCESTRAL LANDS, *supra* note 240, at 10.

261. *See* Walters, *supra* note 257, at 359 (citing Privy Council Memorandum of 9th August, 1722, 2 P. Wms. 75 (stating that "if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the law of England")). The classification of territory also determined the respective roles of Parliament and the Crown. Under the English Constitution, legislative power vested with Parliament, not the Crown. *See* Case of Proclamations, 77 Eng. Rep. 1352, 1353 (K.B. 1611). This rule continued to apply to settled territories; however, it was suspended for conquered territories, granting the Crown legislative powers which it did not possess in England, including the power to change local laws. *See* Campbell v. Hall, 98 Eng. Rep. 848, 895-96 (K.B. 1774).

262. *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 176-81 (1979) (describing the international status of aboriginal communities).

263. *See* SLATTERY, ANCESTRAL LANDS, supra note 240, at 3.

scope of its applicability, were unclear and fluid.[264] What underlays all of these criteria, and the doctrine of discovery in general, was a belief in the inferiority of North America's aboriginal peoples.[265]

The application of the doctrine of discovery to lands claimed by the British Crown in what is now Canada and the United States had three implications for the aboriginal peoples of North America.[266] First, by deeming North America to be legally vacant, the doctrine of discovery denied the existence of aboriginal sovereignty prior to the acquisition of territorial sovereignty by Britain.[267] As a corollary, Britain acquired sovereignty through mere acts of discovery; conquest or cession was unnecessary.[268] Since aboriginal peoples had governed themselves prior to the advent of British sovereignty, discovery in effect extinguished that prior sovereignty. Moreover, discovery vested the Crown with exclusive sovereignty; any sovereignty that aboriginal peoples possessed "stem[med] from the Crown by way of delegation."[269] Second, the logic of *terra nullius* denied the prior existence of aboriginal law in North America. Once again, since aboriginal peoples did have legal systems before European contact, the doctrine had the practical effect of extinguishing aboriginal law.[270] Third, and finally, discovery had the consequence of denying pre-existing aboriginal land rights, and hence, de facto extinguishing them.[271] This flowed from the combined operation of the doctrine of discovery and English property law.[272]

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264. As Kent McNeil notes, English courts, at different times and in different geographic contexts, classified territories as *terra nullius* or uninhabited that were inhabited by hunter-gatherers or peoples whose level of civilization was considered lower than England's, or whose local laws were not deemed suitable for English subjects. KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 117-32 (1989).

265. As Patrick Macklem has written, "European powers viewed Indian nations as different than, and inferior to, themselves, and offered indigenous difference as a reason to treat North America as vacant land." Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1358 (1993).

266. In this paragraph, I follow Brian Slattery, *The Organic Constitution: Aboriginal Peoples and the Evolution of Canada*, 34 OSGOODE HALL L.J. 101, 103-08 (1996).

267. *See id.* at 103-04.

268. *See id.* at 104.

269. *Id.* at 105.

270. *See id.* at 106-07. It is worth noting that while it would have been possible to distinguish the acquisition of territorial sovereignty from the status of aboriginal legal systems, the notion of *terra nullius* precluded the drawing of such a distinction.

271. *See id.* at 106.

272. *See* Patrick Macklem, *What's Law Got to Do with It? The Protection of Aboriginal Title in Canada*, 35 OSGOODE HALL L.J. 125, 132-34 (1997). The doctrine of discovery extinguished any land rights that existed under aboriginal law. *See id.* at 132-33. The resulting legal vacuum was filled by the English law of property and its central legal fiction, the doctrine of tenures. According to that doctrine, the Crown of England was deemed in law to be the original occupant and absolute owner of all lands in England. *See id.* at 133. The Crown's fictional status as original proprietor vested it with the authority to grant legal estates; as a consequence, all grants of land, in theory, originated in Crown grant. *See id.* Most lands in England, however, could not be traced to original Crown grants. *See id.* Therefore, the fiction of original Crown ownership was accompanied by another: that actual occupants at the time of the creation of the doctrine of tenures held those lands through fictitious grants from the Crown. *See id.* In North America, however,

D. "Softening" British Imperial Law and the Doctrine of Discovery

The dramatic consequences of the doctrine of discovery for aboriginal peoples in North America have led some scholars to suggest that the doctrine of discovery should be repudiated by common law courts.[273] Most common law courts and legal scholars have resisted this suggestion, though, because it would have dramatic consequences for the existing patterns of sovereignty and landholding in North America.[274] Given the absence of either conquest or treaties for large parts of North America, Britain may have never acquired sovereignty over many aboriginal peoples. Instead, jurists generally accept that discovery did vest territorial sovereignty in the Crown, but focus on mitigating or "softening" the *consequences* of discovery by vesting special legal rights in aboriginal peoples, ranging from weak rights to occupy land to broad rights of self-governance. What is significant here is that these differences in degree can be traced to a more fundamental distinction—the normative *justifications* they rely on for the notion of aboriginal rights. Doctrinally, these normative justifications translate into different accounts of the *sources* of aboriginal rights.

In the next part, I explore these normative justifications for and sources of aboriginal rights—imperial enactment, prior occupancy, the continuity of aboriginal law, and prior sovereignty—as developed by Canadian courts under the influence of American jurisprudence. Canadian law has undergone a normative evolution in its conception of the sources of aboriginal rights. Genealogical interpretation, relying on the Marshall decisions, has played a pivotal role in that evolution. The Marshall decisions have been influential because they offer an alternative understanding of British imperial law to the conventional account given above.

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although the notion of the Crown as original occupant was held to apply, aboriginal inhabitants were denied the benefit of the system of fictitious grants that operated in England. *See id.* Their lands were considered to be ungranted or legally vacant, and were held absolutely by the Crown. *See id.* As a consequence, the doctrine of discovery granted the British Crown absolute ownership over Canada, notwithstanding aboriginal occupation. Macklem aptly describes the combined effect of these legal doctrines as "Aboriginal territorial dispossession" because those doctrines turned aboriginal peoples into trespassers on their own lands. *Id.* at 134.

273. *See, e.g.*, Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on* R. v. Sparrow, 29 ALBERTA L. REV. 498, 512-17 (1991); Macklem, *supra* note 265, at 1358-59; Macklem, *First Nations*, *supra* note 240, at 451.

274. *See* Regina v. Sparrow [1990] 1 S.C.R. 1075, 1103; Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588-89 (1823).

E. Aboriginal Rights As Creations of British Imperial Law

1. *St. Catherine's Milling*

One approach Canadian courts took to "softening" the doctrine of discovery worked within British imperial law to locate aboriginal rights in imperial enactments or the common law. The first and easiest method for doing so was to locate aboriginal rights to land in acts of the sovereign. This method posed a minimal challenge to the doctrine of discovery, because it accepted as its premise both the sovereign and proprietary power of the Crown, and viewed aboriginal rights as creations or delegations of that power. It is therefore useful to examine the first method as a point of interpretive departure.

The decision of the Privy Council in *St. Catherine's Milling & Lumber Co. v. The Queen* in 1888 relied on this method to recognize aboriginal rights to land in Canada.[275] The dispute in that case centered on the ownership of lands surrendered through treaty by the Ojibway nation to the government of Canada. The lands were largely located within the borders of the province of Ontario.[276] Ontario alleged that on surrender, the lands had passed to the Crown in right of the province; Canada alleged that they had passed to the Crown in right of Canada.[277]

In order to resolve that point, the Privy Council first explained the nature of the aboriginal interest in these lands prior to surrender.[278] The Privy Council assumed throughout its judgment that the aboriginal nation had had a legally cognizable interest in its lands.[279] However, given the effect of the doctrine of discovery, that interest could not exist at common law, and, unsurprisingly, the Privy Council did not address common law arguments at all.[280] Instead, it stated that the "only" source of the aboriginal interest in these lands was the Royal Proclamation of 1763 ("Proclamation").[281] The Proclamation was an enactment of the Crown promulgated at the conclusion of the Seven Years War.[282] It "reserved" to aboriginal nations the lands that they occupied as "hunting grounds."[283] The Proclamation also imposed a moratorium on Crown grants to aboriginal lands that had been neither ceded nor purchased, banned private purchases of Indian lands, and required that any land

275. 14 App. Cas. 46 (P.C. 1888) (appeal taken from Can.).

276. *See id.* at 52.

277. *See id.* The answer to that question involved the interpretation of a provision of the Canadian Constitution which, at the moment of Confederation, had vested title to all public property within each province in the provincial Crown. *See* Constitution Act, R.S.C., No. 5, § 109 (1867 Can.).

278. *See St. Catherine's Milling*, 14 App. Cas. at 53-55.

279. *See id. passim.*

280. *See id.* at 58.

281. *See id.* at 54 (discussing the Royal Proclamation of 1763, R.S.C., app. II, No. 1).

282. *See id.* at 53.

283. *Id.*

purchases be made by the Crown at a public meeting of the aboriginal nation concerned.[284]

In sum, the Privy Council in *St. Catherine's Milling* concluded that the Proclamation had the effect of creating an aboriginal interest in the lands at issue.[285] Moreover, it held that the Proclamation was the sole source of that interest. In the Privy Council's words:

> Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the *interest* which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, *can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.*[286]

2. *Calder*

St. Catherine's Milling marked the beginning of the Canadian jurisprudence on aboriginal title, and therefore, represents the starting point in the normative evolution of Canadian conceptions of the source of aboriginal rights. In brief, it made aboriginal rights contingent on the existence of imperial enactment. The limits of this approach were reached and explored in *Calder v. Attorney-General of British Columbia.*[287] In that appeal, members of the Nishga nation in British Columbia brought a claim for declarations that they had possessed, since time immemorial, an aboriginal title to their lands that had not been extinguished since the advent of Canadian sovereignty.[288] The aboriginals' claim challenged the rationale for aboriginal rights set out in *St. Catherine's Milling.*[289] The only imperial enactment which could have grounded a claim to aboriginal title in British Columbia was the Proclamation.[290] However, the geographic reach of the Proclamation was hotly disputed by the parties, so a finding that the Proclamation did not extend to British Columbia would have denied the claimants land rights that aboriginals in other parts of Canada possessed.[291] Realizing this limitation, the claimants invoked a new normative justification for aboriginal title: their historic occupancy of their lands.[292] Patrick Macklem has termed this argument one of "prior occupancy," that is, "that aboriginal people possess Aboriginal rights because they lived on and occupied portions of the North American continent prior to European contact."[293]

This method of softening the doctrine of discovery viewed aboriginal land rights as creations of the common law, and in particular, of the common law principle that

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284. *See id.* at 53-54.
285. *Id.* at 55.
286. *Id.* (each emphasis added).
287. [1973] S.C.R. 313.
288. *See id.* at 318.
289. *See id.* at 320-23.
290. *See id.* at 322.
291. *See id.* at 323-25.
292. *See id.* at 328.
293. Macklem, *Normative Dimensions, supra* note 240, at 180.

possession is proof of ownership.[294] Like the first method (applied in *St. Catherine's Milling*), "prior occupancy" accepted the legitimacy of the doctrine of discovery and the notion that aboriginal rights were creations of the English legal system. However, because it granted legal significance to the prior presence of aboriginal peoples, it rejected the doctrine of discovery in its strongest formulation, and opened up the possibility that other aspects of that prior presence could be recognized as well.

Both the plurality and dissenting judgments (Justices Judson and Hall, respectively) agreed that prior occupancy could form the basis of aboriginal title, although they divided on whether the Nishga's aboriginal title had in fact been extinguished. Moreover, through genealogical interpretation, they identified the Marshall decisions as the doctrinal source for grounding aboriginal title in prior occupancy. Those decisions were taken to be authoritative because they offered an alternative account of the consequences of discovery under British imperial law.

Justice Judson began his discussion of the Marshall decisions by noting that they had "strongly influenced" the Canadian courts in *St. Catherine's Milling*.[295] He then quoted a lengthy passage from Chief Justice Marshall's judgment in *Johnson v. M'Intosh* as representing the law on aboriginal title.[296] In that passage, though, Chief Justice Marshall explained a version of the doctrine of discovery that was based on, but which differed substantially from, the conventional account offered by British imperial law. On the one hand, Chief Justice Marshall accepted that discovery vested both sovereign and proprietary authority in the Crown, which implicitly relied on the premise that North America was legally vacant. But on the other hand, Chief Justice Marshall acknowledged the presence of aboriginal peoples prior to discovery, and accepted that aboriginal peoples possessed rights to land by virtue of their prior occupation of North America. Thus, in passages quoted by Justice Judson, Chief Justice Marshall referred to an "Indian title of occupancy" which survived the discovery of North America.[297] However, the existence of Indian title did not deny the "absolute title of the Crown."[298] As a consequence, discovery vested the Crown with "the absolute title . . . to extinguish" the Indian right; moreover, the absolute title of the Crown was "incompatible with an absolute and complete title in the Indians."[299]

Recognizing the inconsistency between the visions of aboriginal title set forth in *Johnson* and in *St. Catherine's Milling*, Justice Judson reconciled the two decisions by noting that the Proclamation was not the "exclusive source" of aboriginal title in Canada; as well, he held that the Proclamation did not apply to the lands in question.[300] Justice Judson went on to adopt the Marshall theory of aboriginal title as his own, by holding that "when the settlers came, the Indians were there,

294. *See id.*
295. *See Calder* [1973] 1 S.C.R. at 320.
296. *See id.* at 321.
297. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823).
298. *Id.* at 588.
299. *Id.*
300. *Calder* [1973] 1 S.C.R. at 322.

organized in societies and *occupying the land as their forefathers had done for centuries*. This is what Indian title means . . . ."[301]

The use of *Johnson* as an engine of normative evolution for the Canadian law of aboriginal rights, and the explicit invocation of genealogical interpretation, were even clearer in Justice Hall's dissent. Like Justice Judson, Justice Hall accepted that the Nishga's historic occupation of their lands was sufficient to give rise to aboriginal title. Noting the absence of Canadian authority on this point, Justice Hall drew on a larger body of jurisprudence "affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here."[302]

The Marshall decisions played a dominant role in his discussion. Justice Hall began by justifying the genealogical use of *Johnson*, by examining its treatment in one of the Supreme Court's judgments in *St. Catherine's Milling*.[303] Justice Hall highlighted one portion of that judgment, which is worth quoting in full:

> "The American authorities . . . consist . . . of several decisions of the Supreme Court of the United States, from which three, *Johnston* [sic] *v. McIntosh, Worcester v. State of Georgia*, and *Mitchell v. United States*, may be selected as leading cases. *The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognize it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America.*"[304]

This passage contains each of the three moves of genealogical argumentation. The claim of *ancestry* is made by referring the "*origin*" of Chief Justice Marshall's judgments "*to a date anterior to the revolution*" in the law of the British Empire. Furthermore, there is the claim of *inheritance* ("*a continuance of the principles of law or policy as to Indian titles then established by the British government*"). Finally, and as a consequence, the ancestry and inheritance establish the prima facie relevance of Chief Justice Marshall's judgments ("*therefore identical with those which have also continued to be recognized and applied in British North America*"). The strength of this genealogical argument was recognized by Justice Hall himself, who referred to *Johnson* as "the *locus classicus* of the principles governing aboriginal title."[305]

Having made his genealogical claims clear, Justice Hall went on to draw substantive principles of law from *Johnson*. Like Justice Judson, he relied on *Johnson* for a modified version of the doctrine of discovery that simultaneously recognized both aboriginal rights to land arising out of historic occupation, and the ultimate sovereignty and proprietary power of the Crown. After quoting a lengthy

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301. *Id.* at 328 (emphasis added).

302. *Id.* at 376.

303. *See id.* at 377-83.

304. *Id.* at 377 (quoting Justice Strong in *St. Catherine's Milling & Lumber Co. v. The Queen* [1886] 13 S.C.R. 577, 610 (citations omitted) (emphasis in original)).

305. *Id.* at 380 (emphasis in original).

passage from *Johnson*, Justice Hall stated that the "dominant and recurring proposition stated by Chief Justice Marshall in *Johnson v. M'Intosh* is that on discovery or conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it."[306] But despite Justice Hall's reliance on *Johnson* to soften the consequences of settlement, his acceptance of Crown sovereignty and, hence, of Crown proprietary authority is equally clear. This is evident from his endorsement, for which he cited *Johnson* as authority, of "the original fundamental principle that discovery or conquest gave exclusive title to those who made it."[307]

F. Aboriginal Rights Arising from the Continuity of Aboriginal Law in Guerin

Read moderately, *Johnson* represents a weak challenge to the doctrine of discovery, because it accepted the vesting of proprietary and sovereign authority in the Crown through discovery, and granted land rights to aboriginals through the operation of, and according to the principles of, English common law. However, *Johnson*'s reworking of British imperial law had more radical implications than these. By opening the door to the judicial recognition of the prior presence of aboriginal peoples in North America, *Johnson* raised the questions of *which aspects* of that prior presence ought to be recognized, and what the legal consequences of that recognition ought to be. At the very least, prior to European contact, aboriginal peoples did not merely physically occupy North America; their relationships with each other, and with their lands, were governed by systems of law that varied from nation to nation. Accordingly, another approach to "softening" the consequences of settlement in Canadian jurisprudence, relying on *Johnson*, would be to extend legal recognition to rights under aboriginal law that pre-existed the assertion of sovereignty by European powers.[308]

Doctrinally, this strategy consisted of attacking the simple dichotomy drawn by British imperial law between conquered and settled territories. Recall that for the conquered territories, the pre-existing system of law continued to exist after the acquisition of British sovereignty, and the rights under that system were enforceable in the common law courts, whereas for the settled territories, which were presumed to have no legal system, the common law and applicable statutes entered the colony with the first English settler.[309] In place of this simple dichotomy, Mark Walters has suggested that settled territories should have been (and in fact often were) governed

306. *Id.* at 383. In another significant move, Justice Hall also identified the source of that proposition in the English common law rule that "[p]ossession is of itself . . . proof of ownership." *Id.* at 368. This link between *Johnson* and the common law rules of property tacitly acknowledged the settlement thesis, because it located the source of aboriginal land rights in English legal principles.

307. *Id.* at 383.

308. Indeed, *Johnson* itself discussed the passing of title under aboriginal legal systems; one of the controversial holdings of the case was that title under aboriginal law was unenforceable in United States courts. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592-93 (1823).

309. *See supra* text accompanying notes 259-70.

by principles of "complex settlement."[310] According to this theory, aboriginal customary law had ongoing legal force in North America after discovery, and applied among aboriginal peoples *inter se*, while the common law governed settlers' internal relations.[311] The significance of the theory of complex settlement is that it locates the source of aboriginal rights not in the common law, but in aboriginal law.

There is little in the way of Canadian case law that unambiguously applies the theory of complex settlement in its entirety. However, after *Calder*, the Supreme Court of Canada in *Guerin v. The Queen* used *Johnson* to force the distinction between the legal principles governing settled and conquered territories.[312] *Guerin* turned on the questions of whether the Crown owed a fiduciary duty to aboriginal peoples because it had accepted a surrender of aboriginal lands, and, if so, what was the nature of that duty.[313] In order to explore the latter question, the court considered the basis of aboriginal title.[314]

Guerin confirmed that *Calder* had significantly altered the Canadian law of aboriginal title by grounding aboriginal title in prior occupation, not imperial enactment.[315] The court (per Justice Dickson) noted that "[i]n this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v. M'Intosh* and *Worcester v. State of Georgia*."[316] However, the proposition that the court drew out of *Johnson* in *Guerin* was significantly different than the lesson that Justices Judson and Hall took from it in *Calder*. According to the court in *Guerin*, *Johnson* had held that "the rights of Indians in the lands they traditionally occupied prior to European colonization *both predated and survived the claims to sovereignty* made by the various European nations in the territories of the North American continent."[317] According to this formulation, aboriginal rights to land *existed prior to* the assertion of British sovereignty. As a consequence, they could not have arisen as a creation of the English common law, because that body of law only entered Canada upon the assertion of sovereignty. The only alternative source for aboriginal title, then, would be in pre-existing systems of aboriginal law. It therefore seems that the Supreme Court of Canada used *Johnson* to shift the normative basis of aboriginal rights under Canadian law from prior occupation (and the English common law) in *Calder*, to aboriginal legal systems that existed prior to the advent of British sovereignty in *Guerin*.[318]

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310. Walters, *supra* note 257, at 365.

311. *See id.* at 376.

312. *See* Guerin v. The Queen [1984] 2 S.C.R. 335, 377-78.

313. *See id.* at 377, 383.

314. *See id.* at 376-82.

315. *See id.* at 376-77.

316. *Id.* at 377 (citations omitted).

317. *Id.* at 377-78 (emphasis added).

318. This interpretation is confirmed by the court's statement in *Guerin* that *Johnson* stood for "[t]he principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants." *Id.* at 378. In support, the court cited a decision of the Privy Council. Amodu Tijani v. Secretary, 2 App. Cas. 399 (P.C. 1921) (appeal taken from Nigeria). Significantly, that decision stated the principles for conquered, not settled, territory, and so referred to "presumptive title" under the pre-existing legal regime, not English common law.

G. Aboriginal Rights Arising from Prior Aboriginal Sovereignty in Van der Peet?

Once the theory of *terra nullius* and the doctrine of discovery were softened, and the prior presence of aboriginal peoples in North America was acknowledged, it became difficult to limit which aspects of that prior presence merited legal recognition. Aboriginal laws, even though customary in nature, are created, interpreted, and applied by aboriginal legal institutions. These institutions are the means by which aboriginal peoples engage in self-government. Accordingly, it is a "small step" from applying the doctrine of continuity in Canada to acknowledging the ongoing existence of aboriginal sovereignty after the assertion of European sovereignty.[319]

Although the existence of aboriginal sovereignty at the moment of discovery is not difficult to accept, it is another matter altogether to comprehend that Crown and native sovereignty may have co-existed *after* North America had been acquired by Britain.[320] *Johnson* seems to preclude this possibility, speaking as it does of the assertion by European powers of "the ultimate dominion" over North America, including the power to grant title to aboriginal lands, subject to aboriginal title.[321] Indeed, although the judgment is ambiguous, there is good reason to believe that *Johnson* may have even denied *pre-existing* aboriginal sovereignty, through its description of "the tribes of Indians inhabiting this country" as "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[322]

However, *Johnson* was not Chief Justice Marshall's last word on the constitutional status of aboriginal nations in the United States. Nine years later, in *Worcester v. Georgia*, Chief Justice Marshall articulated a dramatically different version of both the pre-existing social organization of aboriginal nations, and their political status after discovery.[323] He did so in terms that applied not only to the United States, but across what was formerly British North America. Prior to European contact, North America's aboriginal peoples were "divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[324] Given this reality, Chief Justice Marshall found it difficult to accept the doctrine of discovery in its unadulterated form, in which "adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil . . .

Guerin [1984] 2 S.C.R. at 407. The fact that the court cited this decision lends further strength to the view that *Guerin* used *Johnson* to force the distinction between settled and conquered territories.

319. Walters, *supra* note 257, at 388.

320. *See* Walters, *supra* note 240, at 786.

321. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584 (1823).

322. *Id.* at 590.

323. 31 U.S. (6 Pet.) 515 (1832).

324. *Id.* at 542-43.

or rightful dominion over the numerous people who occupied it."[325] Therefore, although he accepted the fact of British (and now American) sovereignty, he went on to qualify it to a significant extent.

Looking at the actual practice of Britain in its colonial dealings, Chief Justice Marshall concluded that Britain viewed aboriginals as "formidable enemies, or effective friends," and, as a consequence, did not assert complete sovereignty over aboriginal nations.[326] Rather, Britain "considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged."[327] The relationship of aboriginal nations to the Crown was that of "a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character."[328]

Worcester stands at the opposite end of the spectrum from *St. Catherine's Milling*, because it recognizes the co-existence of aboriginal and Crown sovereignty, regards the sovereignty of aboriginal nations as inherent, not delegated, and accordingly, views aboriginal sovereignty as the source of a full range of aboriginal rights, including rights of self-government. It is therefore of considerable significance that *Worcester* played a leading role in one of the most important judgments in which the Supreme Court of Canada has interpreted section 35(1) of the Constitution Act, 1982: *Van der Peet v. The Queen*.[329] Although section 35(1) had been applied in an earlier judgment,[330] in *Van der Peet*, the court addressed itself to a novel question—namely, how to define the existing aboriginal rights recognized and affirmed by section 35(1).[331]

The court (per Chief Justice Lamer) answered this question by articulating a theory of why aboriginal peoples possess special rights under the Canadian Constitution. For Chief Justice Lamer, section 35(1) served two distinct purposes:

> [It is] first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and . . . second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.[332]

These two purposes were fulfilled by defining those rights to reflect the manner in which aboriginal peoples occupied Canada prior to European contact. On its face, the judgment would appear to endorse the "prior occupation" model of aboriginal rights. Certainly, this reading of *Van der Peet* is supported by the Court's own

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325. *Id.* at 543.

326. *Id.* at 546.

327. *Id.* at 548-49.

328. *Id.* at 552. Elsewhere, Chief Justice Marshall clarified the unique relationship between aboriginal nations and the United States, stating that aboriginal nations held the unique constitutional status of "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

329. [1996] 2 S.C.R. 507.

330. *See* Regina v. Sparrow [1990] 1 S.C.R. 1075.

331. *Van der Peet* [1996] 2 S.C.R. at 526-27.

332. *Id.* at 548.

statement that its approach to the interpretation of section 35(1) drew upon both of the judgments in *Calder* and *Johnson* itself.[333] However, the court was careful to explain that the prior occupation of Canada by aboriginal peoples had two distinct aspects, not only "the prior occupation of land" but also "from the *prior social organization and distinctive cultures* of aboriginal peoples on that land."[334]

The court drew the latter dimension of aboriginal peoples' prior presence—that is, their prior social organization—from the judgments of Chief Justice Marshall. As the *Van der Peet* court said, "The view of aboriginal rights as based in the prior occupation of North America by *distinctive aboriginal societies,* finds support in the early American decisions of Marshall C.J."[335] The court prefaced its discussion of the Marshall decisions by making a genealogical claim. It cited Brian Slattery's work with approval, and expressly agreed with his statements that the Marshall decisions provided "'structure and coherence to an untidy and diffuse body of customary law based on official practice'" and were "'as relevant to Canada as they are to the United States.'"[336] The court went on to discuss both *Johnson* and *Worcester* in some detail. In particular, it quoted and highlighted the following passage from *Worcester*:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.[337]

The court explained the significance of this passage for the interpretation of the Canadian Constitution in the following way:

> [Chief Justice Marshall]'s essential insight that the claims of the Cherokee must be analyzed in light of their pre-existing occupation and use of the land—their "undisputed" possession of the soil "from time immemorial"—is as relevant for the identification of the interests s[ection] 35(1) was intended to protect as it was for the adjudication of Worcester's claim.[338]

This statement should be read in light of both the highlighted passage from *Worcester*, and the Court's expanded understanding of the nature of the prior presence of aboriginal peoples in Canada. By referring to the "pre-existing occupation and use of the land" in *Worcester*, the court in fact gestured to the presence of "distinct, independent political communities" as an aspect of aboriginal peoples' prior occupation that deserved constitutional protection.[339]

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333. *See id.* at 539-41.

334. *Id.* at 562 (emphasis added).

335. *Id.* at 540 (emphasis added).

336. *Id.* at 541 (quoting Slattery, *Understanding Aboriginal Rights*, *supra* note 240, at 739).

337. *Id.* at 544 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (emphasis omitted)).

338. *Id.* (quoting *Worcester*, 31 U.S. at 559).

339. *Id.* The significance of the court's use of *Worcester* in *Van der Peet* to expand its understanding of the prior presence of aboriginal peoples in Canada becomes clear when one examines the *Van der Peet* court's test for defining aboriginal rights. The court stated that section 35(1) protected the "crucial elements of those pre-existing distinctive societies," which it defined

However, despite *Worcester*'s influence, it is clear that the court does not believe that section 35(1) protects the kind of broad, inherent right of self-government encompassed by the notion of the domestic dependent nation in U.S. constitutional law. In a companion judgment handed down with *Van der Peet*, the court rejected a claim by an aboriginal nation that section 35(1) protected a "broad right to manage the use of their reserve lands," because that claim lacked the requisite specificity to be an aboriginal right.[340] The implication of that judgment is that jurisdiction over specific subject matters will fall to be determined on a case-by-case basis. Nevertheless, the prospect that section 35(1) could embrace self-government at all represents a considerable departure from the early days of Canadian aboriginal rights jurisprudence.[341]

VI. CONCLUSION: A PRELIMINARY ASSESSMENT

A. Introduction

In this Article, I outlined the various ways in which comparative case law is used in constitutional adjudication. By examining the case law of the Constitutional Court of South Africa and the Supreme Court of Canada, I demonstrated that comparative jurisprudence is used in three different ways. These interpretive modes are universalist, dialogical, and genealogical interpretation. For each, I identified both the interpretive methodologies employed by courts and the normative premises underlying those methodologies. I illustrated these points through the use of concrete examples of decisions in which comparative materials have played an important role.

At the outset, I stated that this Article itself has a normative premise. My motivation for engaging in this study is that courts, because of their central role in legitimizing and validating the exercise of public power, are under an obligation to engage in a process of justification for their *own* decisions. That obligation extends

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in terms of the "practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans." *Id.* at 548. Although the court did make this point explicitly, its formulation of aboriginal rights had the effect of constitutionalizing incidents of aboriginal sovereignty. Under the rubric of "practices, traditions and customs," for example, the court included "traditional laws." *Id.* at 546. As well, the court quoted with approval a description of aboriginal rights as concerned with the "customary laws" and "political institutions" of aboriginal peoples. *Id.* at 547 (quoting Slattery, *Understanding Aboriginal Rights*, *supra* note 240, at 737). Indeed, the court's definition of aboriginal rights may be capacious enough to encompass aboriginal laws, and perhaps even governmental institutions, although the proof of rights must proceed on a case-by-case basis.

340. Regina v. Pamajewon [1996] 2 S.C.R. 821, 834.

341. *Van der Peet*'s holding on the nature of claims for self-government under section 35(1) must now be reconsidered in light of the judgment of the Supreme Court of Canada in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010. In *Delgamuukw*, the court held that section 35(1) affords constitutional protection to aboriginal title (roughly analogous to Indian title in the United States), and that title encompasses the right to determine to what use title lands could be put. *See id.* at 1015-17. The jurisdictional incidents of aboriginal title amount, in effect, to a right to self-government, albeit with respect to a somewhat limited range of subject matters.

to courts' interpretive methodologies, because those methodologies define the institutional identity of courts. Accordingly, having identified and elucidated three different modes of comparative constitutional interpretation, the task at hand is to offer a preliminary assessment of them.

The different methods of comparative constitutional interpretation can be assessed along three different dimensions. The first dimension is their *scope*—that is, the range of legal issues and contexts in which they can be used. The second is the effect of the interpretive mode on the *constitutional culture* of the jurisdiction of the interpreting court. The third, and final, dimension is the *legitimacy* of the normative claims that each methodology entails.

B. Scope

The different modes of comparative constitutional interpretation vary considerably in scope. Genealogical interpretation,[342] for example—even the weak version—is confined to a narrow set of legal contexts. Both the legal system of the interpreting court, and the system that is the source of comparative insight, must exist in a familial relationship—that is, they must both originate in a parent legal order. Moreover, the claim of ancestry cannot stand alone; the weak version of genealogical interpretation also requires a common inheritance. Even for the weak version, these relationships rarely exist. Also, since genealogical interpretation is premised on historical relationships, it requires the interpreting court to engage in the difficult task of establishing the existence of that relationship. In the case of the Canadian use of American jurisprudence on the constitutional status of Indian nations, the courts have been assisted greatly by a large body of academic commentary devoted to making these genealogical claims.[343] Other courts, however, may find that they need to do this time-consuming work themselves (and as a consequence may not bother).

The scope of genealogical interpretation is subject to another constraint: the historical relationships it relies on must be plausible. In this respect, although the Marshall decisions have played an important role in the Canadian law on aboriginal rights, their use in that context is somewhat bizarre. The use of the Marshall decisions relies on the premise that both the American and Canadian legal systems emerged from the legal order of the British Empire. The difficulty with this proposition, however, is that America and Canada emerged from the British imperial order in two radically different ways. America was born out of a revolution against British imperial rule, and American constitutionalism was, in large part, formulated as a decisive rejection of key aspects of British constitutionalism. Thus, in the place of an unwritten constitution, a supreme Parliament, a unitary state, and the sovereignty of the Crown, the United States opted for a written constitution, justiciable limits on legislative authority, federalism, and the belief that the people were ultimately sovereign. Canada's relationship to British imperial law, by contrast, is one of evolution, not revolution. The various enactments which make up the Canadian Constitution are Acts of the British Parliament. Moreover, the

342. *See* discussion *supra* Part II.D.3.

343. *See* articles cited *supra* note 240.

Canadian Constitution maintained many aspects of British constitutionalism. Notwithstanding that Canada is a federal state, and has constitutionally entrenched fundamental human rights, Canadian constitutional law has been marked by a commitment to Parliamentary democracy on the Westminster model and the absence of a strict separation of powers. In light of the different relationships between the American and Canadian Constitutions, on the one hand, and the British Imperial order, on the other, genealogical arguments ring a bit hollow. Perhaps for this reason, some Canadian scholars, though they gesture to the genealogical influence on Canadian law of the Marshall decisions, rely on those decisions primarily for their substantive reasoning, without making genealogical claims themselves.[344] The role of the Marshall decisions in Canadian constitutional law thus illustrates how the scope of genealogical argumentation may be quite narrow.

Universalist interpretation,[345] by comparison, applies to a much broader set of circumstances. Unlike genealogical interpretation, in which the use of comparative jurisprudence is premised on the existence of a plausible historical relationship, universalist insights may be garnered from any legal system. The only requirement is that the system that is the source of comparative insight share a particular constitutional provision. Typically, that provision guarantees a fundamental human right. This is largely a function of the fact that the globalization of the practice of modern constitutionalism has principally involved the spread of the notion that individual rights should be legally protected against executive and legislative encroachment. The South African cases discussed above bear out this hypothesis: universalist interpretation has generally involved the interpretation of the South African Bill of Rights.

The scope of universalist interpretation is subject to "plausibility constraints" of its own, however. Universalist interpretation relies on strong normative claims, a point I will return to shortly. Taking these claims as given, they would appear to limit the rights with respect to which universalist interpretation can be invoked to those rights that are truly "universal." The most "universal" of human rights are those which affect the physical security of the individual. The right to life falls into this category, as do the rights to security of the person and physical liberty. However, so do many of the rights that attach to accused persons in the criminal process, because a criminal conviction permits the state to deprive a person of liberty and security of the person (and perhaps of life itself). This would explain the Constitutional Court of South Africa's reliance on foreign case law in this area. By contrast, even the traditional liberal freedoms (such as expression, religion and conscience, association, and assembly), although enshrined by many constitutions, are more normatively contentious. Though courts of various jurisdictions agree on the importance of these rights, they have differed sharply on their interpretation.[346]

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344. Patrick Macklem is foremost in this regard. *See* Macklem, *supra* note 265; Macklem, *First Nations*, *supra* note 240; Macklem, *Normative Dimensions*, *supra* note 240.

345. *See* discussion *supra* Part II.D.1.

346. The most prominent disagreement has centered over the interpretation of constitutional guarantees of freedom of expression. Compare, for example, the Canadian and American jurisprudence on freedom of expression. Although Canadian courts have upheld laws which have criminalized the production and distribution of pornography, *see* Regina v. Butler [1992] 1 S.C.R. 452, and hate speech, *see* Regina v. Keegstra [1990] 3 S.C.R. 697, American courts have struck

In the face of such normative diversity, universalist (or even transcendent) arguments become difficult to make.

Dialogical interpretation[347] has the broadest scope of application. It does not require the existence of a historical relationship, unlike genealogical interpretation. More significantly, it does not require the kind of normative consensus across jurisdictions that universalist interpretation does. Indeed, far from being an obstacle to the use of comparative jurisprudence, normative disagreement drives dialogical interpretation, because it forces courts to identify and justify the sources of that disagreement as a means to developing a sharper awareness of constitutional similarity and difference. For dialogical interpretation to be possible, then, there need only exist corresponding constitutional provisions and jurisprudence in two or more jurisdictions.

C. Constitutional Culture

A court's choice of interpretive methodology will affect more than the outcome of the particular case before it. It will also likely affect the broader constitutional culture of the interpreting court's jurisdiction. These effects may also drive the decision of how to use comparative case law, and are therefore important to assess as well.

Universalist interpretation,[348] in general, will internationalize a nation's constitutional culture. The constant use of foreign jurisprudence will serve to remind not only courts, but other actors in the legal system as well—governments, legal counsel, and private litigants—that a nation's particular constitutional guarantees are shared with other countries. This effect flows as a consequence of one of the normative premises of universalist interpretation: that legal principles are transcendent. Universalist interpretation by courts will work that assumption into the domestic constitutional psyche, so that it becomes part of the *culture* of constitutional argument.

The potential of universalist interpretation to internationalize a nation's constitutional culture raises the question of why a court may wish to achieve this objective. One answer is that judges do not self-consciously pursue this goal; rather, it is only an incidental effect of a genuine commitment to the normative premises underlying universalist methodology. A more realistic answer is that judges view the use of foreign jurisprudence as a means for their country to affirm its membership in, or to rejoin, the mainstream of international society. As I mentioned above, a number of South African judges have explicitly invoked this goal.[349] Interestingly, for these judges, the intended audience of comparative constitutional interpretation is not only the domestic, but also the international, legal community.

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down similar laws, *see* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down municipal ordinance prohibiting hate speech); American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (striking down the McKinnon-Dworkin anti-pornography ordinance), *aff'd mem.*, 475 U.S. 1001 (1986).

347. *See* discussion *supra* Part II.D.2.

348. *See* discussion *supra* Part II.D.1.

349. *See* cases cited *supra* notes 112-14.

Another reason why judges may wish to internationalize domestic legal culture is to reform, revitalize, and reinvigorate it. In South Africa, apartheid operated through the law, and had, therefore, undermined the legitimacy of South African law and legal institutions. In this light, the Constitutional Court's use of comparative jurisprudence through universalist interpretation can be viewed as a means to build a new foundation for South African law in the post-apartheid era.[350]

Genealogical interpretation[351] has quite a different set of cultural effects. Like universalist interpretation, it unshackles a legal system from a narrow parochialism, and makes explicit the features it shares with other jurisdictions. However, these connections are not based on present commitments to shared normative premises. Rather, they flow from the distant past. Thus, instead of serving as a means to forging a new beginning, genealogical interpretation demands that a court remember where its legal system has been. The increased awareness of historical *relationships* fostered by genealogical interpretation accordingly helps to foster, within a constitutional culture, a sense of its *own* history.

The increased sense of history brought about by genealogical interpretation, has, for example, had a profound effect on the Canadian law of aboriginal rights. It has forced Canadian courts to face the racist premises of British imperial law, and to search for alternative formulations of those legal principles that are more just toward aboriginal peoples. Canadian courts have found an answer in the Marshall decisions. However, relying on the Marshall decisions raises new questions which Canadian courts have yet to even ask. The Marshall decisions, especially *Worcester*, gesture to a set of historical commitments made by the British Crown to aboriginal peoples across North America to respect their land rights and rights of self-governance. The use of the Marshall decisions by the Supreme Court of Canada, juxtaposed against the historic failure of the Canadian state to recognize aboriginal self-government, has accordingly helped to revive claims by aboriginal peoples of breached promises.[352]

The impact of dialogical interpretation[353] on domestic constitutional culture is more difficult to assess. Comparative law is a tool for identifying and justifying the premises, both factual and normative, underlying one's own legal order. If those premises differ from those in a foreign jurisdiction, then dialogical interpretation

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350. It is particularly telling that foreign case law has been used extensively to interpret the rights of accused persons in the criminal process, given that in the apartheid era, the criminal law was used as an instrument of oppression against those who resisted the South African government, and that the criminal justice system often failed to protect the rights of the accused. *See generally* DYZENHAUS, *supra* note 133.

351. *See* discussion *supra* Part III.D.3.

352. The most prominent example of claims for extensive rights of aboriginal self-government framed in terms of breached promises can be found in the report of the Royal Commission on Aboriginal Peoples, a commission constituted by the Government of Canada to examine the past, present, and future relationship between Canada's aboriginal peoples and Canadian society at large. 1-5 REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES (1996). The report opens with the argument that "[j]ustice demands . . . that the terms of the original agreements under which some Aboriginal peoples agreed to become part of Canada be upheld. Promises ought to be kept. Undertakings ought to be fulfilled. Solemn commitments ought to be honoured." 1 *id.* at xxiii.

353. *See* discussion *supra* Part II.D.2.

will have created an increased awareness of constitutional difference. If those premises are shared, dialogical interpretation will have brought constitutional similarities to light. The use of comparative jurisprudence will create an awareness that the legal issues facing a country's courts are not unique. In either case, comparative jurisprudence will have brought about a deeper understanding of one's own legal system.[354]

Dialogical interpretation allows a court to use comparative case law without internationalizing its domestic constitutional culture. It enables a court to learn from foreign experience without assimilating its constitutional jurisprudence into a larger transnational conversation about rights and democracy. This is clearest when comparative jurisprudence leads to a heightened awareness of constitutional difference. But it is also the case when dialogical interpretation fosters an awareness of constitutional similarities. In *State v. Solberg*, for example, Justice Sachs relied on Justice O'Connor's decision in *Lynch v. Donnelly* to identify the premises underlying the South African Bill of Rights.[355] He did not make the additional claim, though, that those premises were transcendent; rather, he used the American jurisprudence to come to a better understanding of *South African* constitutional principles.

D. Legitimacy

Finally, I consider the *legitimacy* of the normative claims each methodology entails. Universalist interpretation[356] is premised on extremely strong normative claims. It asserts that the law is best understood as a body of principles rather than rules, and invites a style of adjudication that is openly normative in character. It nevertheless draws a line between legal principles and philosophical or political principles. Most controversially, it claims that these moral principles are transcendent—that is, they are shared by more than one legal system.

Transcendence is the linchpin of universalist interpretation, because it justifies the use of comparative case law without regard to national boundaries. It is important to reiterate, though, that transcendence represents more than just an empirical claim that legal principles tend to be shared by many legal systems. Rather, it turns this empirical observation into the premise of an argument for a normative conclusion: that the presence of a legal principle in many legal systems is evidence of its truth or correctness. Empirical convergence, in other words, is proof of moral truth.

Thus explained, universalist interpretation becomes open to criticism on the ground of cultural relativism. The central argument of relativists is that "moral and

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354. For a similar view of the effects of comparative history, see GEORGE M. FREDRICKSON, THE COMPARATIVE IMAGINATION: ON THE HISTORY OF RACISM, NATIONALISM, AND SOCIAL MOVEMENTS 65 (1997) ("Cross-national comparative history can undermine two contrary but equally damaging presuppositions—the illusion of total regularity and that of absolute uniqueness.").

355. State v. Solberg, 1997 (4) SALR 1176, 1221 (CC) (citing Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984)).

356. *See* discussion *supra* Part II.D.1.

political values are relative to specific cultural contexts."[357] On this view, claims of universality, or transcendence, are merely a means by which a powerful group universalizes its particular values.[358] Cultural relativism underlies the views of legal particularists who are extremely skeptical about the prospects of constitutional transplants.

As Patrick Macklem has convincingly demonstrated, the debate between cultural relativism and universalism is complex,[359] and, more importantly, "shows no sign of abating in the near future."[360] This has led Macklem to suggest that normative arguments for legal rights that rest on relativist premises are inherently unstable.[361] But it follows, as a corollary, that universalist arguments are unstable as well. As a result, the legitimacy of universalist interpretation will constantly be put in question. This poses the additional danger that universalist methodology may in fact corrode the legitimacy of constitutional interpretation itself.

Genealogical interpretation[362] is free from many of the difficulties that plague universalist interpretation. As I have argued above, genealogical claims are positivist. A defining feature of legal positivism is that it allows a distinction between questions of validity and authority, on the one hand, and the substantive content of legal rules, on the other. Positivism, in other words, is content-independent. In the context of comparative constitutional interpretation, this is a source of considerable strength. Positivism establishes the legal relevance of foreign law to domestic constitutional interpretation without recourse to a larger moral theory about the truth or rightness of comparative sources.

But, the positivist nature of genealogical interpretation creates legitimacy problems of its own. Positivist claims are strongest when they operate *within* an established legal system that has clearly identified and publicly recognized principles of legal validity. At a normative level, those principles acknowledge the legitimacy of structures of governmental power within a political community; the legitimacy of those structures is also the basis of law's authority. When applied to foreign sources, however, positivist arguments lose their normative force. The structures of governmental power that are the sources of comparative jurisprudence cannot command legitimacy, precisely because they are located outside a political and legal order. This difficulty is compounded by the fact that genealogical

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357. Macklem, *supra* note 265, at 1335.

358. Iris Marion Young makes this argument. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 59-60 (1990). Ronald Dworkin, for example, makes a universalist argument that advances particular values when he writes that "[f]reedom of speech, conceived and protected as a fundamental negative liberty, is the core of the choice modern democracies have made, a choice we must now honor in finding our own ways to combat the shaming inequalities women still suffer." DWORKIN, *supra* note 52, at 221. Dworkin's categorical statement fails to acknowledge, for example, that courts in liberal democracies like Canada have in effect given priority to the eradication of women's inequality over freedom of expression, by upholding the constitutionality of legislation criminalizing the production, sale, and distribution of pornography. *See* Regina v. Butler [1992] 1 S.C.R. 452.

359. *See* Macklem, *supra* note 265, at 1335-45.

360. *Id.* at 1344.

361. *Id.*

362. *See* discussion *supra* Part II.D.3.

interpretation is historically oriented, and looks to the distant past as a source of positive law for the present. Genealogical interpretation must explain why the past commands of a sovereign should command obedience today.

The fact that positivist approaches to comparative constitutional interpretation raise serious problems of legitimacy has important implications for genealogical interpretation. It suggests that courts working in the genealogical mode will anchor the legitimacy of their recourse to comparative sources by implicitly turning to normative justifications for comparative constitutional interpretation other than positivist ones. My suspicion is that courts will not look to foreign jurisprudence with which they disagree on a substantive level. The image of comparative constitutional interpretation which emerges is one where public claims of validity and authority are asserted when comparative jurisprudence is attractive jurisprudence, whereas secret or private reasons remain unarticulated when comparative case law is unconvincing and is disregarded. In Patrick Glenn's felicitous phrase, comparative law "attracts adherence as opposed to obliging it."[363]

Dialogical interpretation[364] probably wins on the dimension of legitimacy, because it makes no normative claims regarding comparative jurisprudence. It uses comparative case law instrumentally, as a means to stimulate constitutional self-reflection. Thus understood, dialogical interpretation is more a legal technique than a theory of constitutional interpretation. Comparative materials are not asserted to be true or right; rather, they reflect a particular way of articulating underlying values and assumptions. Moreover, comparative materials are neither valid nor authoritative in the positivist sense. They need only be authoritative and valid for the system which is the source of comparative insight.

E. Conclusion: The Beginning of a Constitutional Conversation

This preliminary assessment of the three modes of comparative constitutional interpretation illustrates what is at stake when comparative jurisprudence is used in constitutional adjudication. This discussion offers courts the interpretive resources to explain why comparative law should count. The task at hand is for courts, lawyers, and legal scholars to continue this constitutional conversation and decide whether they are willing to accept the scope, legitimacy, and effects on constitutional culture of the three different interpretive modes. It is my hope that this Article will in some way enable that conversation to begin in earnest.

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363. Glenn, *supra* note 111, at 263.

364. *See* discussion *supra* Part II.D.2.