

Duquesne Law Review

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Comparative Law in the Age of Globalization

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* Mr. Roy edited portions of this article referencing German sources.

** Mr. Cervini edited portions of this article referencing Italian sources.

Comparative Law in the Age of Globalization

Mary Ann Glendon*

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

T.S. Eliot, "Little Gidding," *Four
Quartets*

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I. INTRODUCTION

Comparative law has come a long way in the United States since the American Association for the Comparative Study of Law was founded in 1951 by a tiny band of law professors and attorneys to promote the understanding and comparative analysis of foreign legal systems.¹ Today, with the advance of globalization, law firms that used to regard study abroad as evidence of dilettantism are now aggressively recruiting young lawyers who can communicate easily with their counterparts elsewhere and who can be persuasive in foreign settings. Law schools are scrambling to

* Learned Hand Professor of Law at Harvard University and President of the Pontifical Academy of Social Sciences. The contents of this article were delivered as the 2013 Murray Excellence in Scholarship Lecture, Duquesne University School of Law, September 24, 2013.

1. American Society of Comparative Law, <http://www.comparativelaw.org/about/history> (last visited Sept. 14, 2013).

meet student demand for courses that prepare them for professional life in a shrinking, interdependent world. More controversially, Supreme Court Justices have referred to foreign law to bolster their decisions in high-profile cases. Over a hundred law schools have become sustaining members of the American Association for the Comparative Study of Law (now the American Society of Comparative Law).²

Looking toward the future, it is hard to dispute Thomas Friedman's prediction that law, along with other social systems that have traditionally been associated with our distinctive national identity, will be profoundly affected by the collection of economic and social phenomena known as globalization.³ For those of us in the field of comparative and foreign law, these developments should be a dream come true. American comparatists have long maintained that our legal system could benefit in manifold ways from attention to legal arrangements in countries at comparable levels of social and economic development and with comparable commitments to democracy, the rule of law, and fundamental rights. But were we correct, or might heightened interest in foreign law turn out to be a case of "Be careful what you wish for"? That is the question I explore in this lecture: what are likely to be the benefits or hazards of increased attention to foreign law in American courts, legislatures, and law schools?

I have devoted the bulk of this lecture to the Supreme Court's recent references to foreign law in constitutional adjudication, not only because these few scattered allusions have given rise to a surprising amount of controversy, but because they illustrate both the benefits and risks of comparative law in the judicial process. After reviewing three widely discussed decisions where foreign law figured in the Court's reasoning process, I conclude that in each case there was something to be learned from foreign materials, but that the difficulty of gaining an accurate understanding of foreign law, the burden on judges and lawyers in doing so, the issues of legitimacy, the problems of comparability, and the temptations to selectivity raise doubts about whether the benefits outweigh the drawbacks.

2. The schools and the professors who represent them on the Association's boards of directors and editors are listed on the masthead of the *American Journal of Comparative Law*.

3. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 237, 411 (Farrar, Straus and Giroux 2006).

I then turn briefly to the use of foreign law in the legislative process, where it seems to me that the risks are more manageable and the benefits potentially greater. In my concluding remarks, I suggest that whether American courts and legislatures can maximize the benefits to be derived from consulting foreign experience will depend to no small degree on how the rapidly developing field of international legal studies takes shape in American law schools.

II. COMPARATIVE LAW IN CONSTITUTIONAL ADJUDICATION

In 2005, a lively public debate between two Supreme Court Justices was sparked by the Court majority's references to foreign law in an opinion striking down the death penalty for older juveniles.⁴ Since so many commentators have since weighed in on the controversy, one may wonder whether there is anything more to be said on the subject.⁵ But there may be some value in adding the perspective of one who has spent much of her professional life working with foreign law, convinced of the benefits of comparative studies, but concerned about the pitfalls.

There are many situations, of course, where reference to foreign and international sources by U.S. courts is uncontroversial, notably in the interpretation and application of certain treaties and commercial agreements. There is also broad agreement that comparative research can provide useful information about how various legal measures have worked out in practice, what advantages they may offer, and what unintended effects or indirect consequences they may entail. On this point, both participants in the 2005 debate seem to agree. Justice Stephen Breyer has maintained that the experience of other countries may "cast an empirical light on the consequences of different solutions to a common

4. *The Relevance of Foreign Legal Materials in U.S. Constitutional Court Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 528 (2005) (discussing *inter alia* *Roper v. Simmons*, 543 U.S. 551 (2005)).

5. See Michel Rosenfeld, *Comparative Constitutional Analysis in United States Adjudication and Scholarship*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 38 (Michel Rosenfeld & András Sajó eds., Oxford University Press 2012); Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POL'Y REV. 33 (June-July 2005); Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299 (2005-2006); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653 (2009); Jonathan Levy, *The Case of the Missing Argument: The Mysterious Disappearance of International Law from Juvenile Sentencing in Miller v. Alabama*, 132 S. CT. 2455 (2012), 36 HARV. J.L. & PUB. POL'Y 355 (2013).

legal problem.”⁶ And Justice Antonin Scalia, who has been highly critical of many uses of foreign material, has acknowledged that it can be helpful in estimating the practical results of a particular ruling. As he once put it, “You can look to foreign law and say, gee, they did this in Germany and the skies didn’t fall. That’s certainly a very valid use of foreign law.”⁷

The main issue between Justices Breyer and Scalia in their debate concerned the use of foreign material in constitutional adjudication. Justice Breyer continued the line he had taken in a 1999 dissent where he noted approvingly that “this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”⁸ Scalia took the position that all foreign material (except pre-1787 English sources) is wholly irrelevant to the original meaning of the U.S. Constitution.⁹ But, well aware that many people, including Justice Breyer, do not share his originalist approach to constitutional interpretation, he emphasized the problem of comparability. The political, constitutional, procedural, and cultural contexts of other nations are so different from our own, he argued, that material from other legal systems will rarely if ever be relevant to constitutional issues faced by our courts.¹⁰

Breyer acknowledged that comparability could be a problem. But he said, “If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something.”¹¹ There is “enormous value in any discipline,” he said, “of trying to learn from the similar experience of others.”¹² With respect to Scalia’s observation that judges might be tempted to manipulate such material to serve their own ends, Breyer commented: “Nobody wants undemocratic judges substituting their view for that of the legislature.”¹³

6. Stephen Breyer, *Keynote Address*, 97 AM. SOC’Y. INT’L. L. PROC. 265, 266 (2003). See also *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

7. Antonin Scalia, *Don’t Impose Foreign Law on Americans*, AM. ENTERPRISE, May 2006, at 40 (excerpts). A complete version of the lecture has not been published.

8. *Knight v. Florida*, 120 S. Ct. 459, 463 (1999) (Breyer, J., dissenting).

9. Scalia & Breyer, *supra* note 4, at 525.

10. *Id.* at 526.

11. *Id.* at 523.

12. Breyer, *supra* note 6, at 266.

13. Scalia & Breyer, *supra* note 4, at 539.

As an academic, I am drawn to the point of view expressed by my former colleague Justice Breyer. After all, how can anyone object to learning? But after examining a series of constitutional cases where foreign material has figured prominently, it seems to me that the comparability problems have been underestimated by the Court's foreign law enthusiasts, and that it has been more difficult for some judges to resist the temptation to use such material selectively than Justice Breyer's comment implied. The three Supreme Court decisions discussed below illustrate the seriousness of these concerns, as well as the possible advantages to be derived from comparative research, properly used.

A. *Roper v. Simmons*

The case that ignited the most sustained critique of the use of foreign law in constitutional adjudication was *Roper v. Simmons*, where a five-Justice Supreme Court majority held that Missouri's death penalty violated the Eighth Amendment's ban on "cruel and unusual" punishments when applied to sixteen- and seventeen-year-olds.¹⁴ One's first reaction to that decision might well be surprise that it provoked an outcry (even though it is hard to imagine a less sympathetic defendant than young Mr. Simmons). At age seventeen, Simmons broke into a woman's home at two a.m., covered her eyes and mouth with duct tape, and threw her from a bridge into a river where she drowned. He assured his two accomplices that they could "get away with it" because they were minors, and later bragged about the crime to friends.¹⁵

The debate sparked by the case was not over Simmons' escape from the death penalty. Rather, it concerned the Court majority's rejection of the position that it is up to each state to decide whether to leave it to a jury to determine whether the death penalty is appropriate in some cases involving older juveniles. That the majority seemed to have permitted foreign law to influence that decision was regarded by critics of *Roper* as adding insult to injury.

In Eighth Amendment cases for nearly a half century prior to *Roper*, the Court had canvassed the practices of other states to ascertain whether a particular state's punishment was in line with the "evolving standards of decency that mark the progress of

14. 543 U.S. 551 (2005). Capital punishment for offenders under sixteen at the time of their crime had already been held unconstitutional by the Court in *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

15. 543 U.S. at 556.

a maturing society.”¹⁶ Applying that approach sixteen years before *Roper*, a Court majority had ruled that the Constitution did not bar the death penalty for sixteen- and seventeen-year-old offenders because the fact that the practice was permitted in twenty-five states indicated there was no national consensus.¹⁷

So, what changed between 1989 and 2005 to cause five Justices to reach the opposite result in *Roper*? Well, five more states had abolished the juvenile death penalty, four by legislation and one by court decision, and enforcement of the penalty against juveniles was rare even where it was permitted. But twenty states, encompassing over forty-two percent of the U.S. population, still treated the youth of the offender as a factor to be considered on a case-by-case basis.¹⁸ It was a stretch for the majority to find there was now “evidence” of a national consensus.¹⁹

The crucial change was in the increasingly expansive view of the judicial role taken by Justice Kennedy. It was he who had provided the key fifth vote to uphold the death penalty for older juveniles in 1989, and it was he who authored the five-to-four majority opinion striking it down in 2005.²⁰ In the earlier case, he had joined an opinion insisting that judgments about what is “cruel and unusual” punishment “should not be, or appear to be, merely the subjective views of individual Justices; [but rather] should be informed by objective factors to the maximum possible extent.”²¹ Sixteen years and many international seminars²² later, however, Kennedy took the position that “objective indicia of consensus, as expressed in particular by the enactments of legislatures” merely provided a “beginning point” for analysis.²³ It was

16. *Id.* at 561 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

17. *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989).

18. Twelve states had rejected the death penalty altogether, while eighteen states and Congress had prohibited it only for juveniles. See Ernest Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 154 (2005).

19. *Roper*, 543 U.S. at 564–67.

20. The majority in *Stanford* was composed of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia and White, with Justices Blackmun, Brennan, Marshall and Stevens dissenting. The majority in *Roper* was composed of Justices Breyer, Ginsberg, Kennedy, Souter, and Stevens, with Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas dissenting.

21. 492 U.S. at 369.

22. On Kennedy's foreign travels and relationships with foreign colleagues, see JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 183–84, 196 (Anchor Books 2007). On the travels of Justices O'Connor, Breyer, Ginsburg, and Kennedy, see Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1120 (1999–2000).

23. 543 U.S. at 564.

then up to the Justices themselves, he wrote, to “determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for [older] juveniles.”²⁴

Using their “own independent judgment,” the *Roper* majority ruled that it would violate the constitutional prohibition against cruel and unusual punishment if a state, in the case of a juvenile murderer, was to “extinguish his life and his potential to attain a mature understanding of his own humanity.”²⁵ In so holding, they brushed off the legislatures of twenty states, the jury system, and the federal government, which had expressly preserved the rights of the states regarding capital punishment when the U.S. ratified the International Covenant on Civil and Political Rights.²⁶

An inquisitive person might wonder how foreign law came into this picture. In an apparent effort to show that the ruling rested on something other than the personal views of five Justices, Justice Kennedy turned for support to data on what other countries had done. “[T]he overwhelming weight of international opinion against the juvenile death penalty,” he wrote, “provide[s] respected and significant confirmation for our own conclusions.”²⁷ Justice Kennedy seems not to have noticed that the foreign experience upon which he relied arguably pointed in a very different direction from the one the Court majority took. For the “overwhelming weight” of the international data indicated that decisions about the death penalty had generally not been made by the courts but had been left to the elected representatives of the citizens.²⁸

What drew the most criticism to the *Roper* majority opinion, however, was the degree of weight the Justices appeared to give to the foreign material. Though Justice Kennedy claimed that international opinion was not a decisive factor in *Roper*, his opinion came uncomfortably close to giving foreign material a controlling role in the decision of an American constitutional question.²⁹

That was the gist of the dissent by Justice O’Connor. Although she had long been one of the Court’s strongest boosters of learning

24. *Id.*

25. *Id.* at 574.

26. Young, *supra* note 18, at 165.

27. *Roper*, 543 U.S. at 578.

28. See ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 23-62 (Oxford University Press 3d ed. 2002).

29. See Young, *supra* note 18, at 154; Levy, *supra* note 5, at 371-72.

from foreign law,³⁰ she firmly rejected the idea that international opinion could make up for the absence of an *American* consensus.³¹ A former state legislator herself, she objected that the majority Justices were simply substituting their personal views for the judgments of twenty state legislatures that juries are perfectly capable of determining to what extent the youth of a murderer should be taken into account.³² In my view, Justice O'Connor had it exactly right. As she has said on more than one public occasion, there is much that we Americans can learn from foreign law. The problem was not that the Court referred to what foreign countries do. It was how that foreign material was understood and used.

In fact, there was a lesson to be learned from foreign experience with the death penalty, but it was not the lesson the majority drew. It was a lesson about our own form of government that American judges once understood well. As Oliver Wendell Holmes Jr., put it in his famous dissent in *Lochner v. New York*:

I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution . . . is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.³³

Five years after the *Roper* decision, Justice Kennedy pushed the envelope further in *Graham v. Florida*, where a five-Justice majority held that life sentences without parole are cruel and unusual in the case of juveniles who commit noncapital crimes.³⁴ Although such sentences were permitted by thirty-seven states, the

30. Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y. INT'L. L. PROC. 348, 350 (2002); Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn about Foreign Law*, 4 INT'L. JUD. OBSERVER 2 (June 1997).

31. 543 U.S. at 604-05 (O'Connor, J., dissenting).

32. *Id.* at 588. The shift toward openly basing Eighth Amendment decisions on the Justices' own views had been prefigured in *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (barring the death penalty for the mentally retarded) where the majority said that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty."

33. *Lochner v. New York*, 198 U.S. 45, 75-76 (Holmes, J., dissenting).

34. 130 S. Ct. 2011 (2010).

Graham majority held that a national consensus was not necessary to a finding that the sentences in question violated evolving standards of decency.³⁵ The laws of other nations and international agreements, however, were deemed “relevant . . . because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”³⁶ Then, in 2012, a Court majority held *all* mandatory life sentences for juveniles unconstitutional on the basis of *Roper* and *Graham*, without making reference to the foreign sources that had played such a significant role in the decisions of the two earlier cases.³⁷ Thus was the practice of other countries regarding juvenile sentencing first used to override the judgments of American legislatures, and later cemented into American constitutional law by *stare decisis*.

B. *Lawrence v. Texas*

Another case where the Supreme Court’s reasoning might have benefited from a closer study of the foreign material cited by the majority was *Lawrence v. Texas*.³⁸ In striking down state criminal penalties for homosexual sodomy, Justice Kennedy correctly pointed out that, over the years, the right the petitioners were seeking had “been accepted as an integral part of human freedom in many other countries.”³⁹ But as in *Roper*, he neglected to mention that most of those countries had eliminated sanctions for sexual behavior between consenting adults through ordinary democratic political processes, rather than by court decision. Then, Justice Kennedy went on to say this: “There has been no showing [by the state of Texas] that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent” than elsewhere.⁴⁰ The novel implication of that statement is that the burden is on American legislators to justify a different view of human rights from that which is accepted in other countries. As Judge Richard Posner observed, that is something like subjecting American legislation “to review by the United

35. *Id.* at 2026.

36. *Id.* at 2034.

37. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012). For critical comment, see Levy, *supra* note 5.

38. 539 U.S. 558 (2003).

39. *Id.* at 577.

40. *Id.*

Nations General Assembly.”⁴¹ A similar nose-counting approach to foreign law had been taken to support the opposite result in the case that *Lawrence* overruled, *Bowers v. Hardwick*, where Chief Justice Burger remarked that nearly all civilized countries at that time had statutes penalizing sodomy.⁴²

As a comparatist, I would suggest that there was something important that the Justices in *both Bowers* and *Lawrence* could have learned from foreign law if they had gone beyond tallying outcomes. In *Dudgeon v. United Kingdom*, the leading European Court of Human Rights (“ECHR”) decision on the subject of criminal penalties for homosexual sodomy, the holding of that supranational court was similar to the holding in *Lawrence*, but the reasoning was strikingly different.⁴³ The ECHR judges took care to recognize that both the privacy rights of the complainants and the protection of the community’s traditional moral standards are legitimate and important interests.⁴⁴ *Bowers*, by contrast, gave short shrift to the former, and *Lawrence*, to the latter. Although the ECHR’s decision protected homosexuals from criminal prosecution, the Court specified that some degree of regulation of private sexual conduct could be justified under the European Human Rights Convention as “necessary in a democratic society . . . for the protection of health or morals, or for the protection of the rights and freedoms of others.”⁴⁵ Such regulation, they said, would be appropriate not only in the obvious case where protection of minors is involved, but also to protect “the moral ethos of society as a whole.”⁴⁶

Since there has to be a winner and loser, one might ask whether it really matters how the losers are treated. As to that, I submit that a study of the opinions in *Dudgeon* would have reminded the U.S. Justices that a court can usually decide between competing positions in hard cases without creating the impression that the

41. Richard Posner, *No Thanks, We Already Have Our Own Laws*, 2004 AUG LEGAL AFF. 40 (2004).

42. *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring). For my critique of *Bowers v. Hardwick*, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 147-58 (Free Press 1991). See also Rosenfeld, *supra* note 5, at 43-45.

43. *Dudgeon v. United Kingdom*, 4 European Human Rights Reports 149 (1981).

44. *Id.* at 161-68. Compare Justice Harlan’s dictum that “to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.” *Poe v. Ullman*, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

45. *Dudgeon*, 4 European Human Rights Reports at 160-61, 163-64; ECHR Art. 8-1.

46. *Dudgeon*, 4 European Human Rights Reports at 160-64.

view denied priority is entitled to little respect. After all, most cases that reach the Supreme Court involve choices between positions that are supported by weighty moral and legal arguments, and the Court more often than not must make choices that, either way, will entail substantial individual or social cost.

No one has explained better than Judge Guido Calabresi why a judge should, when possible, avoid rejecting the ideals of the losing party as invalid or outside the law, especially in a heterogeneous society like that of the United States. Judges should make that effort, Calabresi advises, because it helps

to keep us from becoming callous with respect to the moralisms and beliefs that lose out . . . [and it] gives the losers hope that the values they cherish . . . will not ultimately be abandoned by the society In other words, it treats [the losers] as citizens of the polity and not as emarginated bigots or unassimilated immigrants.⁴⁷

As in *Roper v. Simmons*, the most obvious lesson to be derived from foreign experience in *Lawrence v. Texas* was a lesson about judicial decision-making that American judges once knew well. If Chief Justice Burger in *Bowers* and Justice Kennedy in *Lawrence* had been more interested in learning from foreign law, they might have experienced a shock of recognition, for, in the course of exploring foreign territory, they might have been led back to the principled, modest techniques of judicial decision-making that have traditionally been hallmarks of the American legal tradition. They might have been reminded of how many of our greatest judges are respected for their habit of exposing the reader to the actual grounds of their decisions and their actual reasoning processes, including their doubts and uncertainties.⁴⁸ One thinks of Robert Jackson, John Marshall Harlan, Henry Friendly, Learned Hand, and Augustus N. Hand, whose opinions were said to have been written not so much for the bench, bar, or university world as for “the particular lawyer who was about to lose the case and the

47. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 97-98 (Syracuse University Press 1985).

48. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 740 (1987) (noting “the wide respect accorded to those twentieth century judges whose opinions are especially notable for their candid recognition of the difficulties of the decision and the strength of competing arguments,” citing as examples Robert Jackson, John Harlan, Learned Hand, and Henry Friendly).

particular trial judge whose judgment was being reviewed and perhaps reversed.”⁴⁹

C. *Washington v. Glucksberg*

A third constitutional case where foreign material played more than a trivial role was 1997’s *Washington v. Glucksberg*, where a unanimous Supreme Court upheld Washington’s legislative prohibition of assisted suicide.⁵⁰ The Ninth Circuit had struck down the ban, holding that the Due Process Clause of the 14th Amendment should be interpreted to encompass a “liberty interest in controlling the time and manner of one’s death—that there is, in short, a constitutionally recognized ‘right to die.’”⁵¹

In reversing that judgment, the Supreme Court held that the ban on assisted suicide was reasonably related to the promotion and protection of a number of legitimate state interests, including the preservation of human life, upholding the ethics of the medical profession, the protection of “vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes,” and avoiding “the path to voluntary and perhaps even involuntary euthanasia.”⁵² As evidence of the rational basis for the legislature’s judgment, the Court cited studies of euthanasia in the Netherlands, indicating that the practice there has not been limited to competent, terminally ill adults who are enduring physical suffering, and that governmental attempts to regulate the practice may not have been fully effective in preventing abuses.⁵³ The Court also observed, citing legislation from many European countries, that “[i]n almost every state—indeed, in almost every western democracy—it is a crime to assist a suicide.”⁵⁴

Here we have an example of a type of judicial use of foreign law that has been long been accepted as relatively unproblematic. In the early 20th century, Louis Brandeis pioneered the use of empirical data, including foreign experience, to defend regulatory legislation against due process challenges by showing that the challenged statute was not arbitrary or irrational. In the landmark case of *Muller v. Oregon*, the Supreme Court accepted references

49. CHARLES E. WYZANSKI, JR., *WHEREAS: A JUDGE’S PREMISES* 71 (Little Brown 1965).

50. *Washington v. Glucksberg*, 521 U.S. 702, 735-36 (1997).

51. *Compassion in Dying v. Washington*, 79 F. 3d 790, 816 (9th Cir. 1996), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

52. 521 U.S. at 731-32.

53. *Id.* at 734.

54. *Id.* at 710.

from a Brandeis brief as evidence that Oregon's legislation on the working hours of women had a rational basis.⁵⁵

The reason the use of foreign data in *Glucksberg* is more defensible than that in *Roper* is this: it is one thing in a democratic republic to cite foreign data as evidence that the legislature's judgment has a rational basis, but quite another to use foreign data to support the Justices' decision to substitute their own opinion for the judgment of the people's elected representatives.⁵⁶

Then-Chief Justice Rehnquist emphasized this distinction in *Glucksberg*. No foe of consulting foreign experience in constitutional cases,⁵⁷ he pointed out that when judges substitute their own views for the legislature's judgment, they are, to a great extent, placing "the matter outside the arena of public debate and legislative action."⁵⁸ For that reason, he went on, judges "exercise the utmost care"⁵⁹ when asked to recognize new rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."⁶⁰ He noted that Americans are currently "engaged in "an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."⁶¹ By upholding the Washington ban, he wrote, the Court "permit[ted] this debate to continue, as it should in a democratic society."⁶² To strike it down on constitutional grounds would effectively place the issue beyond change through ordinary democratic processes.

From a comparative perspective, there is a further reason why American judges, in particular, should be cautious about striking

55. *Muller v. Oregon*, 208 U.S. 412, 419-20 (1908).

56. For a critique of using social and economic data to support the judges' own views as distinct from illustrating the rational basis of legislative action, see Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1978-1979).

57. "[N]ow that constitutional law is solidly grounded in so many countries . . . it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process." William H. Rehnquist, *Foreword* to *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW*, at vii-viii (Vicki Jackson & Mark Tushnet eds., Praeger 2002).

58. 521 U.S. at 720.

59. *Id.* (quoting *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992)).

60. *Id.* (citing *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1997) (plurality opinion)). *Cf. Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting):

I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

61. 521 U.S. at 735.

62. *Id.*

down legislation in the absence of a clear constitutional warrant. In most other liberal democracies, the legislature, by a supermajority, can override a constitutional court decision; but of all the Constitutions in the world, the U.S. Constitution is one of the most difficult to amend.⁶³ Our process is so cumbersome that, when the U.S. Supreme Court holds a statute unconstitutional, its ruling ordinarily will stand until the Court's composition changes or the minds of some of the Justices change. The unhealthy political effects of judicial overreach thus include incentives for legislatures to shift responsibility for dealing with controversial issues to the courts, and for interest groups to take their causes to the courts rather than to their fellow citizens and their representatives. As a result, political energy flows into litigation and into the judicial selection and confirmation processes.

D. Promise and Perils of Comparative Law in the Judicial Process

To sum up and elaborate upon the promise and perils exemplified by these three cases, let me first note the perils. Both *Roper* and *Lawrence* exhibit difficulties of comprehension, comparability, and selectivity.

The problem of gaining an accurate understanding of foreign material should not be underestimated. Many enthusiasts for increased judicial use of foreign law, including some Supreme Court Justices, do not seem to appreciate the ways in which the political, constitutional, procedural, and cultural contexts of other nations are different from our own. Several examples of the difficulties of comprehension can be found in a volume co-edited by Justice Stephen Breyer and Robert Badinter, a former President of the French Constitutional Council.⁶⁴ The book is a transcript of a meeting among six eminent jurists (Breyer, Badinter, Professor Ronald Dworkin, and internationally minded high court judges from Germany, Italy and Spain). Their discussion was so replete with misconceptions that one reviewer, after listing several of the more egregious errors, concluded as follows:

63. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362, 369 (1994); Richard Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 89 (2005). See generally NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 113-29 (Thomson West 2003).

64. *JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION* (Robert Badinter & Stephen Breyer, eds., New York University Press 2004).

The participants in the dialogue harbored many false assumptions and displayed an alarming lack of familiarity with the composition, institutional powers, and institutional role of the various constitutional courts. If judges as smart, sophisticated, and well traveled as these would have difficulty understanding a foreign precedent, one might well question whether any judges would be capable of successfully undertaking a borrowing exercise.⁶⁵

Guido Calabresi, one of the few American judges with deep knowledge of another legal system, has criticized the tendency to speak of the role of the Supreme Court and various constitutional courts “as if there were only *one* role, independent of where those judges are.”⁶⁶ The problem of comparability is serious enough to have prompted comparative constitutional scholar Mark Tushnet to comment that “differences in constitutional cultures complicate the task of doing comparative constitutional law, perhaps to the point where the payoff in any terms other than the increase of knowledge is small.”⁶⁷

On that point, consider just five of the factors that limit the relevance of foreign court decisions to constitutional adjudication in the United States. First, as mentioned, the U.S. Constitution is far more difficult to amend than the constitutions of most other countries.⁶⁸ Second, there is our unique form of federalism, which, as a former Canadian Supreme Court Justice put it, is the part of American constitutional law that has made “the smallest impression elsewhere.”⁶⁹ Third, very few countries have adopted the American model of judicial review.⁷⁰ Yet former Justice O’Connor

65. Ronald J. Krotoszynski, Jr., “I’d Like to Teach the World to Sing (*In Perfect Harmony*)”: *International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1358 (2006).

66. Guido Calabresi, *Courts and Judges and their Context*, in *IL NUOVO RUOLO DELLE CORTI SUPREME NELL’ORDINE POLITICO AND ISTITUZIONALE* 81, 82 (Vittoria Barsotti & Vincenzo Varano eds., Edizioni Scientifiche Italiane 2012).

67. Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 67, 68 (Sujit Choudhry ed., Cambridge University Press 2007). See also David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L. J. 1717, 1738 (2003).

68. Lutz, *supra* note 63, at 362, 369.

69. Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 35 (1998).

70. See generally MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW* 88–94 (Thomson West 3d ed. 2007); DORSEN, ROSENFELD, SAJÓ & BAER, *supra* note 63, at 113–29; David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 781, 850–51 (2012).

is probably not alone in believing what she once told a legal audience: that the American model of judicial review of legislation was spreading around the globe, and that as a result she and other Supreme Court Justices would be “looking more frequently to the decisions of other constitutional courts.”⁷¹ A fourth difference with a significant bearing on constitutional interpretation is that between explicitly value-oriented constitutions like those adopted by many countries after World War II and the U.S. Constitution, whose amendments enumerate a series of rights but do not establish a hierarchy among them.⁷²

Finally, there is a deep divide between the United States and most other western liberal democracies where legal attitudes toward the state and its functions are concerned.⁷³ As Justice Ruth Ginsburg put it:

Modern human rights declarations . . . do not follow the United States Bill of Rights’ spare, government-hands-off style. Not only do contemporary declarations contain affirmative statements of civil and political rights; they also contain economic and social guarantees, for example, the right to obtain employment, to receive health care and free public education Our courts . . . are accustomed to telling government what it may not do; they are not, by tradition or staffing, well-equipped to map out elaborate programs detailing what government must do.⁷⁴

In the light of so many factors affecting comparability, it is disquieting to read casual statements by Supreme Court Justices that courts in other countries are struggling with “the same basic constitutional questions that we have.”⁷⁵

No doubt legal education over time could reduce the incidence of misunderstandings and lead to a better appreciation of compara-

71. O’Connor, *Broadening Our Horizons*, *supra* note 30.

72. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 175-76 (Random House 2001); EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (Praeger 2002); Law & Versteeg, *supra* note 70.

73. On American distinctiveness generally, see the results of Pew Foundation surveys reported in ANDREW KOHUT & BRUCE STOCKES, *AMERICA AGAINST THE WORLD: HOW WE ARE DIFFERENT AND WHY WE ARE DISLIKED* (Times Books 2006).

74. Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 *LA. L. REV.* 1019, 1025-26 (1997).

75. O’Connor, *Broadening Our Horizons*, *supra* note 30. Cf., Breyer, *supra* note 6, at 266: “Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances.”

bility.⁷⁶ But other problems of a practical nature would remain. If judicial reference to foreign materials were to become routine, litigators would have no way of knowing when, where, and how often judicial minds might wander to faraway lands.⁷⁷ So, although I am keen on the idea of more people studying foreign law, I must concede that there is a real question whether the potential benefits of increased judicial resort to foreign materials would outweigh the increased amount and difficulty of research that would be required of practitioners and judges.

Another concern prompted by some recent judicial excursions into foreign law relates to selectivity.⁷⁸ As Justice Scalia has pointed out, the Court's defenders of learning from other countries have shown little interest in increasing their knowledge of areas where most western democracies take a different view from theirs on such matters as the exclusion of illegally obtained evidence, the regulation of abortion, the regulation of speech, or public funding for religious education.⁷⁹ Not without reason did Scalia, in his *Roper* dissent, compare the majority opinion's reliance on foreign law to the behavior of a person who goes to a party and "look[s] over the heads of the crowd," picking out his friends.⁸⁰

The problem of judicial selectivity, of course, is hardly peculiar to the use of foreign law. Rather, it is rooted in divergent conceptions of the judicial role. And that may explain why some judicial uses of foreign law touch a nerve with some observers, yet strike others as no big deal. The argument between those who maintain that the use of foreign law as persuasive authority in constitutional adjudication is illegitimate and those who see little or no harm in the practice is mainly about how one envisions the role of a

76. Rosenfeld, *supra* note 5, at 49: "[T]he more good comparative scholarship there is, the more both litigants and judges will be in a position to become prepared to gauge the similarities and differences between diverse jurisprudences."

77. As Charles Fried has pointed out, if the use of comparative materials by judges becomes routine in constitutional cases, it will introduce "a whole new range of materials to the texts, precedents and doctrines from which the Herculean task of constructing judgments in particular cases proceeds." Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J. L. & PUB. POL'Y 807, 820-21 (2000). See also Posner, *supra* note 63, at 85-86 (use of foreign materials would vastly increase the amount and difficulty of research that lawyers and judges would have to do with little or no commensurate benefit in terms of better opinions).

78. On the problems of bias in the use of foreign law, see Rosenfeld, *supra* note 5, at 38-41.

79. *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting). See also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3055-56 (2010) (Scalia, J., concurring).

80. 543 U.S. at 617.

judge in our constitutional system.⁸¹ To put it another way, it is about who should decide the most divisive questions in our society when there is little or no guidance in constitutional text, structure, or precedent. If one is not troubled when a Court majority substitutes its own opinion for that of the people's elected representatives without warrant in constitutional text, structure, or precedent, then one is probably not going to be troubled when the Court throws in some foreign material to shore up its own opinion. But if one believes that our system of government and the health of our civic culture require most issues in our society to be hashed out through the ordinary democratic processes of bargaining, education, persuasion, and voting, then one will probably regard those references to foreign law as injurious to the body politic.

Anyone inclined to be anxious about such matters will not find reassurance in the arguments advanced by academic defenders of "transnational" law.⁸² Harold Koh, for example, has written approvingly of how participants in transnational dialogues create "international legal norms [that] seep into, are internalized, and become embedded in domestic legal and political processes."⁸³ Anne-Marie Slaughter has welcomed the "flood of foundation and government funding for judicial seminars" where judges from many countries acquire a sense of "participation in a common judicial enterprise, independent of the content and constraints of specific national . . . legal systems."⁸⁴ She looks forward to a time when judges will "see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders."⁸⁵ Now that judges from many countries meet more frequently and cite each other's opinions, they are, to use her phrase, contributing to the formation of "a global jurisprudence."⁸⁶

81. I would agree with Michel Rosenfeld, however, that the disagreement often involves differing attitudes toward American exceptionalism as well. See Rosenfeld, *supra* note 5, at 51.

82. As generally used, the term "transnational law" encompasses not only the quest for commonalities among legal systems, discussed in this article, but norms found in international instruments and customary international law, both of which are beyond the scope of the present discussion.

83. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84, 199, 205 (1996).

84. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L LAW 1103, 1117, 1124 (1999-2000).

85. *Id.* at 1124.

86. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192-93 (2003). One hopes that U.S. judges attending these gatherings are mindful of ABA

The sense that some American Justices have come to have more in common with like-minded judges on the international seminar circuit than they do with their fellow citizens is, of course, precisely what worries observers who think that the conditions under which Americans live, work, and raise their children should be determined primarily by ordinary American political processes rather than by the opinions of a few well-traveled Justices whose views happen to coincide with those that prevail among European elites and American legal academics. As critics have observed, the transnationalist project tends to formulate its objectives mainly in terms of its own dogmatic interpretations of human rights, and to treat international norms as a means to achieve results that have been rejected by national democratic political processes.⁸⁷ Joseph Weiler, who is both a comparatist and an international law specialist, has called attention to the “ironic dissonance” between the tendency of many internationalists to moralize about their version of human rights and their contempt for any notion of democratic legitimation of the norms they favor.⁸⁸

John O. McGinnis and Ilya Somin point to another serious problem, namely, the “democracy deficits” in the processes through which international norms are generated. Arguing that “the political processes that produce U.S. law have stronger democratic controls and are less vulnerable to interest group capture” than those that produce international norms, they suggest that “only those international obligations that have been validated by [U.S.] domestic political processes should be part of our law because they alone can avoid the democracy deficit of raw international law.”⁸⁹

To sum up: in each of the controversial cases that I have discussed, there was something to be learned from foreign materials. Nevertheless, the difficulty of gaining an accurate understanding of foreign law, the burden on judges and lawyers in doing so, the

Code of Judicial Conduct, Canon 3B(7) (2003) (amended as Canon 2, R.2.9 (2011)), which requires them to avoid discussion of pending cases unless notice is given to the parties.

87. See, e.g., Kenneth Anderson & David Rieff, “Global Civil Society”: A Skeptical View, in *GLOBAL CIVIL SOCIETY* 26 (Sage Publications 2005); Kenneth Minogue, *Transnational Interest*, *AM. OUTLOOK*, Spring 2000, at 52; John Kyl, Douglas Feith, & John Fonte, *The War of Law: How New International Law Undermines Democratic Sovereignty*, *FOREIGN AFF.* (July/August 2013).

88. Joseph H.H. Weiler, *Governance without Government: The Normative Challenge to the Global Legal Order*, in *PONTIFICAL ACADEMY OF SOCIAL SCIENCES, THE GOVERNANCE OF GLOBALISATION* 49 (Edmond Malinvaud & Louis Sabourin eds., Libreria Editrice Vaticana 2004).

89. John O. McGinnis & Ilya Somin, *Should International Law be Part of Our Law?*, 59 *STAN. L. REV.* 1175, 1246 (2007).

problems of comparability, the issue of legitimation, and the temptation to selectivity raise doubts about whether the benefits to be gained from judicial use of foreign materials outweigh the drawbacks.

But since even the strongest critics of the Court's use of foreign law expect the practice to increase,⁹⁰ it is worth considering how the advantages could be maximized and the risks minimized. To that end, I would advance four propositions. First, foreign data can provide useful information about how various legal arrangements have worked out in practice (as it did in the *Glucksberg* case). Since controlled experimentation is rarely possible in law, comparative investigation can be helpful in expanding the theater of observation—provided always that attention is paid to the problems of comparability and accuracy. Second, with the same caveats, foreign data used in the manner of the Brandeis briefs can be relevant in the same way as social science data to the issue of whether legislation has a rational basis. Just as with social science material, of course, there are risks of errors, misunderstandings, and selectivity (and of evaluating testimony by paid expert witnesses).⁹¹ Third, foreign law can never legitimately be used to support an interpretation of the U.S. Constitution that is not otherwise grounded in this country's constitutional text, structure, or precedent.

Finally, I would suggest that the greatest potential benefit of increased attention to foreign law in the constitutional area would be to bring us to a deeper understanding and a renewed appreciation of our own unique version of the democratic experiment. As the French social historian Fernand Braudel once wrote:

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,

90. Scalia, *supra* note 7.

91. See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 274–84 (Brookings 1977); Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L. & HUM. BEH. 433 (2001); Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279 (1995).

which you did not previously understand because you knew them too well.⁹²

Similarly, one might hope, for our judicial wanderers, that the more they begin to understand foreign law, they will, in the light of their surprise, find their way back to their own Constitution, to the traditions of judicial modesty that were neglected in *Bowers* and *Lawrence*, and to the respect for democratic decision-making that was slighted in *Roper* and *Graham*.

III. COMPARATIVE LAW IN THE LEGISLATIVE PROCESS

I now turn very briefly to an area where comparative legal studies have already demonstrated their practical value, namely, in connection with law revision and law reform efforts of the type presently carried on by groups like the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

As long ago as 1921, Justice Benjamin Cardozo suggested in the *Harvard Law Review* that lawmakers in the United States should adopt the well-established practice of several European countries to regularly canvass the experience of other countries in dealing with novel or intractable problems.⁹³ The idea was not that there are devices in foreign lands that, like a new electrical appliance, can simply be fitted with an adapter and plugged in at home. It was, rather, that awareness of how other nations deal with similar situations could, at a minimum, give us a deeper understanding of the problems. Often it could do more, by providing insight into how various legal approaches work out in practice, what advantages they offer, and what risks or indirect consequences they are likely to entail. Since 1965, that type of inquiry has been mandatory for the English and Scottish Law Commissions. These bodies are required by statute to “obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.”⁹⁴

In the United States, legislators are still a long way from routinely expanding their field of inquiry to that extent. But Ameri-

92. Fernand Braudel, *Histoire et Sciences Sociales: La Longue Durée*, *Annales: ECONOMIES, SOCIÉTÉS, CIVILISATIONS*, 725, 737 (1958).

93. Benjamin N. Cardozo, *A Ministry of Justice*, 35 *HARV. L. REV.* 113 (1921).

94. Law Commission Act 1965, c. 22, § 3 (1f) (U.K.).

can lawmakers have, on occasion, drawn upon foreign experiences with impressive results.⁹⁵ For example, Workers' Compensation Acts in American states are largely based on 19th-century English and German statutes.⁹⁶ Several measures facilitating the distribution of small and medium-sized estates with a minimum of expense and delay now closely resemble continental European models.⁹⁷ British marital property law was the inspiration for a 1986 reform of Massachusetts divorce law requiring judges to take the needs of minor children into consideration when reallocating the assets and income of the parents.⁹⁸

One of the most successful American instances of legal borrowing is one of the least known. As Chief Reporter of the Uniform Commercial Code, Karl Llewellyn drew freely on German models, both as to form and substance.⁹⁹ For obvious reasons, Llewellyn and his fellow drafters did not advertise that pedigree when they campaigned for the Code's adoption by state legislatures soon after the end of World War II.

Up to now, fuller use of comparative resources in the legislative process has been hampered by lack of expertise, and by a certain insularity. But with the advance of globalization, expertise can be expected to increase, and insularity can be expected to diminish. After all, when it comes to devising solutions to new legal problems, or to old problems that we do not handle very well, what matters more than where an idea comes from is whether the idea is a good one. One promising area is information-privacy law, where European models might suggest ways to afford individuals

95. For historical discussion, see ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 94 (Little, Brown & Co. 1938).

96. Michael L. Perlin, *The German and British Roots of American Workers' Compensation Systems: When is an "Intentional Act" "Intentional"?*, 15 *SETON HALL L. REV.* 849, 860, 868 (1985).

97. The continental model is described in MAX RHEINSTEIN & MARY ANN GLENDON, *THE LAW OF DECEDENTS' ESTATES* 13-14 (Foundation Press 1971), and the Uniform Probate Code model, now adopted in many American states is described in JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 46-47 (8th ed. 2009).

98. See MASS. GEN. LAWS ch. 208, § 34 (2012). The amendment followed a recommendation of the Governor's Commission on the Unmet Legal Needs of Children which based its proposal on the Matrimonial and Family Proceedings Act 1984, Section 25 (1). The Commission's report is available at <http://www.massbar.org/media/725241/final%20unmet.pdf>.

99. RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG, & EDWARD M. WISE, *COMPARATIVE LAW* 20-21 (6th ed. 1998). See also Whitman, James Q., Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code* (Faculty Scholarship Series., Paper No. 658, 1987), available at http://digitalcommons.law.yale.edu/fss_papers/658.

greater protection against data mining without depriving law enforcement agents of necessary tools.¹⁰⁰ Americans could also learn a great deal about statutory drafting, currently one of the most neglected areas of U.S. legal education.

In sum, I believe that careful, well-informed, and intelligently targeted study of foreign law could bring benefits to American legislators and law reform bodies by expanding the laboratory of best practices to consult when struggling with new problems or with old problems that our system still does not handle very well. It is, of course, not enough to examine the law on the books; one must also be aware of how it functions in practice, and how its operation is affected by its political, economic, and procedural context. But unlike courts, law revision commissions can establish their own priorities, and target their investments in research to the areas where they have reason to believe they will get the best return.

IV. CONCLUSION

As globalization proceeds, it will be a challenge to figure out which legal arrangements should be modified to promote America's ability to flourish in a more interdependent world, and which are sources of values that must be protected. Thomas Friedman has predicted that the countries that will have an advantage in that process will be those that can combine openness to foreign ideas with their own traditions.¹⁰¹ As the brief survey in this lecture indicates, however, that will not be a simple task.

Whether increased attention to foreign law by courts or legislatures can benefit the U.S. legal system without jeopardizing the distinctive goods associated with our democratic experiment will depend to no small degree on how American legal education adapts to globalization. Thus far, U.S. law schools are making great strides toward preparing future lawyers to adapt to the powerful economic and cultural forces that are transforming the world we live in. But legal education has been less attentive to the homogenizing, disrupting thrust of those forces on national, regional, and local cultures and traditions.

100. See generally Francesca Bignami, *European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. REV. 609 (2007); Francesca Bignami, *Privacy and Law Enforcement in the European Union: The Data Retention Directive*, 8 CHI. J. INT'L L. 233 (2007).

101. Friedman, *supra* note 3, at 237, 411.

In this new academic environment, comparatists, with their attention to particularity and their love of local knowledge, could play a useful role. Indeed, the comparatists' skill in mediating between the universal and the particular may be the greatest service they can offer to legal education at its present stage. As Paolo Carozza has pointed out, comparative law "has the paradoxical capacity to deepen our understanding and appreciation of the particularities of legal traditions while at the same time helping us to transcend their differences by relating them to one another."¹⁰² Carozza, who combines expertise in the law of continental European nations with public international law and human rights law, has called attention to the need for an integrated approach that "values the freedom and integrity of local cultures without reducing particularism to pure devolution," and that "affirms internationalism . . . without the temptation for a super-state or other centralized global authority."¹⁰³

At the present moment, although most American law schools have greatly increased their offerings in international business law, international tax, and public international law, it is not clear what role there will be for foreign and comparative law in the burgeoning field of international legal studies. For one thing, it has never been easy to find professors with expertise in foreign law. Just as it takes a considerable investment of time to acquire a working knowledge of one's own legal system, it takes similar time and effort to become familiar with that of another country, especially if other languages must be mastered. For another, there is a tendency on the part of many public international lawyers, human rights specialists, and international business law experts to be impatient with, or even dismissive of, national differences.

I would like to think, however, that those obstacles can be surmounted, and that the future of international legal studies will be marked by fruitful collaboration and interaction among comparatists, public international lawyers, international business law specialists, and all who labor on behalf of human rights.

102. Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1236 (1997-1998).

103. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 78 (2003).

The Controversy over Citations to Foreign
Authorities in American Constitutional
Adjudication and the Conflict of Judicial
Philosophies: A Reply to Professor Glendon

*Michel Rosenfeld**

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* Justice Sydney L. Robins Professor of Human Rights and Director, Program on Global and Comparative Constitutional Theory, Benjamin N. Cardozo School of Law.

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INTRODUCTION

The controversy concerning citation to foreign authorities in U.S. Supreme Court cases adjudicating constitutional issues has been exceptionally vehement. On the one hand, Justice Kennedy's reference to a European Court of Human Rights ("ECtHR") decision in his majority opinion in *Lawrence v. Texas*¹ and his reference to foreign law in *Roper v. Simmons*² unleashed a veritable furor culminating in calls for his impeachment³ and in proposed legislation prohibiting federal judges from referring to foreign authorities when adjudicating constitutional cases.⁴ On the other hand, several scholars have advanced the view that constitutional adjudication is or ought to be the same worldwide⁵ while others have insisted that international norms have been absorbed into, and internalized, within domestic constitutional law.⁶ Moreover, even U.S. Supreme Court Justices are closely and vigorously divided over the issue.⁷

Although much has been written on this controversy,⁸ Professor Glendon's article in this issue of the *Duquesne Law Review*⁹ is a much welcomed addition to the literature for two principal reasons: first, it offers a rich, subtle and complex analysis of the question and does not conclude with a flat "yes" or "no" answer, but

1. 539 U.S. 558, 573 (2003).

2. 543 U.S. 551, 575 (2005).

3. See, e.g., Jane Lampman, *Bringing the Case against Judges*, CHRISTIAN SCI. MONITOR, Apr. 13, 2005, available at <http://www.csmonitor.com/2005/0413/p15s02-usju.html>; Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A03.

4. See, e.g., H. R. Res. 372, 110th Cong. (2007); S. Res. 92, 109th Cong. (2005).

5. See DAVID BEATTY, *THE ULTIMATE RULE OF LAW* 159-88 (2004) (arguing that the ultimate goal of all constitutional adjudication is to subject constitutional controversies to resolution according to the dictates of the principle of proportionality).

6. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84, 199 (1996).

7. See *The Relevance of Foreign Legal Materials in U.S. Constitutional Court Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005) (Justice Breyer making the case for; Justice Scalia, the case against).

8. For a sampling of the various positions within the debate, see NORMAN DORSEN, ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 19-33 (2d ed. 2010).

9. Mary Ann Glendon, *Comparative Law in the Age of Globalization*, 52 DUQ. L. REV. 1 (2014).

instead with a nuanced approval of the practice for certain purposes in certain cases and a measured disapproval in other cases; and second, it provides a thorough and enlightening close examination of relevant cases that forces the reader to focus on practical concerns in addition to engaging with the broader theoretical debates. Furthermore, I agree with much of Professor Glendon's analysis and with many of her conclusions. Specifically, I share her insight that good comparative work should be as much about relevant differences as about relevant identities; that looking to foreign constitutional systems may be, at times, most useful in allowing one to better understand her own constitutional system; that comparative work is inherently perilous as access to foreign cultures confronts difficult hurdles that are inexistent or attenuated in the case of one's own culture; and, that the comparativist is almost never likely to achieve the same level of expertise regarding a foreign constitutional system as she has with respect of her own. In spite of these substantial areas of agreement and of the fact that I have already weighed in on the overall controversy,¹⁰ however, I have accepted the Law Review's kind offer to reply to Professor Glendon because I have a major disagreement with her that goes to the heart of her thesis. I believe that the conflict over citations to foreign authorities is ultimately a sideshow. It is parasitic on a much larger and enduring controversy involving two clashing judicial philosophies—not to say ideologies—regarding the proper bounds of constitutional adjudication that has long bedeviled the Bench, the American polity, and the legal academy. My claim is essentially that once it is accepted that the main divide is over whether restrictive or expansive judicial interpretation of the U.S. Constitution is optimal, then the foreign authorities citation controversy should recede as a relatively minor area of disagreement. In other words, except in cases of sheer xenophobia¹¹ or of blind preference for what is not American, differ-

10. See Michel Rosenfeld, *Principle or Ideology? A Comparatist Perspective on the U.S. Controversy over Supreme Court Citations to Foreign Authorities*, 2009 ANALISI E DIRITTO 291; MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 119-23 (2010); Michel Rosenfeld, *Comparative Constitutional Analysis in United States Adjudication and Scholarship*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 38 (Michel Rosenfeld and András Sajó, eds., 2012).

11. See the Oklahoma *Sharia Law Amendment*, State Question 755 (2010), which was approved by voters and would have prohibited courts from using or considering Sharia law when making rulings. A federal judge issued a preliminary injunction against the state constitutional amendment, and ruled this year that that the amendment's references to Sharia, or Islamic law, violated the Establishment Clause of the U.S. Constitution, writing

ences over reliance on foreign materials should be amenable to being subsumed as instances of the all-encompassing clash between proponents of restrictive constitutional interpretation and their expansive counterparts.

The controversy over citations to foreign authorities has been exacerbated by confusion or glossing over what is really at stake—a charge from which Professor Glendon is, of course, completely exempt. In order to identify those forces which place serious issues in play, and to sharpen the contrasts and similarities between Professor Glendon’s views and mine, Part I of this Reply concentrates briefly on the key terms and concepts that figure most importantly in the controversy, and outlines the principal features of the contrast between restrictive and expansive philosophies of constitutional interpretation. Part II revisits the cases discussed by Professor Glendon and briefly discusses a few others to highlight the differences between her approach and mine. Finally, Part III lays the legitimate scope and limitations of citations to foreign authorities in light of the broader conflict over judicial interpretation, to which I claim constitutional interpretation is subordinate.

I. RESTRICTIVE VERSUS EXPANSIVE PHILOSOPHIES OF CONSTITUTIONAL ADJUDICATION AND THEIR IMPACT OVER CITATIONS TO FOREIGN AUTHORITIES

Given the vituperative tone of its most strident critics, one might think that judicial citation to foreign authorities is a sign of betrayal of the U.S. Constitution in favor of foreign constitutions or of international treaty-based norms, including those to which the U.S. had explicitly refused to adhere.¹² Yet, focusing on Justice Kennedy’s citations to foreign authorities in *Lawrence* and in *Roper*, it becomes obvious that his concern was confined to consideration of foreign positions bearing in terms of subject-matter on

that “it is abundantly clear that the primary purpose of the amendment was to specifically target and outlaw Sharia law and to act as a preemptive strike against Sharia law to protect Oklahoma from a perceived ‘threat’ of Sharia law being utilized in Oklahoma courts.” See also *Awad v. Ziriax*, CIV-10-1186-M, 2013 WL 4441476, 6 (W.D. Okla. Aug. 15, 2013).

12. For example, the United States is one of only seven U.N. member nations (including Iran, the Sudan and Somalia) to have not ratified the U.N.’s Convention to Eliminate All Forms of Discrimination Against Women, and is the only country in the Western Hemisphere and the only industrialized democracy that has not ratified this treaty. See Lisa Baldez, *U.S. Drops the Ball on Women’s Rights*, CNN (Mar. 8, 2013), <http://www.cnn.com/2013/03/08/opinion/baldez-womens-equality-treaty/>.

the constitutional question that the U.S. Supreme Court had to decide and over which there had been a longstanding, vigorous domestic controversy. Specifically, in *Lawrence*, Justice Kennedy had a twofold purpose for referring to the ECtHR and a UK parliamentary special report on criminalization of homosexual sex: first, to refute, based on reference to actual positions held in contemporary Western Europe, the sweeping statements concerning Western civilization's condemnation of homosexuality made by Chief Justice Burger in *Bowers*;¹³ and second, to draw additional support for the position already articulated without reliance on foreign authorities by the four dissenting justices in *Bowers*.¹⁴ This took place in the context of changing attitudes regarding homosexuality within the U.S. from 1986 until 2003, and of the fact that Justice Powell, who was in the majority in *Bowers*, revealed upon his retirement from the Court in 1987 that his vote in that case had probably been wrong.¹⁵ Accordingly, it strains credulity to maintain that the reference to Europe had any decisive effect on the reversal of the constitutional jurisprudence in *Lawrence*. At best, the European reference in question was meant to buttress the already articulated argument in favor of one of the two contending judicial positions on the constitutional issue at stake, which had already been clearly drawn out in *Bowers*.

Justice Kennedy's reference to foreign authority in *Roper* was certainly more dramatic: the U.S. stood alone in the world together with Somalia in refusing to ratify international covenants prohibiting the execution of those who committed capital crimes between the ages of sixteen and eighteen.¹⁶ No doubt, focus on the United States' isolation on this issue and on its pairing with Somalia would provide added fodder for U.S. opponents of the execution of juvenile offenders and put proponents of the constitutional legitimacy of the practice on the defensive.¹⁷ Notwithstanding

13. See *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring).

14. See *id.* at 199-220 (Justice Blackmun, with whom Justice Brennan, Justice Marshall, and Justice Stevens join, dissenting).

15. See Henry J. Abraham, *Lewis Franklin Powell, Jr.*, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall, ed, 2005).

16. *Roper*, 543 U.S. at 576. The U.S. and Somalia were the only countries that failed to ratify the UN Convention on the Rights of the Child, and the U.S. entered reservations to other covenants, including the UN International Covenant on Civil and Political Rights ("ICCPR") to refuse acceptance of prohibitions on the execution of juvenile offenders. *Id.*

17. Justice Scalia's dissent in *Roper*, though dismissive in tone is indicative of a defensive attitude in substance, particularly in his chastising the UK for its "submission to the jurisprudence of European courts dominated by continental jurists" and his drawing attention to the UK's abandonment of the trial by jury requirement in cases involving serious

this, in Justice Kennedy's view, the reference was meant for a relatively much more modest purpose: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."¹⁸ Professor Glendon criticizes Justice Kennedy, who in 1989 was the fifth vote¹⁹ in favor of upholding the constitutionality of the very practice challenged in *Roper*, for having changed his mind and for having adopted a more activist role after much exposure to foreign law.²⁰ Justice Kennedy, for his part, stresses in his opinion that since 1990, Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China abolished the death penalty for juveniles.²¹ Perhaps, upon reflecting on this development, Justice Kennedy paused to look inward and revisited the American debate on the issue that had divided his Court five to four in 1989. Be that as it may, it is clear that the debate in question is closely associated with the different judicial philosophies of the judges involved. Justice Scalia's originalism, as he makes clear in his dissent in *Roper*, requires that the judge interpret "cruel and unusual punishment" as it was understood in 1791 when the Eighth Amendment was adopted.²² And under that standard no present day foreign view could be relevant, but for that matter neither would any prevailing view within the U.S. unless it took hold by 1791. Hence, if ninety percent of the U.S. population and the legislatures of forty-nine states were to find the execution of juvenile offenders morally repulsive, but a single state by a bare majority adopted such a law and American society had accepted such punishment as just and fair in 1791, then a logically consistent originalist would have to uphold that single state's law as constitutional. On the other hand, for a non-originalist who believes that what is deemed "cruel and unusual" must be assessed in terms of currently prevalent social mores, a virtually unanimous rejection of a particular punishment outside

crimes. 543 U.S. at 626-27. One may wonder what connection there may be between these matters and determining whether executing juvenile offenders amounts to a "cruel and unusual punishment" which is prohibited by the Eighth Amendment to the U.S. Constitution. See *infra* Part II.B.1 for further discussion of this point.

18. *Roper*, 543 U.S. at 578.

19. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

20. Glendon, *supra* note 9, at 6.

21. *Roper*, 543 U.S. at 577.

22. Consistent with that originalist view, the execution of a seven-year-old would be currently constitutional. See *id.* at 587 (Stevens, J., and Ginsburg, J., concurring).

the U.S. should at least warrant some inward inquiry and reflection, if not some downright reconsideration.

As briefly mentioned already, the key distinction in the present context is that between an expansive and a restrictive judicial philosophy. That distinction, as I conceive it here, transcends the ones between originalists and non-originalists²³ and between politically conservative and politically progressive judges.²⁴ It is certainly true that a restrictive judicial approach will leave more room for majoritarian decision-making than an expansive one.²⁵ Take, for example, the expansive view of the majority justices in *Griswold v. Connecticut*,²⁶ who recognized an unenumerated constitutional right to privacy, and contrast it to the restrictive view of Justice Black, who in his dissent made it clear that, in his interpretation, the Constitution did not protect a right of privacy, and that hence no law, no matter how silly or personally offensive, could be struck down on privacy grounds.²⁷ Now, consistent with the expansive majority view in *Griswold*, one may certainly argue that it would be both legitimate and fruitful to look to foreign authorities in the context of judicially handling a privacy issue for the first time in the U.S. courts, if privacy had already been the subject of well-reasoned judicial decisions abroad.²⁸ But, of course, no such possibility for consultation would arise if Justice Black's restrictive view had prevailed. In short, had the U.S. Constitution been held not to protect any privacy right, then no consultation of

23. There is no inherent incompatibility between originalism and an expansive judicial philosophy as legitimacy of the latter as opposed to that of its restrictive counterpart would depend on the actual views of the framers, ratifiers of the Constitution, and/or of the understandings of the latter's contemporaries.

24. In this respect, it is noteworthy that the Roberts Court and its (politically) conservative majority have been characterized as being among the most judicially activist ones. See Erwin Chemerinsky, *Supreme Court—October Term 2009 Forward: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863, 863 (2011).

25. I deliberately use "majoritarian" rather than "democratic" as some conceptions of democracy require the protection of certain anti-majoritarian rights as a prerequisite to the establishment of a functioning and viable democracy. See *Australian Capital Television v. The Commonwealth of Australia*, 177 C.L.R. 106 (High Court of Australia 1992) (even in the absence of a bill of rights in Australia, the High Court invalidated a law restricting certain speech immediately prior to an election, on the grounds that a genuine democracy requires free discussion of political alternatives before votes are cast).

26. 381 U.S. 479, 485 (1965).

27. *Id.* at 508-10.

28. For example, in a case in which the U.S. Supreme Court was confronted with the obligation to decide on the merits whether there is a constitutional right to same-sex marriage, it would make sense for the justices to consult (for both similarities and differences) the already existing well-reasoned decisions by the Supreme Court of Canada and the Constitutional Court of South Africa. See *Reference re Same-Sex Marriage*, 3 S.C.R. 698 (2004); *Minister of Home Affairs v. Fourie*, 1 SA 524 (CC 2006).

foreign authorities on the subject would seem either relevant or appropriate.

Professor Glendon's argument against citation of foreign authorities in cases like *Lawrence* and *Roper* is principally based on two considerations: first, a plea in favor of a restrictive conception of judicial review;²⁹ and second, a preference for judicial deference to democratic decision-making through elected officials wherever possible.³⁰ Moreover, Professor Glendon seeks to reinforce her argument by emphasizing how difficult it is to amend the U.S. Constitution as compared to those of most other Western democracies.³¹ Granting all that, it seems clear that it is the restrictive conception of the legitimate role of judges combined with the large role reserved for legislators in Professor Glendon's vision that accounts above all else for her mistrust of citations to foreign authorities. This seems unmistakably confirmed by her endorsement of the citations at stake in cases such as *Washington v. Glucksberg*³² where, in her assessment, the foreign reference is used to buttress judicial deference to the legislator's choice.³³

Even under the most restrictive views of the proper judicial role, such as those articulated by Robert Bork, there is necessarily some room left—as narrow as it may be—for legitimate anti-majoritarian adjudication in constitutional cases.³⁴ For example, no genuine originalist who espouses a restrictive judicial philosophy would deny that the First Amendment requires judicial invalidation of a law endorsed by a political majority (however large it may be) criminalizing the expression of citizen support for the policy objectives espoused by a minority of elected representatives in the relevant legislature. Moreover, whereas proponents of the restrictive view may seek to restrain judicial discretion even within the confines of legitimate anti-majoritarian constitutional adjudication—through requiring strict conformity to original intent or original meaning and strict confinement to the plain meaning of the text of the Constitution³⁵—it defies reason to assume that there will not be *some* instances in which a judge will both be

29. See Glendon, *supra* note 9, at 14.

30. *Id.*

31. *Id.* at 15.

32. 521 U.S. 702 (1997).

33. See Glendon, *supra* note 9, at 13.

34. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 6-7 (1971).

35. See Justice Scalia's dissent in *Roper v. Simmons*, 543 U.S. 551, 608 (2005).

called upon to render an anti-majoritarian decision and have some legitimate room for discretion in choosing among plausible outcomes for the case before her. Indeed, original intent may not always be clear and original meaning may at times be contested rather than transparent.³⁶

Professor Glendon's second consideration evoked above, namely her preference for judicial deference to democratic decision-making, particularly in view of how difficult it is to amend the Constitution, may well seem on target upon first impression. Upon further analysis, however, once it is admitted that some constitutional rights are at least in part anti-majoritarian and that it is for judges to uphold them against majoritarian infringements, then under-protection of the rights in question seems no more justified than over-protection. Moreover, the difficulty in overcoming judicial error, be it due to omission or to overreach, through a constitutional amendment would be as serious in cases of overly restrictive judicial interpretations as in those of overly expansive ones. This can be illustrated in terms of the gender-based equality issue under the Equal Protection Clause adjudicated in *United States v. Virginia*.³⁷ At stake in that case was whether VMI, an elite state military college in Virginia was constitutionally entitled to persist in its traditional policy of being exclusively open to men.³⁸ The Court in an opinion written by Justice Ginsburg held that VMI's men-only policy was unconstitutional.³⁹ Justice Ginsburg stressed that "inherent differences" between men and women are "cause for celebration," but not for "denigration" or for "artificial constraints" based on sex.⁴⁰ In contrast, in his dissent Justice Scalia argued that VMI's policy was constitutional and that the exclusion of women from the college's "adversative" approach was

36. It is plain that the contemporary understanding of key constitutional concepts such as "Due Process" or "Equal Protection" are highly contested—one need only consider the sharp differences between the majority and the dissents in *Bowers* and *Lawrence* as well as in the context of Equal Protection in the sharply divided affirmative action decisions by the Court. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003). Why assume that eighteenth century America was any less divided over the meaning of "due process" or nineteenth century America over that of "equal protection"? Also, at some crucial constitutional crossroads, the most ardent defenders of originalism confront the unpalatable choice of having to veer away from their commitment in order to avoid embarrassment. See David Strauss, *THE LIVING CONSTITUTION* 78 (2010) (arguing that the constitutional invalidation of racial segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954) contradicts the original intent behind the Fourteenth Amendment).

37. 518 U.S. 515 (1996).

38. *Id.* at 519.

39. *Id.* at 546.

40. *Id.* at 533.

not violative of the latter's equality rights.⁴¹ Clearly, if Justice Scalia were right, then the Court would have exceeded its anti-majoritarian mandate and unduly trampled on the democratic rights of Virginians. But had Justice Scalia been in the majority and Justice Ginsburg proven to have been right, then the Court would have failed to honor the legitimate right of women to constitutional equality to the full extent warranted. Both of these arguably plausible outcomes would be equally objectionable, and neither of them would presumably stand a better chance of correction through successful adoption of a constitutional amendment.

There is one further argument from democracy that seemingly buttresses Professor Glendon's position in privacy right cases such as *Lawrence*. Going back to *Griswold*, the constitutional right to privacy has been construed as an unenumerated right derived from the Ninth Amendment, which specifies that the rights specified in the Bill of Rights are not exclusive⁴² and as a (substantive) "due process" right under the Fourteenth Amendment.⁴³ To refute charges that they were engaging in pure judicial subjectivism, the Justices who appealed to either of the two above-mentioned amendments insisted that the privacy right involved and its proper contours were so deeply rooted in "the traditions and [collective] conscience" of the American people as to be "ranked as fundamental."⁴⁴ In the same vein, references were made to "basic values 'implicit in the concept of ordered liberty'"⁴⁵ and to the traditions of the "English-speaking peoples."⁴⁶ The "collective conscience," "basic values" and "traditions" at stake have been interpreted as being both historically grounded⁴⁷ and as being democratic in the sense of being imprinted in, and endorsed by, a vast majority of Americans.⁴⁸ Consistent with this, the proper sources of inquiry for judges adjudicating privacy rights cases would appear to be

41. *Id.* at 535.

42. U.S. CONST. amend. IX (1791). See the concurring opinion by Justice Goldberg in *Griswold v. Connecticut*, 381 U.S. 479, 488-93 (1965).

43. U.S. CONST. amend. XIV (1868). See Justice Harlan's concurring opinion in *Griswold*, 381 U.S. at 499-502.

44. *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring).

45. *Id.* at 500 (Harlan, J. concurring).

46. *Id.* at 512 n.4 (Black, J., dissenting).

47. The Court in *Griswold* stresses that regarding marriage "we deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system," 381 U.S. at 486.

48. This view has been expressed by Justice Scalia. See *The Relevance of Foreign Legal Materials in U.S. Constitutional Court Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, *supra* note 7, at 526, 533-34.

confined to American history (which would incorporate some pre-1787 English history) and American values and convictions endorsed by relevant majorities within the country.

This, however, is only one among the prevailing interpretations of the Ninth and Fourteenth Amendment in the context of privacy. As Justice Harlan has explained, what the judge confronts is the need to strike a balance between individual liberty and the demands of organized society. That balance is struck by this country having regard for what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.⁴⁹

Thus, once tradition is regarded as changing and the focus is shifted from the values held by the majority to a proper balance between individual autonomy and societal objectives, the legitimate task of the judge expands. Indeed, distilling the relevant course of an evolving tradition requires reconciling the present with the past instead of merely considering past mores as frozen in time. Furthermore, in order to strike a balance between individual rights and societal interests, the judge cannot rely exclusively on majoritarian considerations, but must instead find a defensible way to harmonize majoritarian and anti-majoritarian values.

Debate continues over the appropriate level of abstraction at which tradition ought to be gauged for purposes of assessing the sustainability of constitutionalizing a particular liberty interest. This debate sharply divided the justices in *Michael H. v. Gerald D.*⁵⁰ At stake was whether a genetic father who had had a child with a woman married to another enjoyed a constitutional right to visitation.⁵¹ A closely divided Court held that there was no such right, and writing for a plurality Justice Scalia asserted that, taking the relevant tradition at “the most specific level,”⁵² out-of-wedlock fathers enjoyed no constitutional right to visitation. In his dissent, Justice Brennan differed sharply: under Justice Scalia’s criterion, only those traditions protected by legislative majorities would be vindicated, thus making constitutionalization re-

49. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Justice Harlan relied on his dissent in *Poe* to elaborate his position in *Griswold*.

50. 491 U.S. 110 (1989). For an extended discussion of the controversy over the appropriate level of abstraction for determining the meaning and scope of a tradition, see Rosenfeld, *supra* note 10, at 78-81.

51. 491 U.S. at 113.

52. 491 U.S. at 128 n.6.

dundant.⁵³ For Justice Brennan, the relevant tradition had to be conceived at a much higher level of abstraction, namely that of the relationship between parent and child.⁵⁴ Justice Brennan stressed that in a pluralistic society like the then-prevailing one in the U.S., there were different conceptions of the family and of the good life.⁵⁵ More specifically, two important changes had taken place between the late eighteenth century and the late twentieth century: paternity could be scientifically established with near certainty in 1989 but not in 1791 or 1868; and the model of the traditional family had given way to a current proliferation of intimate association arrangements.⁵⁶

Michael H. did not involve citations to foreign authorities, but under Justice Brennan's approach it could have easily included some. Indeed, once one combines conceptions of tradition at higher levels of abstraction with a construction of the latter in relation to liberty or privacy rights understood as requiring some measure of anti-majoritarian judicial protection, there seems to be no impediment to references to traditions commonly shared with societies beyond the U.S.—or at least with those other countries that are English speaking.⁵⁷ Had there been a judicial decision on the evolution of intimate associations and their impact on the relationship between parent and child in a society similar to that of the U.S. taken at a high enough level of abstraction—say Australia, (Anglophone) Canada or the UK—then it would seem perfectly appropriate for a judge imbued with Justice Brennan's judicial philosophy to consider and, if she found it sufficiently illuminating, to make reference to the said foreign decision. Once again, as in the other situations discussed above, the key divide proves to be the one between restrictive and expansive approaches to constitutional interpretation.

53. *Id.* at 140-41 (Brennan, J., dissenting).

54. *Id.* at 142.

55. *Id.* at 141.

56. See ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT, *supra* note 10, at 80.

57. See *supra* note 46 and accompanying text.

II. REVISITING RELEVANT U.S. SUPREME COURT CONSTITUTIONAL CASES WITH A BEARING ON THE CONTROVERSY OVER CITATIONS TO FOREIGN AUTHORITIES

Even under an expansive judicial philosophy, not all references to foreign authorities would be justified, and some would be to underscore differences rather than to stress similarities. In some cases, the constitutions of two countries being considered may be so diametrically opposed on a subject—for example, a constitution establishing an official state religion versus one prescribing strict separation between state and religion—that there ought to be a presumption against the benefits of comparison outweighing the pitfalls. In other cases, contextual differences may be so pronounced—again, for example, millennial ethnic strife versus longstanding ethnic homogeneity—that the same presumption also ought to prevail. Moreover, in some cases involving important contextual variants, references to foreign authorities may be fruitful to draw attention to differences that buttress the case for jurisprudential divergences. For instance, the constitutional protection of Holocaust denial in the U.S. stands in contrast with its criminalization in Germany, and this difference tracks the contrast between Germany’s Nazi past and the lack of any significant Nazi influence in the U.S.⁵⁸

A. *National and Transnational Comparisons, Levels of Abstraction and the Dynamic between Analogical and Contextual Reasoning*

Just as in a purely national setting, comparisons across time or space depend, for relevance and persuasiveness, on approaching that which is to be compared at an appropriate level of abstraction. That emerged vividly in *Michael H.* (discussed above) and played a key role in *Griswold*, in which the Court derived a twentieth century constitutional marital right to use contraceptives from an eighteenth century deeply rooted commitment to the sanctity of marriage that preceded the adoption of the 1787 U.S. Constitution.⁵⁹ Similarly, in a transnational context in which a

58. See Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 242, 244 (Michael Herz and Peter Molnar, eds 2012).

59. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). Whereas the sanctity of marriage was firmly embedded in eighteenth century U.S. tradition, marital use of contraceptives was certainly not. See Brandon R. Johnson, ‘*Emerging Awareness*’ After the Emer-

comparison regarding the death penalty or the criminalization of consensual sex is at stake, consider, for example, the cases of two individuals, one an American the other a Frenchman, facing punishment for the same kind of murder or for engaging in the same kind of homosexual sex. Should the comparison in question focus mainly on the differences between nationalities, cultures, constitutional, legal and political systems? Or should they instead underscore the common concerns in two constitutional secular democracies steeped in similar Christian and individualistic traditions, confronting the need to reconcile punishment and respect for human dignity and to find the proper balance between individual privacy and entrenched social mores?

As made manifest given the divisions among justices in *Griswold* and *Michael H.*, there are likely disagreements over the optimal level of abstraction at which a particular comparison across time or space ought to be approached in the context of constitutional review. And that applies to both domestic and transnational comparisons. The only important difference between the two in this respect is that in the national context, comparison seems appropriate even at the lowest conceivable level of abstraction, as indicated by Justice Scalia in *Michael H.*⁶⁰ That does not appear to be the case in a transnational context. Indeed, in contrast to his stance in *Michael H.*, in *Roper* Justice Scalia forecloses comparison at any level of abstraction: "Either America's principles are its own, or they follow the world; one cannot have it both ways."⁶¹

Beyond that, however, there may be judicial agreement that transnational comparison is appropriate, but disagreement about the right level of abstraction at which it would be best to tackle it in a particular case. Thus, Justice O'Connor, who like Justice Scalia dissented in *Roper*, agreed with Justice Kennedy that reference to foreign authorities in that case was entirely appropriate.⁶² Nevertheless, Justice O'Connor did not go along with the Court's majority as she deemed the differences separating the U.S. from the countries that had abolished the death penalty for juvenile offenders to be greater than the similarities between them.⁶³

gence of Roberts: Reasonable Societal Reliance in Substantive Due Process Inquiry, 71 BROOKLYN L. REV. 1587, 1619 (2006).

60. 491 U.S. at 123-30.

61. *Roper v. Simmons*, 543 U.S. 551, 627 n. 9 (2005).

62. *Id.* at 604-05.

63. *Id.*

Disputes concerning the appropriate level of abstraction for purposes of undertaking comparisons across time and space in both national and transnational settings may be resolved depending on how expansive the judicial philosophy involved may be. Significantly, both in the determination of which level of abstraction is likely to be optimal for a particular interpretive purpose, and in sorting out the relevant importance of clusters of similarities and differences within a chosen level of abstraction, heavy reliance must be placed on the dynamic between analogical and contextual reasoning in judicial interpretation.⁶⁴ That dynamic, moreover, plays a key role in common law adjudication as both judges and litigants must sort out what is analogous and disanalogous in previous judicial decisions that might constitute precedents in the case at hand. Very frequently, disanalogy is established or reinforced through ever greater contextualization.⁶⁵ Consistent with this, absent inherent hostility or unthinking attachment to foreign countries, the place and scope of citations to foreign authorities in constitutional adjudication should primarily depend on general principles of judicial interpretation. As we already saw, the difference between expansive and restrictive judicial philosophies is very important in this respect. But so are different conceptions of the proper uses of processes of abstraction and competing views on how to optimize the balance between analogical and contextual considerations. With this in mind, let us now briefly revisit the cases considered by Professor Glendon, as well as a few additional ones that seem particularly relevant in the light of the present discussion.

B. *Revisiting the Relevant Cases*

1. *Roper*

Beginning with *Roper*, two principal considerations, one inward looking and the other directed outward, militate in favor of con-

64. I have characterized the stringing together of similarities as a “metaphoric” process of interpretation, and uses of contextualization to highlight differences as a “metonymic” process. Based on that, and for an account of the uses of analogizing and contextualizing for purposes of developing the judicial account of “tradition” in *Griswold* and its progeny, see ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT*, *supra*, note 10, at 73-125.

65. See *id.* at 104-15 (detailing use of contextualization, both historical to highlight moral objections, and physical, by contrasting homosexual sodomy to “normal” procreative heterosexual sex, by the justices in the majority in *Bowers* and in the dissent in *Lawrence*).

sidering how the rest of the world has dealt with the question of the death penalty for juvenile offenders. The inward concern is dramatically triggered by Justice Kennedy drawing attention to the U.S. and Somalia being on one side of the divide and the rest of the world on the other. In view of this, at the very least, American judges ought to go beyond counting the number of states that provide for the death penalty for juvenile offenders and determine whether they can mount a cogent and principled positive argument for justifying the conclusion that the punishment in question is neither "cruel and unusual" nor grossly disproportionate.⁶⁶ The outward concern, on the other hand, should be prompted even if one does not entertain inward doubts, given the isolation of the U.S. vis-à-vis the rest of the world on this particular issue. In view of the near universal condemnation of the punishment involved, the conflict between maintaining respect for the dignity of the individual (no matter how heinous his crime) and society's need for proportionate and effective punishment presumably trumps cultural, political and historical differences. Accordingly, focus on the relation between the individual, society, the crime and the punishment across national borders above and beyond the above-mentioned differences would clearly seem to hit the appropriate level of abstraction. It also follows from this, that the comparison should be undertaken and foreign authorities ought to be factored in either to alter the national approach or to reaffirm it fully cognizant of the widespread worldwide criticism of it.

Both Justices Kennedy and O'Connor approach the question presented in *Roper* at a level of abstraction congruent with the one advocated above, and they both insist on the appropriateness of considering relevant foreign authorities.⁶⁷ They differ in their conclusions, however, at least in part because Justice Kennedy places greater emphasis on analogical factors and Justice O'Connor on contextual ones, with the consequence that the former downplays majoritarian considerations while the latter gives them significantly greater weight. In any event, it is noteworthy that neither of the two justices invokes the majoritarian versus anti-majoritarian conundrum to reject consideration of foreign

66. In order to be unconstitutional as "cruel and unusual," a punishment must be grossly disproportionate. See *Coker v. Georgia*, 433 U.S. 584 (1977). Cf. 1948 *UN Universal Declaration of Human Rights* (no one should be subjected to "cruel, inhuman or degrading treatment or punishment"); 1950 *European Convention on Human Rights*, Art. 3 (prohibiting "inhuman and degrading" punishment).

67. See *Roper*, 543 U.S. at 578, 604-05.

authorities. In contrast, Justice Scalia rejects such consideration on both majoritarian and (categorical) contextual grounds. What is striking about Justice Scalia's position is not his originalism—he could have filed a dissent comprised of a couple of sentences stating that since the punishment at issue was not deemed cruel and unusual in 1791 America, it is without a doubt constitutional in the twenty-first century—but his seeming runaway contextualism, without any apparent regard for the ongoing dynamic between similarities and differences. As already noted,⁶⁸ Justice Scalia is particularly critical of the UK, which may be the most similar to the U.S. among the nations of the world and which yet has abolished the death penalty notwithstanding that a majority of its citizens may still be in favor of it.⁶⁹

Among the differences that Justice Scalia underscores to support his conclusion that the Court looking to the laws of the UK “is perhaps the most indefensible part of its opinion,”⁷⁰ are the UK submission to the jurisprudence of European courts dominated by continental judges,⁷¹ and its trial of those accused of the most serious crimes without a jury.⁷² These are indeed differences among the two countries and they are certainly apt for use for contextualization. It seems inescapable that Justice Scalia's use of them in *Roper* amounts to misplaced and misleading contextualization. The suggestion is that the UK's attitude toward the death penalty is untrustworthy because the country has fallen under the sway of judges whose standards are different from (perhaps even inferior to?) those of their common law counterparts; and because the UK seems less concerned than it once was concerning the dignity of criminal defendants. None of this seems relevant, however, to a comparison between the U.S. and the UK on the impact of the death penalty for juvenile offenders on human dignity and society's standards of decency. In terms of the latter issue and of constitutional and human rights-based dignity and societal decency concerns in general, there actually seems to be little significant difference between European (continental) and common law judg-

68. See *supra* note 17.

69. See *The Relevance of Foreign Legal Materials in U.S. Constitutional Court Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, *supra* note 7, at 529 (Justice Scalia asserting that every public opinion poll in the UK indicates that the country's people are in favor of the death penalty).

70. *Roper*, 543 U.S. at 626.

71. *Id.* at 626-27.

72. *Id.* at 627.

es, including American ones.⁷³ Similarly beside the point are departures from jury trials in the UK, which does not have the equivalent of the U.S. Seventh Amendment jury trial guarantee,⁷⁴ and which has departed from jury trials motivated by reliability and efficiency considerations without any design to weaken or disregard the dignity concerns of criminal defendants.⁷⁵

2. *Lawrence*

Turning to *Lawrence*, what clearly comes to the fore is an evolving “tradition” concerning acceptance and inclusion of homosexuals within the mainstream of society both in the U.S. and in Europe, though not in certain other parts of the world, as noted by Justice Scalia in his dissent.⁷⁶ Three principal positions relating to criminalization of consensual homosexual sex among adults are assertively brought forth not only in *Lawrence*, but also in *Bowers* and in *Dudgeon*, the ECtHR case cited by Justice Kennedy.⁷⁷ The first is the (now overwhelmingly discredited) position that homosexual sex is somehow devious, abnormal or dangerous based on beliefs that homosexuals are prone to having sex with minors.⁷⁸ The second position is the religious condemnation of homosexual sex by the West’s three major religions, and the moral condemnation derived from the latter.⁷⁹ And, finally the third position is

73. See generally Michel Rosenfeld, *Comparing Constitutional Review By The European Court of Justice and the U.S. Supreme Court*, 4 INT’L J. OF CONST. L. 618 (2006). There are certain rights, such as social and welfare rights, with respect to which there are important differences in approach between common law and continental judges. There are also differences in approaches to constitutional interpretation that separate the U.S. from other common and civil law countries, such as the inclusion of limitation clauses in bills of rights, e.g., Section 1 of the 1982 Canadian Charter of Rights, that have no equivalent in the U.S. However, none of these differences have any discernible bearing on the issues involved in *Roper*.

74. See US CONST., amend. VII (1791).

75. See *R v. Twomey*, [2011] EWCA (Crim) 8, [2011] All E.R. 136.

76. *Lawrence v. Texas*, 539 U.S. 558, 597-98 (2003) (Scalia, J., dissenting).

77. *Dudgeon v. United Kingdom*, 4 EHRR 149, 45 Eur.Ct.H.R. (ser. A) (1981).

78. See Chief Justice Burger’s concurring opinion in *Bowers* citing to Blackstone’s reprehensible dictum describing homosexual sex as “the infamous crime against nature,” an offense “of deeper malignity” than rape, *Bowers v. Hardwick*, 478 U.S., 186196-97 (1986); Judge Zekia’s dissenting opinion in *Dudgeon*, asserting that “all civilized countries” have “till recently” penalized homosexual sodomy “and akin unnatural practices”, 4 EHRR, at para. 2; and Judge Matscher’s dissenting opinion in *Dudgeon* claiming that “it is well known” that homosexual relations with minors “is a widespread tendency,” 4 EHRR, I(b).

79. See Chief Justice Burger’s concurring opinion in *Bowers* referring to condemnation of sodomy in “Judeo-Christian moral and ethical standards,” 478 U.S. at 196; Judge Zekia’s dissenting opinion in *Dudgeon* specifying that “Christian and Moslem religions are all united in the condemnation of homosexual relations and of sodomy”, 4 EHRR, at para. 1.

that asserted by the dissenters in *Bowers*, the majority in *Lawrence* and that in *Dudgeon*: homosexuals are as entitled as heterosexuals to conduct their intimate sex life in full privacy without interference by the state.⁸⁰ Moreover, this last position is backed by a direct refutation of the assertions made by proponents of the first position. Indeed, already many years before *Bowers*, professional associations of psychologists and of public health specialists had repudiated earlier stances that characterized homosexual sex as deviant and officially reclassified it as normal.⁸¹

Even without any reference to foreign law, *Bowers* and *Lawrence* highlight two fault lines among the principal judicial approaches manifest in the various opinions filed in the two cases. The first of these fault lines is the predictable one between restrictive and expansive judicial approaches, but the second one is much more remarkable as it pits two expansive views on privacy rights against one another. Under a restrictive view, such as that of Justice Black in *Griswold*, there is no more a constitutional right to homosexual intimacy than there is one to marital privacy.⁸² But that is not the case for Justice White, whose view was expansive in that he concurred with the majority in *Griswold* and yet he wrote the opinion of the Court in *Bowers*. It may seem that Justice White was inconsistent with respect to these two cases, but closer analysis does not bear that conclusion out.

In relation to traditions entitled to constitutional protection, Justice White distinguishes marriage and contraception in the context of marital sex, on the one hand, from homosexual sex, on the other.⁸³ In contrast, the dissenters in *Bowers* and the majority in *Lawrence* place homosexual sex on the same side of the ledger as they do marriage and contraception, and treat all three as equally deserving of constitutional protection.⁸⁴ What differentiate the latter justices from Justice White are not their equally expansive judicial approaches, but the fact that they rely primarily on analogical reasoning, while he correspondingly engages in con-

80. *Lawrence*, 539 U.S. at 578-79; *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting); 4 EHHR at para. 69.

81. The dissenting justices in *Bowers* cited the *amici* briefs to that effect of the American Psychological Association and of the American Public Health Association, 478 U.S. at 203.

82. See *Griswold*, 381 U.S. at 509.

83. *Bowers*, 478 U.S. at 190-91.

84. *Lawrence*, 539 U.S. at 577-78; *Bowers*, 478 U.S. at 217-18.

textual reasoning.⁸⁵ Once homosexual sex is determined to be normal by the relevant experts, then all intimate relationships involving consensual sex among adults should be deemed equivalent for purposes of determining what is analogous today to what marriage represented in the eighteenth century. This conclusion is reinforced by the Court's extension of protection to the kind of intimate sex recognized in *Griswold* to apply to non-marital heterosexual sex in *Eisenstadt*.⁸⁶ Justice White and those in his camp in *Bowers*, however, contextualize homosexual sex by referring to it in historical terms and refusing to approach it at the same high level of abstraction, as they were willing to tackle marriage, contraception and non-marital heterosexual sex.

Can this inconsistency in the use of levels of abstraction be justified? Presumably, it cannot, unless positions one or two listed above, involving respectively categorical objections based on the conviction that homosexual sex is in some relevant sense not as normal as its heterosexual counterpart and religious objections are advanced as reasons for the seeming discrepancy relating to levels of abstraction. Reliance on religious objections is problematic to the extent that the latter also extends to heterosexual non-marital sex and, in some cases, even to contraception. Reliance on the conviction that homosexual sex is not normal is also questionable to the extent the overwhelming weight of expert opinion strongly militated against this position already more than a decade before *Bowers* was decided.⁸⁷

In view of the preceding observations, the three judicial approaches that happened to weigh in on the American constitutional debate over the criminalization of homosexual sex managed to elaborate distinct positions that are independent from any foreign authorities or influences. Moreover, the restrictive approach had no need or use for foreign authorities. The two expansive positions did have such use, however, but each for its own reasons.

85. For a detailed account of the contrasting analogical and contextual—or, in other words, metaphoric and metonymic—approaches in *Bowers* and *Lawrence*, see ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT*, *supra* note 10, at 104-15.

86. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972).

87. For example, in 1974 the American Psychological Association changed its position to declare that homosexuality is not per se a mental disorder, and “[s]ince 1974, the American Psychological Association (APA) has opposed stigma, prejudice, discrimination, and violence on the basis of sexual orientation and has taken a leadership role in supporting the equal rights of lesbian, gay, and bisexual individuals.” *See Resolution on Appropriate Responses to Sexual Orientation Distress and Change Efforts*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/about/policy/sexual-orientation.aspx> (last visited Dec. 8, 2013).

The majority justices in *Bowers* who were bent on contextualizing to reinforce their approach, but also seemingly (whether intentional or not) to dissimulate the inconsistencies produced by their shifts in levels of abstraction, invoked past foreign authorities. They did this to overplay the historical, long passed, groundings of the tradition at stake while underplaying its more recent evolution and adaptation. Thus, Chief Justice Burger's allusion to millennial Judeo-Christian morality and to Blackstone's characterization of homosexual sex as being "against nature"⁸⁸ places the U.S. in a Western civilization context that long predates it. The allusion also aligns the U.S. to the legal system of which it is the heir, by referring to a common tradition invoked by one of its most celebrated commentators. What this reference to foreign authorities overemphasizes is continuity; what it dissimulates is the substantial erosion of positions one and two above within the precincts of the U.S. Supreme Court and within the larger social landscape comprising the relevant experts and American society at large.

In contrast, Justice Kennedy's reference to foreign authorities in *Lawrence*, as already noted,⁸⁹ had both a negative and a positive purpose. The negative purpose, which seems unobjectionable and which Justice Scalia has also used to the same end in both *Roper* and *Lawrence*, is to dispel the erroneous impression concerning current attitudes in the rest of the Western world conveyed by Chief Justice Burger in *Bowers*. The positive purpose, on the other hand, far from seeking dissimulation, confirms and amplifies the judgment of the majority in *Lawrence* in ways that are uniquely relevant and weighty. Both Chief Justice Burger and Justice Kennedy agree that the question concerning a constitutional privacy right covering homosexual sex arises in a cultural, religious, moral, and political setting that encompasses an entire Western tradition, of which the U.S. is a part. All three positions alluded to above have equally gathered support throughout this broader culture (at least in Western Europe and North America). The "tradition" in question has evolved in the same direction, with the third position now predominant (and the other two in full retreat⁹⁰) in constitutional cultures that protect certain anti-

88. See *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

89. See *Lawrence*, 539 U.S. at 573.

90. To avoid misunderstanding, the position based on religion is clearly in rapid retreat in the context of constitutional reasons for upholding laws discriminating against homosexuals. This does not imply any change within the ambit of those religions that forbid homosexual sex.

majoritarian fundamental rights against majoritarian encroachments.

Accordingly, Justice Kennedy's citation in *Lawrence* to the ECtHR's *Dudgeon* is not only apt, but probative and quite persuasive on the question of the evolution of the commonly shared Western "tradition" regarding the proper relationship between homosexual sex and the right to privacy in one's intimate life. Justice Kennedy does not allude to this in *Lawrence*, but the invalidation of Northern Ireland's criminalization of homosexual sex was only decreed by the ECtHR after the clearing of a major hurdle set by that court. The court had to reconcile respect for the rights protected by the ECHR and the divergences in constitutional, legal, political and ideological culture that set apart the (now) forty-seven European countries subject to the ECHR. The hurdle in question has been established through use of the judicially devised standard known as "the margin of appreciate on."⁹¹ In a nutshell, this standard is designed to allow the ECtHR to insure that all countries party to the ECHR equally enforce the core of an applicable right under the Convention, while leaving room for differences and divergences meant to accommodate the diversity of cultures comprised within the forty-seven members of the Council of Europe at the periphery. In response to the complaint lodged against the UK for maintaining the criminalization of homosexual sex among consenting adults in Ireland while having decriminalized it in the rest of the country, the UK invoked the margin of appreciation in an endeavor to convince the ECtHR that the criminalization at stake was not violative of Article 8 of the Convention (which provides, in relevant part, that "Everyone has the right to respect for his private and family life . . .").⁹² While acknowledging that Northern Ireland was more morally and religiously conservative than the rest of the UK,⁹³ the ECtHR refused to allow for any exemption or deviation based on the margin of appreciation. In so doing, the ECtHR stated:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council

91. For a more extended discussion of this standard, see ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT*, *supra* note 10, at 256-57.

92. *See Dudgeon v. United Kingdom*, 4 EHHR 149, 7 Eur.Ct.H.R. (ser. A) (1981).

93. *Id.* para. 57.

of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied . . .⁹⁴

In other words, not only is the trend in the broader world that shares the same tradition with the US—both in terms of attitudes toward homosexual sex and of protecting anti-majoritarian fundamental rights—toward decriminalization, but also the change in this respect has been so thorough and dramatic that a laggard polity such as Northern Ireland can no longer be afforded any margin for deviation.

3. *Glucksberg*

Professor Glendon approves of Chief Justice Rehnquist's reference in *Glucksberg*⁹⁵ to studies evaluating the Netherlands's experience with physician-assisted suicide and euthanasia in considering whether the challenged Washington's law banning assisted suicide met minimal scrutiny under the Due Process Clause.⁹⁶ This approval is consistent with Professor Glendon's endorsement of legislative as opposed to judicial reliance on foreign authorities because the former do not raise the anti-majoritarian issues that the latter do.⁹⁷ The purpose of the reference to the Dutch experience with assisted suicide was to determine whether the Washington law banning such practice satisfied the threshold of being minimally rational.⁹⁸ The Dutch studies taken as a whole were inconclusive, as some asserted that there had been abuses leading to involuntary euthanasia while others concluded that no such abuses had occurred.⁹⁹ Because one of the purposes of the Washington law was to protect individuals from involuntary euthanasia,¹⁰⁰ the very inconclusiveness of the Dutch studies lent support to the conclusion that the Washington legislature had acted rationally.

Given the very low threshold under minimal scrutiny, the reference to the Dutch studies added very little. Even had these stud-

94. *Id.* para. 60.

95. *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).

96. *See* Glendon, *supra* note 9, at 12.

97. *Id.* at 12-13.

98. To satisfy minimum scrutiny, laws must not be arbitrary, capricious or wholly irrational. *See Railway Express Agency v. New York*, 336 U.S. 106 (1949).

99. *See Glucksberg*, 521 U.S. at 785-87.

100. *Id.* at 782.

ies been unanimous in showing no abuses, Washington could have still met its constitutional obligations by arguing that it aimed at a zero risk of involuntary euthanasia, or that conditions in the U.S. could not be assumed to be in all relevant respects identical to those in the Netherlands. The key issue in *Glucksberg* was whether there is a constitutional privacy right to control one's death in the U.S. that would render laws banning assisted suicide unconstitutional. Had the Court decided in favor of such right, then the Washington law would have had to be subjected to strict scrutiny and the inconclusive Dutch studies would have been of no discernible help. Washington would have to prove a compelling interest for banning assisted suicide. Dutch studies indicating that there may or not be abuses in that country would certainly not satisfy the applicable strict standard.

Reference to foreign authorities in relation to the key issue before the Court in *Glucksberg* did figure in the Court's opinion by Chief Justice Rehnquist although this is not mentioned by Professor Glendon. In discussing the evolving trend in the U.S. and changed conditions due to advances in medicine, the Chief Justice pointed out that "[o]ther countries are embroiled in similar debates."¹⁰¹ Specifically, the Chief Justice cited to a decision of the Supreme Court of Canada, and legislative action by the British House of Lords and the parliaments of Australia and New Zealand, all against recognition of a right to assisted suicide.¹⁰² In addition, he also cited a decision by Colombia's Constitutional Court upholding a right to euthanasia for the terminally ill as the only foreign authority headed in the opposite direction.¹⁰³ These citations are introduced in the course of making the case that American tradition had not evolved to the point that any recognition of a right to assisted suicide would be warranted.

Chief Justice Rehnquist's citation to foreign authorities in *Glucksberg* seems completely similar to that of Justice Kennedy in *Lawrence*. The only difference between the two is that Chief Justice Rehnquist has recourse to foreign authority in support of his refusal to provide a more expansive interpretation of the constitutional right to privacy whereas Justice Kennedy does so for purposes of a more expansive interpretation of that right. Once again, the citations to foreign authorities play but a secondary

101. *Id.* at 718 n.16.

102. *Id.*

103. *Id.*

role. The important issue is that between restrictive and expansive approaches—in the case of the comparison at hand, more expansive versus more restrictive conceptions of constitutional rights as contrasted to expansive versus restrictive judicial philosophies.

4. *Printz*

I now turn to cases not considered by Professor Glendon with a view to sketching a more complete account of the nature and legitimate scope of judicial references to foreign authorities. The first of these cases is *Printz v. United States*,¹⁰⁴ a federalism case in which Justice Breyer referred to foreign federal systems in his dissent. Comparisons in the area of federalism are presumptively more problematic than those in the area of individual rights as each constitutional federal arrangement may reflect a *sui generis* compromise concerning apportionment of powers, whereas relationships between men and women, or homosexuals and heterosexuals, may well be very similar, if not universally, across a large number of different polities.¹⁰⁵ Nevertheless, as Justice Breyer illustrates in *Printz*, comparisons in the area of federalism may be quite useful, provided they are undertaken at the appropriate level of abstraction.

The issue in *Printz* was whether the federal government could enlist state executive personnel to conduct a federally required computer background check on prospective firearm purchasers within the relevant state. The Court's majority in an opinion by Justice Scalia held that the obligation imposed by the federal government on state officials amounted to unconstitutional "federal commandeering."¹⁰⁶ Justice Breyer, in his dissent, emphasized that the key federalism issue raised in the case was whether delegation of enforcement to state officials or dispatching federal officials to the state for that purpose would be least intrusive on the state's sovereignty.¹⁰⁷ Pointing out that the U.S. Constitution was silent on the matter, Justice Breyer referred to the federal systems of Germany, Switzerland and the European Union, which, though different from one another and from that of the U.S., all

104. 521 U.S. 898, 976 (1997).

105. See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L. J. 223, 273 (2001).

106. 521 U.S. at 925.

107. *Id.* at 976-77.

provided empirical evidence that delegation to the executive of the federated unit proved least intrusive upon the latter's prerogatives.¹⁰⁸ Underlying Justice Breyer's reference to foreign federal systems is the proposition that in spite of the significant differences among these various federal systems and between all the latter and their American counterpart, they all lend support to the empirical conclusion that delegation is less intrusive than direct enforcement by the federal authorities. In this context, the reference to foreign systems involved in *Printz* seems equivalent to the common practice of a U.S. state's highest court looking to other U.S. state courts that have dealt with the issue it is considering for the first time in order to determine which of the various available alternatives developed in other jurisdictions is most likely to provide guidance or useful caveats.¹⁰⁹

5. *Hate Speech Cases*

Finally, I address cases that do not refer to foreign authorities, but that arguably should have for purposes of achieving a better look inward that might have led to a change of jurisprudence or to a strengthening or refinement of the latter. I also deliberately concentrate exclusively on First Amendment cases, perhaps the most distinct and deeply entrenched area of American exceptionalism.¹¹⁰ The two cases in question are *R.A.V. v. City of St. Paul*¹¹¹ and *Virginia v. Black*,¹¹² both involving hate speech against African-Americans. Unlike international treaties, Western Europe and Canada, which do not afford constitutional protection to racial hate speech, the U.S. draws the line at speech that incites violence.¹¹³

The two cases in question concerned cross burning, long a practice of white supremacists such as those belonging to the Ku Klux Klan, which has figured as a symbol of virulent racism much like the swastika has been associated with virulent anti-Semitism.¹¹⁴

108. *Id.* at 976.

109. See Chad Flanders, *Towards a Theory of Persuasive Authority*, 62 OKLA. L. REV 55 (2009).

110. See Robert A. Sedler, *An Essay on Freedom of Speech: The United States versus the Rest of the World*, 2006 MICH. ST. L. REV. 377 (2006).

111. 505 U.S. 377 (1992).

112. 538 U.S. 343 (2003).

113. See Rosenfeld, *supra* note 58, at 242.

114. The St. Paul ordinance successfully challenged in *R.A.V.* criminalized, among other things, placing "a burning cross or Nazi swastika" on public or private property. 505 U.S. at 380.

In *R.A.V.*, young white extremists placed a burning cross inside the fenced yard of an African-American family that had moved to a neighborhood that was in the process of becoming more racially integrated.¹¹⁵ In a unanimous decision, the U.S. Supreme Court held that the cross burning at issue was constitutionally protected expression, as it did not amount to an incitement to violence.

In *Black*, a divided Court adjudicated a case comprising two cross burning incidents, one at a Ku Klux Klan rally attended by hooded members of the group, and the other by whites not affiliated to the latter group in the yard of an African-American neighbor.¹¹⁶ The Virginia statute at stake in this case made it a crime to burn a cross “with the intent of intimidating any person or group of persons,”¹¹⁷ and provided that a cross burning amounted to “prima facie evidence of an intent to intimidate.”¹¹⁸ The Court held that the “prima facie” presumption was unconstitutional, but that cross burning with intent to intimidate was not constitutionally protected expression.¹¹⁹ Based on that reasoning, the Court made it clear that consistent with this, the Klan rally, with its vicious racist rhetoric which unmistakably amounted to an incitement to racial hatred, was protected speech. In Justice O’Connor’s words, it amounted to a protected communication of “potent symbols of shared group identity and ideology.”¹²⁰ The second cross burning, however, appeared to have been carried out with an attempt to intimidate, and as such would not be protected speech.¹²¹

Because intimidation need not involve a threat of, or incitement to, violence—one can intimidate with threats of ridicule, public humiliation, social exclusion, and the like—it may seem that *Black* is internally inconsistent or at least irreconcilable with *R.A.V.* To ward off such a conclusion, Justice O’Connor specified in *Black* that throughout its history the Klan has used “cross burnings . . . to communicate threats of violence”¹²² Indeed,

115. 505 U.S. at 379.

116. 538 U.S. at 348-52.

117. VA. CODE ANN. § 18.2-423 (1996).

118. *Id.*

119. 538 U.S. at 363.

120. *Id.* at 356.

121. *Id.* at 350-53. Because of its finding that the Virginia statute’s presumption of intent to intimidate was unconstitutional, the Court could not uphold the conviction of those responsible for the second cross burning. For purposes of present doctrinal analysis and critique, however, I will proceed as if the intent to intimidate had been established without any presumption at play.

122. *Id.* at 354.

as cross burnings have been frequently followed by beatings, lynchings, shootings, and killings of African-Americans, either they amount to incitements to violence or they create a reasonable fear in those whom they target of becoming victims of impending violence.

The link between intimidation and incitement to violence or reasonable fear of becoming the victim of violence seems logical. But then, why treat doctrinally differently the rally that whips up the virulent racist animus that prompts to, and precedes, intimidation and violence? And, what if that rally is not only before converts, but also before a white audience that far from being intimidated, may be comprised of potential Klan recruits? Furthermore, does *Black* blur the clear line drawn in *R.A.V.*? Also does *Black* sufficiently account for the concern of the marginalized and the oppressed who are disproportionately confronted by hatred and violence?¹²³

Significantly, in his dissent in *Black*, Justice Thomas alludes to the “intolerable atmosphere of terror” produced by cross burnings in Virginia during the 1950s.¹²⁴ Justice Thomas finds banning cross burning unequivocally constitutional, but surprisingly seeks to justify his conclusion by characterizing the latter as conduct rather than as symbolic speech.¹²⁵ Indeed, not only does that characterization seem in direct contradiction to the unanimous treatment of cross burning as speech in *R.A.V.*, but also seems to run counter to the Court’s well-established jurisprudence affording protection to symbolic speech.¹²⁶

This brief review of *R.A.V.* and *Black* reveals doctrinal inconsistency or strain and a seeming underestimation of the severe potential (cumulative) harm of hate speech on its targeted victims. In view of this, the U.S. Supreme Court could have benefited—and could certainly do so in future hate speech cases—from consideration of foreign judicial treatment of the subject. In this respect, the Canadian Supreme Court decision in *Regina v. Keegstra*¹²⁷ seems particularly instructive. In that case, the Court upheld as

123. See MARY J. MATSUDA, ET. AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); CHARLES LAWRENCE, *If He Hobbles Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 474-75 (tolerance of hate speech fosters unconscious racism in the marketplace of ideas).

124. 538 U.S. at 393.

125. *Id.* at 388.

126. See *United States v. O'Brien*, 391 U.S. 367 (1968).

127. [1990] 3 S.C.R. 697.

constitutional the criminal conviction of a high school teacher who communicated virulent anti-Semitic hate speech to his students, clearly inciting the latter to hatred of Jews.¹²⁸ In many respects, the Canadian protection of speech shares much with the American one, relying on justifications from democracy, pursuit of the truth and autonomy.¹²⁹ Unlike its American counterpart, however, the Canadian Constitution places greater emphasis on multicultural diversity and on social cohesion among diverse groups within the polity.¹³⁰ While keeping this difference in mind, two points emphasized by the Canadian Court seem worthy of consideration from the standpoint of U.S. jurisprudence. The first of these is the observation—consistent with that of U.S. minority critics of current American hate speech doctrine¹³¹—that the damage caused by hate speech on its intended victims may be gradual and yet profoundly demeaning and eventually devastating.¹³² The second observation, which the Canadian Court puts forth in knowing disagreement with prevailing American assumptions, is that in an era of pervasive and sophisticated propaganda, hate speech can be fine-tuned to play on the emotions and to bypass reason. Citing a study commissioned by the Canadian Parliament, the *Keegstra* Court stated:

The success of modern advertising, the triumphs of impudent propaganda such as Hitler's have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by historical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.¹³³

These two considerations do not necessarily militate in favor of American hate speech jurisprudence emulating the Canadian example, but they seem particularly apt for prompting an inward look by the U.S. Supreme Court in view of its current doctrinal unease and the pleas of those who have disproportionately endured hate speech as members of minority groups that have been targeted by hate propaganda. Should the line between incitement

128. *Id.* at 713-14.

129. See ROSENFELD, *supra* note 58, at 261.

130. 3 S.C.R. at 736.

131. See LAWRENCE, *supra* note 123, at 474-75.

132. 3 S.C.R. 746-47.

133. *Id.* at 747.

to racial hatred and to racial violence be struck down or further blurred? Or, should it be firmly maintained or restored? Both the American and the Canadian approach have strengths and weaknesses.¹³⁴ Be that as it may, whatever may eventually prove optimal in the American context, it appears that further self-inquiry in light of similarities and differences with the Canadian constitutional approach could prove quite useful and productive as the U.S. Supreme Court continues to confront hate speech cases in the future.

III. SETTING A PROPER FIT BETWEEN CITATION TO FOREIGN AUTHORITIES AND JUDICIAL PHILOSOPHY

Absent xenophobia as the reason for refusal to look beyond one's own borders, the preceding analysis indicates that the legitimacy of references to foreign authorities in U.S. constitutional adjudication is above all a function of judicial philosophy. Moreover, from the standpoint of the most restrictive philosophies, there is little or no room for the references in question. In contrast, the more expansive a judicial philosophy happens to be, the more it is likely to carve out a very broad scope of legitimacy for such references. That said, the use of references to foreign authorities by Chief Justice Rehnquist in *Glucksberg* plainly suggests that even a relatively restrictive judicial approach may suffice for purposes of legitimating references to authorities beyond America's shores.¹³⁵

As the legitimacy of references to foreign authorities is parasitic on the expansiveness of the corresponding judicial approach, it becomes necessary to settle on the relevant judicial approach that is best suited to determine when, why, how much, and for what purpose, such references might be useful and legitimate. Before proceeding any further, however, there are two important threshold questions which must be briefly addressed. First, in terms of expansiveness, what range of judicial approaches are actually in use in relevant U.S. Supreme Court constitutional adjudications?¹³⁶ And second, in light of present day constitutional controversies and changing circumstances, including the proliferation of

134. See ROSENFELD, *supra* note 58, at 281-82.

135. See *Washington v. Glucksberg*, 521 U.S. 702, 787 (1997).

136. I emphasize "relevant" as there are presumably prescriptions under the U.S. Constitution, such as to be qualified to be President of the U.S. a person must have attained the age of thirty five, U.S. CONST. art. II, § 1, cl. 5 (1787), with respect to which looking to foreign authorities would make little sense no matter how expansive one's judicial approach.

transnational legal regimes that affect the U.S. directly or indirectly, how expansive must judicial approaches to the U.S. Constitution be to achieve a proper balance between efficiency, coherence and legitimacy?

A. *On the Expansiveness of Operative Judicial Approaches in U.S. Constitutional Adjudication and on the Optimal Expansiveness to Tackle Foreign Authorities*

As Professor Glendon observes, the use of foreign law is here to stay and is likely to increase.¹³⁷ Already at present, all judicial approaches, except those predicated on a conception of originalism akin to that embraced by Justice Scalia, make use of foreign citations. Ironically, even Justice Scalia, who repeatedly professes his preference for originalism, has felt obliged in cases like *Roper* and *Lawrence* to have significant recourse to foreign authorities to buttress his dissents. Indeed, in addition to stressing that if he had his way the Court would stick to originalism, Justice Scalia has made liberal use of references to foreign authorities in an effort to prove that those cited by justices in the majority are unpersuasive, countered or overshadowed by others that Justice Scalia brings to the attention of his fellow justices and to readers of the Court's opinions.¹³⁸ Taking together the references to foreign authorities made by Chief Justice Rehnquist in *Glucksberg*¹³⁹ and the liberal use of them by Justice Scalia clearly indicates that even judges who view themselves as proponents of very restrictive judicial philosophies seem inevitably drawn to the fray.¹⁴⁰ In short, in response to the first question above, at least in the context of Due Process cases, as a practical matter even the most restrictive judicial approaches in constitutional adjudication have regular recourse to references to foreign authority.

Reasonable minds may disagree about where to draw the line in answering the second question above. For example, depending on how exceptionalist and isolationist one may be, the scope of convergence between U.S. and foreign constitutional norms may be

137. See Glendon *supra* note 9, at 20.

138. See *Roper v. Simmons*, 543 U.S. 551, 626-27 (2005) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

139. See *Glucksberg*, 521 U.S. at 787.

140. I leave aside how restrictive judicial philosophies such as those of Chief Justice Rehnquist and of Justice Scalia actually are. Suffice it to point out that, at least in the eyes of some, the philosophies in question tend to be much more expansive than their proponents would have us believe. See *supra* note 24.

viewed as narrower or broader and the internationalization of constitutional law beyond the borders of the U.S. as highly relevant or wholly irrelevant for American constitutional interpretation.¹⁴¹ In view of these apparently irreconcilable positions, it seems best to circumvent them as much as possible in the course of framing a principled approach suited to the discovery of the judicial philosophy with the optimal expansiveness needed to best deal with new and evolving challenges. Most notably, the latter include those posed by the globalization, transnational spread and cross-fertilization of constitutional norms, as well as by the spread of international norms with substantive content that is for all practical purposes constitutional in nature, such as the individual rights protected by the UN's International Covenant on Civil and Political Rights (ICCPR).¹⁴²

A particularly attractive way to further the objective at hand, in light of the consensus over the ubiquity and endurance of reference to foreign authorities in American constitutional adjudication, is by starting from a presumption that references to foreign authorities are always warranted. This requires openness to inquiring into the relevance of both similarities and differences between the American and the foreign circumstances, materials, and authorities brought to the attention of the adjudicator. Moreover, it should be the burden of the party introducing the foreign material to point to the relevant similarities and differences in play and to make out a prima facie case why these ought to be considered or factored in the adjudication of the American constitutional issue in dispute.¹⁴³ Thus far, under this proposal, introduction of foreign materials should be treated in much the same way as that of relevant judicial, legislative and administrative authorities from one U.S. state in the course of adjudication in another U.S. state. This is particularly true where the latter lacks a developed jurisprudence on the subject, or where its existing precedents are

141. See ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT, *supra* note 10, at 246-47 (discussing the internationalization of constitutional law and the constitutionalization of international law).

142. See Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN ST. L. REV. 1051 (2011).

143. Based on the discussion above, both Justice Kennedy and Justice Scalia lay out a prima facie case respectively for and against the relevance of foreign materials in *Roper* and *Lawrence*. As we have seen, although Justice Scalia forcefully argues against the relevance of foreign materials, he nevertheless refers to some for purposes of refuting the relevance of others relied upon by Justice Kennedy.

challenged as no longer adequate to deal with salient changes better accounted for in the jurisprudence of certain sister states.¹⁴⁴

There is, of course, one major difference between relying on materials of a sister U.S. jurisdiction and drawing upon foreign materials. The latter poses a problem of “translation” in both a literal and a figurative sense that the former does not.¹⁴⁵ Leaving “translation” aside for the moment, as I will return to it below,¹⁴⁶ it bears emphasizing from the outset that adoption of a policy based on an unlimited presumption of admissibility of references to foreign materials has one major advantage: it allows for avoidance of the at this point in time rather futile ideological debate over whether foreign materials should be banned, avoided or else not cited in U.S. constitutional adjudication. Aside from “translation,” these ideological battles can be more usefully fought *within* the actual confines of adjudication, as are the differences in judicial philosophy (to which the battles in question are inextricably linked) bearing directly on the constitutional issues before the relevant court.

Furthermore, unlimited admissibility should cause no genuine “opening the floodgates” concerns. In many cases, foreign materials would be irrelevant, clearly dwarfed by domestic considerations, inconclusive or unhelpful to any litigation party or to advancing any of the judicial philosophies that divide the judges involved. Under such circumstances, neither the litigants nor the judges would have any reason to seek consideration of foreign materials. In other cases, these materials may be introduced, but then swiftly discarded as inapposite.

Finally, even where foreign materials are admittedly relevant, they need not automatically help either side of the judicial ideological divide. Although much of the discussion focused on *Roper* and *Lawrence* links reliance on foreign materials with the more progressive justices, the examples set by Justice Scalia in the same cases and by Chief Justice Rehnquist in *Glucksberg* suggest that reference to such materials can also bolster the positions of more conservative justices.

More specifically, Professor Glendon asserts that “foreign law can never legitimately be used to support an interpretation of the

144. See Flanders, *supra* note 109.

145. See Richard Posner, *Forward: A Political Court*, 119 HARV. L. REV. 31, 86 (2005) (“the judicial systems of the [US] are . . . readily accessible, while [those] of the world are immensely varied and most of their decisions inaccessible . . . to our mostly monolingual judges . . .”).

146. See *infra* Part III.B (Foreign Materials and the Problem of “Translation”).

U.S. Constitution that is not otherwise grounded in this country's Constitutional text, structure or precedent".¹⁴⁷ Based on the preceding analysis, I disagree with Professor Glendon regarding precedents—as should be plain given our differences over the use of foreign law in *Roper* and *Lawrence*—but agree with her with respect to text and structure, with one major qualification. Only foreign law that could not weigh in except to contradict the text of the Constitution, or to counter or undermine the distinct structures clearly prescribed by the Constitution, such as federalism and the federal separation of powers, should be excluded outright.¹⁴⁸ This latter qualification is consistent with the proper reference to foreign law in *Printz*, where the Court dealt with a structural issue upon which the Constitution happened to be silent.¹⁴⁹

Even consistent with the broader scope of legitimacy of uses of foreign law deriving from the position I defend here, a large number of such uses would prove inappropriate, irrelevant or of barely marginal value. It is of course obvious that when the text of the Constitution is clear and determinative in a particular case, there is no legitimate place for contradictory or inconsistent foreign authority. Moreover, the same conclusion would extend to instances where the foreign authority at stake derives from a constitution that is textually directly at odds with that of the U.S. For example, consider a judicial decision extolling the virtues and unifying benefits of mandatory daily public school prayers conforming to the creed of the country's majority religion that is consistent with a constitution declaring the majority religion as the official state religion.¹⁵⁰ Clearly, citation to that decision could have no legitimate place in a U.S. case involving a controversy over the constitutionality of public school prayers under the Establishment

147. See Glendon, *supra* note 9, at 20.

148. This suggestion is not inconsistent with the position adopted above that all references to foreign authorities should be allowed to be introduced in the course of litigation. Accordingly, the foreign law in question here should be "excluded" in the same sense that a court would "exclude" by giving no consideration to domestic material that directly contradicted constitutional text, such as, for example, citation to a pre-Civil War court decision vindicating slavery which squarely contradicted the text of the Thirteenth Amendment.

149. See *Printz v. U.S.*, 521 U.S. 898, 976-78 (1997).

150. See, e.g., *Folgero v. Norway*, 4 EHHR 47 (2008) (ECtHR) (assessing conformity with the ECHR of a law of Norway mandating public school teaching of Christian religion and philosophy in accordance with Evangelical Lutheran Faith propagated by the country's constitutionally enshrined state religion).

Clause.¹⁵¹ Similarly, a judicial decision about the great benefits of unifying and centralizing all criminal law countrywide coming from a unitary country such as France would have no place in a U.S. case raising an issue of apportionment of powers relating to criminal law.

Beyond these obvious examples, whether use of foreign law would be legitimate, relevant or valuable should be left to the ordinary workings of the adversary system. Disagreements involving foreign authorities should be treated in the same way as those concerning domestic law: domestic cases can be introduced as persuasive in their reasoning, their doctrinal approach or their fair and judicious treatment of the conflicting interests fueling the litigation at stake; and empirical data and studies bearing on the legal issues can be presented for adjudication.¹⁵² In typical divided decisions, the Court's justices disagree on a whole range of relevant matters ranging from the meaning of the constitutional text, the proper interpretation of precedents, the particular fit of the case to be adjudicated within various plausible lines of precedents, and the relevance of certain data or fact patterns. As made manifest by the above-discussed disagreements between Justice Kennedy and Justice Scalia in *Roper* and *Lawrence*, at the level of actual discussion of the similarities and differences between foreign and domestic authorities, examples or experiences, the judicial *modus operandum* appears to mirror quite closely that prevalent in purely domestic settings.

B. *Foreign Materials and the Problem of "Translation"*

One may object that even if one were in full agreement with all the observations made above, one would have to reject most uses of foreign law because of serious and even arguably insurmountable problems of translation. That is the position taken by Professor Glendon¹⁵³ and others.¹⁵⁴ Translation does indeed pose serious problems as what is not readily available to the American judge is not only the foreign language in which certain non-U.S. materials are couched, but also the legal, constitutional, social and cultural context in which the materials in question are produced and in

151. See *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

152. On this last point, I am in full agreement with Professor Glendon.

153. See Glendon, *supra* note 9, at 14-15.

154. See Posner, *supra* note 145.

which they remain firmly embedded. Moreover, problems of translation are also responsible, at least in part, for the selectivity and partiality associated with citations to foreign law which has been forcefully decried by Justice Scalia.¹⁵⁵ On the one hand, selectivity is fostered because some otherwise pertinent foreign materials remain untranslated; on the other hand, conscious selectivity by the proponent of foreign materials is facilitated because judges are less likely to be familiar with the full foreign legal landscape than they are with their own domestic one.

While the translation problem is serious, it is not insurmountable, or more precisely, it is susceptible to adequate handling within the ambit of constitutional adjudication. In other words, consistent with the position I have elaborated above, translation problems should not lead to exclusion, but should be dealt with as best as possible within the precincts of adjudication. To better understand the reasons for this suggested handling of the translation problem it is instructive to draw an analogy to translation in literature.

Certain great works of literature, whether poetry or prose, cannot be given full justice in any translation into a foreign language. Furthermore, even if such works could be translated fully satisfactorily, the foreign reader may miss out on some of the richness of the work because of lack of familiarity with the relevant culture and mores that are accessible to all native readers. Nevertheless, even if the translated work is not the same as the original, it can be appreciated as a great work of art even in translation. Shakespeare may not be the same in French or German translation as he is in the original English, yet translations of his plays have been studied, read and performed in non-English speaking countries for centuries. Presumably, what accounts for the endurance and success of certain great works of literature in translation is above all a combination of two factors: on the one hand, a profound insight into facets of human nature or experience that tend to be universal; and, on the other hand, adaptability for purposes of reconceptualization within the social context delimited by the culture and mores of the country into whose language the work has been translated. Thus, for example, a novel about a great love threatened by potentially tragic impediments rooted in the social mores of the country in which it is set may well be appreciated by a reader in a foreign culture. The latter may be unfamiliar with

155. See Justice Scalia's dissent in *Roper v. Simmons*, 543 U.S. 551, 622-28 (2005).

the social mores alluded to in the novel, and may not fully comprehend the import of these on the relationship at the center of the narrative, but may nonetheless be able to similarly benefit from the novel as would a native reader. The foreign reader can imagine the novel's tragic dilemmas in terms of social mores which could give rise to similar impediments within her own country.

In short, great works of literature are translatable and adaptable to remain effective in different linguistic and cultural contexts. Moreover, the adaptability in question not only stretches over space, but also over time. A contemporary English speaking audience at a performance of a Shakespeare play certainly does not have the same familiarity with the language of the play and the social mores it addresses as would have a sixteenth century audience. Nevertheless, the contemporary audience is able to adapt and to reconceptualize so as to appreciate the play's greatness.

The analogy between translation and reconceptualization in literature and in the case of foreign law is of course subject to important qualifications and limitations. The most important of these for present purposes is that presumably any topic can be addressed by great literature and thus made of universal interest, whereas the same is certainly not the case in law. Accordingly, the analogy to literature applies to certain subjects in law, but not to others. For example, the death penalty, the rights of homosexuals, and the right to choose one's death in the context of medicine's increasing ability to prolong life without improving its quality for the very old and the very ill, are subjects that pose similar questions and legal and moral concerns in a large number of countries, if not virtually throughout the globe. Other subjects, in contrast, such as the legal and constitutional peculiarities of particular structural architectures, do not generally fit within the scope of the analogy to literature. It is thus difficult to see how the particulars about apportionment of powers among the legislative and executive powers in a parliamentary democracy such as the UK or Germany would be of any use in adjudicating a separation of powers dispute between the U.S. President and Congress. With this in mind, I now turn to the question posed and left open above: namely when, why, how much, and for what purpose may references to foreign law be useful and legitimate in U.S. constitutional adjudication consistent with the position I have elaborated above?

C. *When, Why, How Much, and for what Purpose Are References to Foreign Law Legitimate in U.S. Constitutional Adjudication?*

When reference to foreign authorities might be relevant and legitimate depends on the dynamic between content and context. In a case in which the subject matter for adjudication is the same as that dealt with in the relevant foreign material, differences in context may be profitably downplayed through analogical reasoning at a justifiable level of abstraction. *Printz* presents a good illustration of this: in spite of differences between U.S. and the foreign federalisms referred to in *Printz*, the experience under the latter on the issue of whether intrusion on the sovereignty of federated entities is minimized through delegation of federal enforcement obligations would seem helpful to a court facing the same issue under U.S. federalism.¹⁵⁶ In other cases, contextual similarities may outweigh differences, thus significantly diminishing the risks of material “mistranslation” when considering the foreign material. This situation is aptly illustrated by *Lawrence* in as much as changing attitudes toward homosexual sex in the U.S. appear substantially similar to those in Western Europe.¹⁵⁷ Finally, in the context of the growing body of laws of universal application in an increasingly globalized world, certain legal norms, such as those prohibiting torture or crimes against humanity, known as *jus cogens*, impose obligations on all countries even in the absence of any applicable treaty obligations.¹⁵⁸ In such cases, differences in context ought to be largely disregarded. Consistent with this, the universal prohibition of the death penalty for juvenile offenders, except in the U.S. and Somalia, could arguably have become part of *jus cogens* and thus proven persuasive in *Roper* at least to the extent that such prohibition did not contravene a clear textual U.S. constitutional provision to the contrary.¹⁵⁹

The reasons *why* references to foreign authorities may be useful and legitimate are manifold. Some of these may be technical and related to constitutional adjudication as a practical exercise. Thus, in *Glucksberg*, the Court dealt for the first time with the

156. See *Printz v. U.S.*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting).

157. See *Lawrence v. Texas*, 539 U.S. 558, 571-73 (2003).

158. See Erika de Wet, *The Constitutionalization of Public International Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1209 (Michel Rosenfeld and András Sajó eds. 2012).

159. See *supra* Part II.B.1.

question of whether a right to assisted suicide under certain limited circumstances ought to be recognized as a privacy and liberty right under the Due Process Clause. Domestic sources revealed no traditional protection of such right in the past, changing medical conditions, and a need for compassionate minimizing of the suffering experienced by the terminally ill.¹⁶⁰ Under these circumstances, the Court was not prepared to end a difficult debate under evolving medical options and fluctuating attitudes towards active as opposed to passive end-of-life alternatives, by affording practically irreversible constitutional recognition to assisted suicide. The fact that the Court could point to foreign authorities that had already dealt with the issue overwhelmingly confirming the Court's conclusion thus provided useful and legitimate reassurance that risk averseness against expansion of rights in this area was the better available judicial course at the time of the decision.

In contrast, in *Roper*, the reason for referring to foreign authority was above all substantive. Did the fact that the U.S. stood virtually alone against the rest of the world on as momentous a legal and moral issue as the death penalty for juvenile offenders, require a reexamination of, or perhaps even counseled a change in, America's assessment of the proportionality of the punishment at issue? Finally, yet another reason would justify recourse to foreign authority to better look inward in cases such as those involving hate speech discussed above.¹⁶¹ Whereas no one would suggest that America abandon its First Amendment exceptionalism, perhaps its current hate speech doctrine, which is at odds with what it was in the mid-twentieth century,¹⁶² ought to be reconsidered to determine whether it would be better to alter it while remaining within the bounds of exceptionalism.

How much and for what purpose references to foreign authorities may be useful and legitimate seem to be closely related. On one end of the spectrum, such references may be purely illustrative and reassuringly confirmative of a domestic constitutional adjudication that stands exclusively on its own. That is what Justice Kennedy appears to intimate concerning his citation to foreign law in *Roper*.¹⁶³ Consistent with the assessment of *Roper* in the

160. See *Washington v. Glucksberg*, 521 U.S. 702, 736 (1997) (O'Connor, J., concurring); *Id.* at 789-90 (Breyer, J., concurring).

161. See *supra*—Part II.B.5.

162. See *Beauharnais v. Illinois*, 343 U.S. 250 (1953) (5-4 decision upholding criminalization of hate speech as group libel).

163. See *Roper*, 543 U.S. at 575.

context of *jus cogens* that was suggested above,¹⁶⁴ however, the reference to it locates it at the other end of the spectrum. On that reading of *Roper*, the reference to foreign authority is crucial and close to determinative—something that Justice Scalia seems to have sensed given the vehemence of his dissent and of his misplaced and disproportionate attacks on the UK.¹⁶⁵

Furthermore, *Lawrence*, for its part, seems to fall somewhere in the middle of the spectrum. Particularly in view of *Lawrence* overruling *Bowers*, its reference to the ECtHR's decision to hold that any criminalization of consensual adult homosexual sex was beyond the margin of appreciation can be fairly understood as furnishing more than mere confirmation or illustration.¹⁶⁶ Indeed, in addition of confirmation, the reference to *Dudgeon* provides an additional reason which, together with the changing mores in the U.S., buttresses the Court's decision to reverse itself so as to constitutionalize the right to engage in homosexual sex.

In closing, a brief word about the claim that reference to foreign authorities should be banned or severely restricted because it is bound to be selective, drawing upon materials that support the user's position while ignoring or sweeping aside materials that would boost the case against that user's position.

Selectivity is indeed inevitable, and it divides into a purely practical as against a substantive theoretical issue. Practically, not all foreign authorities bearing on a given issue will be available due to language barriers. That seems for the moment inevitable, but certainly not significant enough to counsel against references. There is a large body of foreign materials originally produced in English as well as a large number of English translations provided by foreign language courts, such as the German Constitutional Court,¹⁶⁷ and by scholars for inclusion in casebooks and other materials.¹⁶⁸ Accordingly, except in a case where the number of decisions worldwide on an issue would be considered a key factor, it is difficult to envisage why one would deprive courts of exposure to

164. See de Wet, *supra* note 158.

165. See *Roper*, 543 U.S. at 608, 627-28.

166. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

167. See *The Federal Constitutional Court*, BUNDESVERFASSUNGSGERICHT, <http://www.bundesverfassungsgericht.de/en/decisions.html> (last visited Dec. 2, 2013).

168. The Georgetown Law Library has a comprehensive listing of foreign legal materials translated into English. See *Foreign and Comparative Law Research Guide*, GEORGETOWN LAW, <http://www.law.georgetown.edu/library/research/guides/ForeignandComparativeLaw.cfm> (last updated Nov. 2013).

the rich, varied jurisprudence of other countries representative of a large number of countries, constitutional cultures, and approaches to constitutional issues solely because not all that is produced worldwide can be made equally accessible. Beyond that, selective references due to the self-interests of parties to litigation or to the ideological biases or judicial philosophy preferences of judges can be adequately dealt within the confines of America's adversary system of justice. In some cases selectivity may be successfully defended. Take, for example, Justice Kennedy's references to Europe rather than South America or Asia, which at the time of *Lawrence* had jurisprudence contrary to that of Europe on homosexual sex.¹⁶⁹ That selectivity could be persuasively justified by showing that the United States' changing mores and constitutional culture were much more like those of Western Europe than those prevalent in other parts of the world. On the other hand, if Justice Kennedy had been selective because of a bias, then completing the picture as Justice Scalia endeavored to do in his dissent in *Lawrence* would be the best antidote and the best insurance against illegitimate abuses of selectivity. In short, the dangers posed by selectivity are best dealt with not by exclusion, but by the ordinary workings of the adversary system.

CONCLUSION

Globalization impacts American constitutional adjudication in many different ways and citations to foreign materials appear to be here to stay. Professor Glendon is to be commended for stirring the sometimes heated debate all too often veering to sloganeering towards reasoned, rich, nuanced and measured analysis that goes beyond generalities and offers a wealth of valuable insights into the most relevant particulars. Whereas she appears to adhere to a rather restrictive judicial philosophy, Professor Glendon nevertheless recognizes as legitimate certain references to foreign materials while counseling against certain others.

As made clear throughout the preceding analysis, I ultimately disagree with Professor Glendon and advocate much wider acceptance of references to foreign materials within the ambit of constitutional adjudication as practiced within the American adversary system of justice. In spite of my disagreement, however, I have sought to build upon Professor Glendon's insights on particu-

169. See 539 U.S. at 598-99 (Scalia, J., dissenting).

lars and emulated her nuanced approach to the dynamics between identity and difference, which I have considered to be of central importance in my previous work on the subject.¹⁷⁰

As I have insisted throughout that differences regarding the legitimacy of citations to foreign law are parasitic on differences with respect to judicial philosophies, some may be inclined to conclude that my disagreement with Professor Glendon boils down to one over judicial philosophy. That, however, would be misleading. For regardless of my own judicial philosophy, I have sought to demonstrate that in spite of how restrictive a justice *has professed* his or her judicial approach to be, *in fact* all justices who have addressed the issue have dealt with it in an expansive enough manner to legitimate recourse to foreign materials more broadly than Professor Glendon has. The latter is a descriptive assertion, but the preceding analysis also leads to a prescriptive claim about how expansive a judicial approach ought to be in order to deal adequately with the challenges of an increasingly globalized world with greater transnational cross-fertilization.¹⁷¹ *Jus cogens* and human rights covenants ratified with or without reservations by the U.S. may require incorporation of foreign law in constitutional adjudication, so long as this would not contradict the Constitution itself as opposed to favored interpretations of it or constitutional precedents, as I suggested in connection with *Roper*.¹⁷²

Furthermore, as evinced by *Glucksberg* and *Lawrence*, changes in mores with important consequences for national constitutional rights, and particularly such open-ended ones (consistent with purely domestic interpretations of them) as the U.S. Due Process clauses, may proceed on a transnational scale or in an atmosphere of cross-national fertilization. Accordingly, barring consultation of existing foreign authorities on point would needlessly deprive the U.S. judge of a valuable resource that may be instrumental because of similarities or differences in helping her reach the most appropriate result in view of all the relevant variables.

Finally, globalization tends to go hand in hand with balkanization.¹⁷³ As globalization leads to increased exposure to, and con-

170. See Rosenfeld, *Principle or Ideology*, *supra* note 10.

171. For an extended discussion of these challenges, see Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L. 415 (2008).

172. See *supra* Part III.C.

173. See ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT, *supra* note 10, at 234-35.

frontation with, a great array of diverse cultures, it often results in feelings of threatened identity and in tendencies toward retrenchment to one's own core cultural essentials.¹⁷⁴ Under such circumstances, constitutional values may be profitably garnered to search for a proper equilibrium between inward and outward tendencies. And because of its potential for aiding in both these tasks—outwardly as in *Lawrence* and inwardly as suggested in relation to the hate speech cases¹⁷⁵—references to foreign authorities ought definitely be made part of the available tools at the disposal of the constitutional adjudicator.

In the end, the prescriptive argument in favor of broad acceptance of references to foreign authorities is analogous to a purely domestic prescriptive argument that can be made from the standpoint of contemporary reality against an originalism, such as that endorsed by Justice Scalia. As noted above, in both *Roper* and *Lawrence*, Justice Scalia professes his preference for originalism, but engages Justice Kennedy in conformity with the latter's more expansive judicial approach.¹⁷⁶ But if one imagined that Justice Scalia's originalism were to become strictly followed by the Court, it might well lead to consequences that would most certainly horrify most of its earnest proponents. Indeed, such originalism would justify under the Cruel and Unusual Punishment Clause the hanging of someone who had committed certain crimes at the age of seven;¹⁷⁷ the return to racial segregation under the Equal Protection Clause;¹⁷⁸ and the destruction of the national economy by confining the Commerce Clause to its eighteenth century pre-industrial "original understanding."¹⁷⁹ It may be much less obvious, but a similar argument can be made, from the standpoint of contemporary reality, against overly restrictive judicial approaches as they would apply in the context of references to foreign law.

Finally, it bears reemphasizing that the prescriptive case for expansive acceptance of references to foreign law is not made here to dissolve America's distinct national and constitutional identity into those of the larger world. The prescribed openness is urged

174. *Id.*

175. *See supra* Part II.B.5.

176. *See Roper v. Simmons*, 543 U.S. 551, 608, 628 (2005); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003).

177. *See Roper*, 543 U.S. at 589.

178. *See discussion supra* note 36.

179. *Cf. Gonzales v. Raich*, 545 U.S. 1, 69 (2005) (Justice Scalia concurring opinion approving federal regulation under the Commerce Clause of California non-commercially produced marijuana for private non-commercial medicinal use in that state).

instead in order for the U.S. to better balance its inevitable increasing openness to the world at large and its ever more urgent need to preserve its core distinctiveness as a constitutional democracy and as a nation.

A Focus on Comparison in Comparative Law

*Kirk W. Junker**

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The common law was not developed in the university, but in the inns of court, in the law offices of practitioners and in the courtrooms of adversarial advocacy. As such, it was not developed as an academic discipline. So which disciplines did form the foundation of the formal education that lawyers had during the development of the common law? The historical record will show that lawyers in both the civil and common law traditions were being taught the foundational training and practices of rhetoric. With this general thesis in mind, one can consider rhetoric’s topic of comparison. In the ancient art of rhetoric, the common *topoi* (topics) included relationship, circumstance, testimony, definition and comparison. For this present article, I will focus only upon comparison. Definition, as it turns out, may well be a trend in the way of seeing the world, just as atomism was a trend in the way of seeing the world in the natural sciences before systems began to be taken seriously as non-reducible to their parts; that is, as not being atomic. Thus, a shift to comparative thinking and study in the law and a shift away from definitional thinking in the law well might be part of the *Zeitgeist* of globalization. The question to be addressed is whether this is the time for comparativism.

* Chair, U.S. American Law, Faculty of Law, University of Cologne, Germany. kirk.junker@uni-koeln.de. The author would like to thank P. Matthew Roy, Esq. of the University of Cologne Faculty of Law for research assistance for this article.

I. GLOBALIZATION—THE LATEST IN THE HISTORY OF COMPARATIVE LAW EXIGENCIES

In many Western consumer industries—clothing, furniture, automobiles, electronics, and entertainment, for example—fashion is determined by the whim of those who have the power to profit from their ideas. Does that include intellectual fashion? Can it be manipulated intentionally? Does intellectual fashion come about as a response to a perceived crisis? Indeed it does. Globalism is one such perceived crisis. To the profiteers of the market, globalism is expressed as a positive thing—more and bigger markets and supply chains. But for those who are not in dominant cultures, for those who either cannot or choose not to profit from their ideas, globalism can be a threat. Is the study and practice of law a market commodity or an expression of culture? During an era of globalization, if a particular culture is not a dominant one, the culture stands the risk of losing the features of its legal system that are unique to the culture. Globalism is the latest exigency that emphasizes the need to employ comparative law, and it merits a focus upon comparison itself.

A. *A History of Law's Comparative Practices*

Where has the focus in comparative law been until now? Why do we compare? Too often, foundational questions such as why one compares and whether comparative law goals are really achievable are ignored. Instead, we jump ahead immediately into the method of *how* one compares or worse, just start making unmethodical juxtapositions without asking why or how. Even before comparative law had a disciplinary status or a name, practitioners of law looked outside their own systems. Already in the eleventh and twelfth centuries, the historical record indicates practices that we might today call “comparative.” “[T]he jurists observed that *in all the various legal systems under examination* the question arose whether one who was forcibly dispossessed of his goods has the right to take them back by force.”¹ The author of the 1231 *Liber Augustalis*, a codification of the law of the Kingdom of Sicily, was “moved by the spirit of scholasticism that informed the intellectual life of the age to resolve differences within the existing legal tradition of the *regno* and to distill his legal knowledge

1. HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 153 (Harvard University Press 1983) (emphasis added).

and that of his associates, probably practical men of the courts, into a unified body of law”²

But although the practice of comparison has been with us from inside the law for some time, the practice is most often silent on the nature and workings of the very act of comparison itself. For example, my own informal survey of many well-known scholars working today found that their institutions list their areas of research as including comparative law, but a review of the titles these scholars publish indicates little talk of comparison. Instead, the titles seem to indicate that the scholar is active in at least one foreign language and one or more foreign legal system that practices law in that language, but nowhere do these titles talk about comparison per se. John Henry Merryman has noted that the study of foreign law is what “most comparatists do in fact most of the time.”³ Consequently the nature of the comparisons is done uncritically, as though there is some “natural,” one and right way to do it. It would be more accurate and helpful to keep separate a category of scholarship called “foreign law,” in which persons trained in one tradition and language serve the important function of reporting on other traditions and languages to persons for whom the others are foreign.

There are other reasons why one might rightly distinguish the study of foreign law from comparative law. In their canonical treatment of comparative law, Konrad Zweigert and Hein Kötz have agreed that the “mere study of foreign law falls short of being comparative law.”⁴ Unfortunately, the majority of literature fails to heed that admonition. Perhaps the distinction is blurred be-

2. JAMES M. POWELL, *THE LIBER AUGUSTALIS OR CONSTITUTIONS OF MELFI, PROMULGATED BY THE EMPEROR FREDERICK II FOR THE KINGDOM OF SICILY IN 1231* xxi (Syracuse University Press 1971), *quoted in* BERMAN, *supra* note 1, at 427. It is also worth noting here that, as with the common law, the knowledge of “the practical men of the courts” was part of the unified body of Sicilian law.

3. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 675 n.18 (2002) (citing JOHN H. MERRYMAN, *THE LONELINESS OF A COMPARATIVE LAWYER* 4 (1999)). In that same footnote, Reimann notes that “Looking through the volumes of the *American Journal of Comparative Law*, one quickly recognizes that almost invariably, the articles about foreign law outnumber (often by a huge margin) those explicitly comparing two or more systems.”

4. KONRAD ZWEIFERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 6 (Tony Weir trans., 3d ed. 1998). Reimann notes that “Indeed, foreign legal studies (‘Auslandsrechtskunde’) would be a more precise term.” Reimann, *supra* note 3, at 675 n.17 (citing MAX RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 22 (2d ed. 1987)). American literary critic Kenneth Burke said of his own work that he was most uncomfortable when he disagreed with Aristotle. I should feel the same about disagreeing with Zweigert and Kötz.

cause anyone who is studying something that he would call “foreign” must be doing so while standing in his or her own legal system. While an author of such a study may not explicitly talk of comparison, he or she is of course comparing. When studying a foreign legal system, we cannot avoid comparing it to our own, at the very least. But it is important to become cognizant that we are comparing. Successful comparative law study must bring one’s comparisons to consciousness and not act as though they are fixed and non-negotiable. Even when the theme of a work does not make its comparative thought explicit, evidence of an author’s comparative practices may be found in the preface, foreword and other marginalia of his or her work.⁵

Mathias Reimann notes that “outside of a small hard core, most of those engaged in comparative work of one sort or another do not even think of themselves (primarily) as comparative lawyers but mainly as Asia specialists, Russian law scholars, constitutional lawyers with comparative interests, etc.”⁶ And yet if these scholars and lawyers are specializing in legal cultures other than their own, they must be doing so by way of comparison with their own legal culture.

As an aide to focus on the concept of comparison, one can begin by looking at when and why comparative law came into being as a separate discipline of its own. In reflecting upon such considerations, comparativist Paul Koschaker persuasively concluded that legal comparison is not possible, only comparative legal history is possible.⁷ A neatly-packaged history of the schools of thinking in comparative law is not readily possible because there are not clean breaks over time with any one “ism” (formalism or functionalism, for example), and besides, most scholars do not reside neatly in any one school. Nevertheless, some approximations in both history and intellectual camps are helpful. Legal historian Frederick G. Kempin asserts that “[l]egal history can dispel many commonly held misconceptions. One is that the common law is held in the iron bands of tradition through the doctrine of precedent. But precedent is little more than comparing present cases with past

5. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law* 26 HARV. INT’L L.J. 411, 443 (1985).

6. Reimann, *supra* note 3, at 687.

7. Paul Koschaker, *Was vermag die vergleichende Rechtswissenschaft zur Indogermanenfrage beizusteuern?* FS Hirt, Vol. 1, 145, 150 (Heidelberg, 1936), quoted in BERNHARD GROSSFELD, CORE QUESTIONS OF COMPARATIVE LAW 239 (Vivian Grosswald Curran trans., Carolina Academic Press 2004).

cases.”⁸ Thus, Kempin goes so far as to say that the practice of making and applying common law is in fact *constituted* by comparison. But is the comparison practiced by a common law lawyer the same as that practiced by a civil law lawyer?

To answer this question, it remains important to note that as a discipline, comparative law cannot approach its topic from a neutral or omnipresent position. At a minimum, common law lawyers approach comparative law differently than civil lawyers do, because their point of departure differs. And here we learn that at the great Paris Exposition in 1900, the International Congress for Comparative Law introduced comparative law in the form in which we know it today. The spirit of that age was “progress.” The goal of the Congress, as recorded by its reporter, Edouard Lambert, was a *droit commun de l’humanité*. (law common to all of humanity). He went on to describe the noble goal that:

[C]omparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral, or social qualities of the different nations, but to historical accident or to temporary or contingent circumstances.”⁹

So at the height of the world’s love affair with industrial progress, it was thought by Edouard Lambert and the others present at the International Congress for Comparative Law that it was not only possible to distill a world private legal system from comparing all those existing already, but that it was desirable to do so.

In the century or so that comparative law has been researched and practiced as such, its goals and theories have changed. The optimism of that purpose eroded with the passage of time during which a world system was not forthcoming, soured by the discordance of two world wars and a lengthy cold war.¹⁰ Nevertheless,

8. FREDERICK G. KEMPIN, *HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW* (3d ed. West Publishing Company 1990).

9. ZWEIGERT & KÖTZ, *supra* note 4, at 3. Note that the Congress sought a similar goal in 1900 as the Liber Augustalis author sought in 1231—“to resolve differences.”

10. Although it should be noted that as recently as 1989, physicist Werner Heisenberg still wrote “If one looks around in history as to what great capacities human societies hold, next to the primitive same-race feelings that are prevalent already in the animal kingdom, is the shared language. But in addition to these strengths are two more still, which are stronger and can bring together even peoples of different races and languages: a common faith and, strongest of all, a common law.” WERNER HEISENBERG, *ORDNUNG UND WIRKLICHKEIT*, 152 (Piper Munich/Zurich 1989), *cited in* GROSSFELD, *supra* note 7, at 232.

unperturbed by the First World War, French lawyer Pierre Lepaulle, writing in the *Harvard Law Review* in 1922, claimed that the war was evidence of an even greater need for comparative law because “divergences in laws cause divergences that generate unconsciously, bit by bit these misunderstandings and conflicts among nations which end with blood and desolation.”¹¹ One must of course remain conscious of one’s stated focus and goal in any comparative law enterprise. For example, the European common market, established by the legal acts of treaties, became a legal reality in order to prevent a third world war. When José Manuel Barroso, President of the European Commission, is asked with every new “crisis” in the EU, whether the EU is successful, he answers without hesitation that it is, and quickly continues to say that Europe has not started another world war since the EU began. Perhaps a similar, though lesser claim could be made about the United Nations. Both examples echo Lepaulle’s point that when cultures are in dialogue, through some institutionalized means, they are less prone to war.

While avoiding war is a large and noble goal for comparative law, there are other, more direct and personal goals for comparative law as well. Lepaulle added:

If I may state a personal experience, I never completely understood French law before coming to the United States and studying another system. History of law seems inadequate to give the student this sense of relativity, because in history we often deal with forces which are not yet dead, which still unconsciously bend the mind of the student in a certain direction. To see things in a true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our own country. This is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies¹²

There are many other reasons why one might compare legal systems or legal families. Respected comparativists René David and John E. C. Breierly summarize three reasons to compare as follows: “it is useful in historical and philosophical legal research; it

11. Pierre Lepaulle, *The Function of Comparative Law With a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 857 (1922).

12. *Id.* at 858.

is important in order to understand better, and to improve, one's national law; and it assists in the promotion of the understanding of foreign peoples," thereby developing favorable contexts for international relations.¹³

Günter Frankenberg asserts that "The ultimate aims of comparative law [are]—to reform and improve the laws, to further justice and to better the lot of humankind"¹⁴ From his own survey of the biggest names in the comparative law field—René David, Mary Ann Glendon, John Henry Merryman, Max Rheinstein, Rudolph B. Schlesinger, Konrad Zweigert and Hein Kötz—Mathias Reimann summarizes the reasons to teach comparative law from the authors of what one might consider to be the canon of comparative law:

1. Foreign models may improve domestic law;
2. Comparative law practice promotes international unification or at least harmonization;
3. Comparative law study and practice reveals the common core of all law;
4. Comparative law study teaches the basic skills of international legal practice;
5. The study of comparative law provides overview of law on a world-wide scale by introducing the student to the major legal families, or at least provides knowledge of foreign legal families;
6. The study of foreign law familiarizes students with foreign rules, concepts, and approaches and thereby facilitates communication with foreign lawyers;

13. R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 4 (2d. ed. 1978), *quoted in* Frankenberg, *supra* note 5, at 418.

14. Frankenberg, *supra* note 5, at 412-13 (citing K. ZWIGERT & H. KÖTZ, *supra* note 4, at 12-14, 19-23; A. Tunc, *La contribution possible des études juridiques comparatives à une meilleure compréhension entre nations*, 16 *REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.]* 47 (1964); A. Tunc, *Comparative Law, Peace and Justice*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 80 (A. Mehren & J. Hazard eds., 1961); Ferdinand F. Stone, *The End to be Served by Comparative Law*, 25 *TUL. L. REV.* 325 (1951); René David, *The Study of Foreign Law as a Contribution Towards International Understanding*, 2 *INT'L SOC. SCIE. BULL.* 5 (1950); Hessel E. Yntema, *Comparative Law and Humanism*, 7 *AM. J. COMP. L.* 493 (1958)).

7. By forcing students to compare foreign law with their own, it forces them to be critical of their own system;

8. The study of comparative law helps students to understand law as a general phenomenon, in particular its contingency on history, society, politics, and economics; and

9. By providing critical perspectives and explaining alternatives, the study and practice of comparative law fosters tolerance towards other legal cultures and thus overcomes parochial attitudes.¹⁵

Using this brief historical survey of the reasons that scholars have given for comparison, and after answering the question of why we should compare, we further the process by asking *how* one makes comparisons within the law (generally), then ask how one compares specific legal phenomena, and then finally, ask what conclusions are warranted from an exercise in comparison.

B. The Comparative Law Orthodoxies of Method

A study of the history of comparative law yields some trends in method. And so the history of comparative law may be told as a history of the orthodoxies of method, whether they were consciously or unconsciously employed. Regardless of the reason why one compares parts or whole legal systems, one must proceed methodically in order to compare intelligently. As Paul Koschaker warned in 1935, "bad comparative law is worse than none."¹⁶ For example, bad comparative law might simply look to compare texts (usually in some language of translation, perhaps for both countries). Even if the codes or procedural rules of two systems appear superficially to be very similar, they will often provide an unreliable comparison: "For example, some aspects of Dutch procedures . . . bear a striking resemblance to recent proposals for new procedures in the Scottish courts. Yet we can be certain that if the Scottish proposals were to be implemented, the Scottish courts would still work very differently from the Dutch courts."¹⁷ To make useful

15. Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49, 54 (1996).

16. Koschaker, *supra* note 7, at 149-50, *quoted in* GROSSFELD, *supra* note 7, at 14.

17. Judge David Edward in "Fact-Finding: A British Perspective," in 14 THE OPTION OF LITIGATING IN EUROPE 44 (D.L. Carey Miller and Paul R. Beaumont eds., British Inst. Of Intl and Comparative Law 1993), *quoted in* Jeremy Lever, *Why Procedure is More Im-*

comparisons in the law, one must know more than the words of texts.

However one arrives at the method of comparison that one employs, he or she must give serious consideration to the choice. Why? To begin with, a student or practitioner outside a particular legal society *cannot* study law in the same way that a person within that society would study its law. Learning language produces a good analogy here.¹⁸ We learn our native language by usage, and learn that usage in the context of its native spoken culture. We learn additional languages through the methodical mechanics of grammar and vocabulary, outside of the native cultural context. Therefore, we should be wary of the mechanical artificialities, out of context, when learning additional legal cultures and making comparisons. Even the native who does not study the law as a legal specialist has learned the values, norms and procedures in that law, at some level, from everyday experience in his or her culture. Some of the things a native of any culture learns about his legal system might even be regarded by legal professionals as being wrong, but if it is generally learned in that culture, it is a force that forms general cultural expectations among the natives and cannot be dismissed. Equally important is the fact that one should not study a foreign society's law, out of cultural context, as though it is just another substantive law course or practice area in one's own system.

Weak comparisons, typical of colonization justifications, begin with the assumption that what one already does is natural or normal, and if another person or culture does things differently, then that other person or culture is therefore unnatural or abnormal. This seems to be more commonly accepted among non-comparativists and even among those who are neither comparativists nor lawyers, such as the German television journalist who telephoned me when Dominique Strauss-Kahn was arrested in New York and demanded to know why "American" law allowed Mr. Strauss-Kahn to be shown in handcuffs and allowed cameras in the courtroom. Of course, in the journalist's own culture both were prohibited, so to him the prohibition of either must be natural and normal. "The similarities that surface in the course of such comparisons are mirror images of the categories of the con-

portant Than Substantive Law, 48 *International and Comparative Law Quarterly* 285, 301 (April 1999).

18. *Infra* we will see that language functions in an even greater role than as analogy.

ception of law in the comparativist's own culture. Ambiguities are defined away or adjusted to fit the model; thus the 'home' law is positioned as natural, normal, standard"¹⁹ Correcting for one's native bias is one of the thorniest problems in comparative law scholarship and practice. Can these biases be corrected simply by recognizing them? Perhaps. In criticizing the status quo of comparative law, Günter Frankenberg writes:

The comparatist approaches her field of research purely as philosopher, historian, sociologist or legal scholar; her task is merely to collect interesting items, to systematize, to develop or unify the law and/or to bring about rational change. . . . They call for an objectifying methodological approach or trust that international collaborations will correct national biases. They modestly propose rules of comparative reason, that if every comparatist follows will control subjectivity.²⁰

Rather than look for an introduction to comparative law written from one's own perspective, so as comfortably to ignore the fact that we are viewing the phenomenon from only one perspective, we can benefit from the perspectives of others who react to, and analyse its functionality. At the same time, one must however remain observant of the functionality principle, even while criticizing it. While functionalism may have problems and faults, the fact remains that if we want to compare legal traditions, there must be something we are comparing, and for the comparison to be worthwhile, the things compared should in some way be justifiably comparable. Some authors like James Gordley would compare black letter law and say civil and common law cultures are converging. The mixing of systems within the European Union contributes to this phenomenon. "It is worth noting, however, that English judgments nowadays, by reason of the incorporation of Community law and the European Convention of Human Rights use such abstract concepts [as principles, freedoms and rights]

19. Frankenberg, *supra* note 5, at 423. In the spirit of the critical legal studies relative, post-modernism, one can turn this critique back on Frankenberg and note that he too is too much wed to continental civil law when he says "In order to find, compare and evaluate these effects, the comparativist has to move back and forth between texts and their application." Such a characterization of law omits both customary law and the oral tradition, and assumes that at its foundation, law is a text.

20. *Id.* at 424-25, referring to Zweigert and Kötz as well as Ernst Rabel's statement "If the picture presented by a scholar is colored by his background or education, international collaboration will correct it," in Ernst Rabel, *Deutsches und Amerikanisches Recht*, 16 *Zeitschrift für Ausländisches und Internationales Privatrecht* 359 (1951).

more than in the past.”²¹ But if instead of comparing the black letter law one compares the mentalities of the practicing lawyers, as does Pierre Legrand, one might well conclude that there is no convergence.²²

A simple attempt to correct for the bias of assuming one’s own norms to be standard comes to us through formalism. Given that formalism was a trend in other disciplines at the time, it should not be a surprise if one might trace a thread of formalist method in comparative law back to the beginning of the twentieth century.²³ “Formalism prompts a narrow conception of law that, in a comparative perspective, is informed by the domestic legal culture and then projected onto what in other historical or social contexts is, looks like or may be taken as law.”²⁴ In comparative law, formalism theorizes law as a “set of rules and principles independent of other political and social institutions.”²⁵ An alternative approach to formalism would be to treat foreign law as a topic of domestic law; that is to say, just another course in a student’s domestic curriculum, like taxation or wills and estates, such that he then uncritically and unreflectively takes what he knows already of law, and plugs in foreign law as though it were just new rules within one’s own system.

From the formalist roots that often beset the beginning of attempts to systematize or scientize a discipline, comparative law then drifted into functionalism. Private practitioners who wish to represent the interests of their clients are likely to use the functionality approach. “Functionality becomes the pivotal methodological principle determining the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and the evaluation of findings.”²⁶ Functionalism rejects formalism in part and incorporates formalism in part. The great proponents of functionalism, Konrad Zweigert and Hein Kötz, reduce all comparative law method to functionalism: “The basic methodological principle of all comparative law is that of functionalism. . . . Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the

21. Sir Konrad Schiemann, *From Common Law Judge to European Judge*, EUROPÄISCHES PRIVATRECHT (ZEUP) HEFT 4, 742 (2005).

22. Reimann, *supra* note 3, at 690 n.109.

23. Frederick Schauer, *Formalism*, 97 YALE L.J. 509 *passim* (1988).

24. Frankenberg, *supra* note 5, at 422.

25. BLACK’S LAW DICTIONARY 913 (7th ed. 1999).

26. Frankenberg, *supra* note 5, at 436.

same function.”²⁷ The great assumption upon which this method must be based is that “[t]he proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results.”²⁸

This *praesumptio similitudinis* (presumption of similarity) is not without its critics. A weak point in the functionalist method, including that of Zweigert and Kötz, is that it begins from a presumption that legal systems of the world are sufficiently similar such that one can find similar functions among them. As a result of this presumption, Zweigert and Kötz go so far as to say that if at the end of research one discovers “diametrically opposite results, he should be put on notice to go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.”²⁹ With this in mind, analyses can only be conducted if the questions used are capable of yielding similarities, regardless of how well those similarities represent the practices of lawyers in those systems. It would be equally as logical to begin from the presumption that legal systems are dissimilar enough that no similarities can be found. Both assumptions put a rabbit in the magician’s hat that pre-determines the outcome of the comparison.

Functionalism seems especially to have an affinity for commercial law. So for example, legal origins scholarship “produced primarily by economists, not legal scholars—has a close affinity with functionalist comparative law.”³⁰ Commercial law and some other areas of the law are less culturally-connected than other areas of the law.³¹ When the specifics of a culture are not at issue, the law’s norms and forms are more easily transferred to another culture and may be understood by lawyers in multiple cultures with-

27. ZWEIGERT & KÖTZ, *supra* note 4, at 34.

28. *Id.* See also, Zweigert, *Die Praesumptio Similitudinis als Grundsatzvermutung rechtsvergleichender Methode*, in *Inchiesete di Diritto Comparato—Scopi e Metodi di Diritto Comparato* 735 (M. Rotondi ed 1973 as cited by Frankenberg, *supra* note 5, at 437). Critiques of this presumption of similarity are found at 3 L. Constantinesco, *Rechtsvergleichung* (1971) at iii, 54-68 and VIVIAN CURRAN, *COMPARATIVE LAW: AN INTRODUCTION passim* (Carolina Academic Press, 2002).

29. ZWEIGERT & KÖTZ, *supra* note 4, at 40.

30. Christopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, *BYU L. REV.* 1879, 1880 (2009).

31. JAMES GORDLEY ET AL., *AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW*.

out so much need for translation or cultural immersion—that is to say, without a need for focus on comparison.

But other areas of the law are more attached to a culture, such as constitutional law,³² family law or criminal law,³³ for example. It is in these areas that we see the points of contention among U.S. Supreme Court Justices in Mary Ann Glendon's lead article. These culturally-dependent areas cannot so easily be understood without a focus on the process of comparison. While the process of comparison could begin without focus on its process, an uncritical juxtaposition will, in short order, employ a comparative theory, such as formalism or functionalism, consciously or unconsciously. In short, the study of any foreign legal system is *not* the same process as the study of one's own system and that study is vastly improved if one is conscious of the differences of cultural approach within the foreign legal system before one carries out the comparison.

In the one hundred or so years that we have recognized “comparative law” as an independent scholarly pursuit, many scholars have concluded that it has been unfortunately rather unproductive. A survey of comparative law literature, both among the practice-oriented authors and among the theory-oriented authors makes two things rather clear from their perspective: first, there is no agreed-upon set of practices or concepts by which one can denote “comparative law,” and second, because of the failure to agree on the category, no method or theoretical framework seems to be happening that would enable would-be researchers or practitioners to build a discipline.³⁴ Mathias Reimann and others have noted the increased interest in comparative law in Europe as part of the Europeanization process of the Single European Act, the Maastricht Treaty and the Lisbon Treaty, but they have also cautioned that the process is concerned largely only with black letter law, viewed positivistically, and advancing private interests. “As

32. See, e.g., DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM, CASES AND MATERIALS* and JACKSON AND TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW*.

33. Discussions with practicing professional German lawyers who have obtained their masters degrees in law (usually the LLM degree) have indicated that they chose their curricula based upon cultural interest—hence family law and criminal law—and not just practical, commercial interest. After all, is legal education not intended to be a complete education, not just formal training, *Bildung* and not just *Ausbildung*, in the words of Alexander von Humboldt?

34. Indeed, researchers in the field cannot even agree whether to call themselves “comparativists” or “comparatists.”

a result, there is no better theoretical framework in Europe than there is in the United States.”³⁵

C. *Critiques of the Orthodoxies*

Much comparative private law has been written using the functionalist method and it continues to garner quite a following. A considerable amount has also been written as critique of the functionalist method. Criticism comes from several directions against functionalism. A first critique for consideration was launched already back in 1922, long before functionalism was named and introduced. Then, Pierre Lepaulle made a strong case that comparisons are misleading when restricted to *one* legal phenomenon, observing that: “A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. Hence each part must necessarily be seen in its relation to the whole.”³⁶

Some of the criticism of functionalism comes from critical legal studies. The now-famous text by Zweigert and Kötz provides a replicable method of functionalism which one might employ as a social scientific tool to achieve respectable comparisons. Social unrest in much of the world in the 1960s eventually made its way to comparative law as well. Through the 1980s and 1990s, comparativists in the critical legal studies movement in the United States were applying social thinking and post-modern theory to the law with the expressed aim of including marginalized and repressed persons’ legal cultures among those to be compared, all the while questioning the orthodoxies that supported a notion of comparative law that one might easily describe as contributing to globalization.³⁷ I will review some of the critiques made by Günter Frankenberg, Mathias Reimann, and Vivian Curran as just a sample here.

The problem of bias grew into allegations of ethnocentrism by proponents of critical legal studies. Günter Frankenberg offers as a corrective that:

35. Reimann, *supra* note 3, at 694.

36. Lepaulle, *supra* note 11, at 853.

37. See Udo Mattei, *Comparative Law and Critical Legal Studies*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 815 (Mathias Reimann and Reinhard Zimmerman eds., Oxford University Press 2006).

To cope with ethnocentrism we have to analyze and unravel the cultural ties that bind us to the domestic legal regime. A practical and rather fascinating beginning could be a deviant reading of comparative legal literature focusing on the marginal stuff that is normally skipped for lack of relevance. Forewords and prefaces have iterating stories to tell about how comparison, despite higher aims and claims, is inspired and organized, in part at least, by contingent factors that reveal perspective: the comparativist's legal education and exposure to specific legal cultures honeymoons and travels, invitations to conferences, and so on. The marginal remarks indicate why and how the purportedly objective discovery and comparisons of the 'compared' legal culture is undercut by the comparativist's assumptions.³⁸

Where might one see evidence of ethnocentrism in functionality? If we apply an important lesson from comparative law itself to Zweigert and Kötz, we can legitimately examine the perspective from which they see the discipline of comparative law. Part II of their *Introduction to Comparative Law* is divided into contracts, unjust enrichment and torts.³⁹ Most German readers will readily recognize these divisions as being borrowed directly from the German Civil Code, the *Bürgerliches Gesetzbuch*. Why, for example, is a newer area of the law, such as environmental law not included?⁴⁰ Thus, in attempting to provide a science and a method for comparative law that is above or beyond any one system, even the powerful work of Zweigert and Kötz demonstrates that it is impossible to compare without having a point of perspective from which one compares. One cannot step out of the hermeneutic circle, but rather can at best become conscious that one is in the circle, that one sees the world from his place in the circle, and that one tries to make observations of other things in the circle knowing that his is only one perspective.⁴¹ Thus a common law lawyer writing on comparativism might need to invite a civil law lawyer to present the picture from civil law, and vice versa.

38. Frankenberg, *supra* note 5, at 443 (citation omitted).

39. ZWEIGERT & KÖTZ, *supra* note 4, pt. 2.

40. See, e.g., NICHOLAS ROBINSON ET AL., *COMPARATIVE ENVIRONMENTAL LAW* (2d ed. 2012).

41. See generally RAINER HEGENBARTH, *JURISTISCHE HERMENEUTIK UND LINGUISTISCHE PRAGMATIK* (Athenaum 1982).

By the new century, comparative law might well have reached a new era. Mathias Reimann avers that “comparative law has moved way beyond . . . relatively rudimentary models in at least three regards.”⁴² First, according to Reimann, we now understand that all classifications are only approximations of reality; second, we have now learned to think of legal systems as legal traditions and not as static and isolated entities; and third, “we have developed at least some understanding of the *interactions* between these legal families, traditions, and cultures.”⁴³ While functionalism has come under criticism—much of it justified—a single, new ship sailing forward upon which to fly the flag of comparativism has yet to emerge. The critical legal studies movement criticized functionalism heavily, but has not put forward an agreed-upon replacement.

Regardless of whether comparative law is conducted as a scholarly pursuit or a practical pursuit, it is often practiced as though from the perspective of the disinterested neutral observer, who is objectively and evenly studying several legal systems, their histories, pieces of their practices or their sources of law. There are several well-founded critiques of such an approach to comparative law. First, one can see that “[i]n the end the neutral observer reveals herself as a lawyer in defense of the status quo.”⁴⁴ Further, “the comparativist’s own ‘system’ is never left behind or critically exposed to the light of the new. . . . The comparativist travels strategically, always returning to the ever present and idealized home system.”⁴⁵ That said, much of comparative law since World War II has been conducted in North America or Europe. Consequently, the successes of comparative law in the latter half of the twentieth century can largely be characterized as a tool for the “Europeanization of private law.”⁴⁶ While new forays in comparative law may be happening recently in Asia, “Latin America continues to be understudied and Africa is almost ignored”⁴⁷ even by such flagship comparative law journals as the *American Journal of Com-*

42. Reimann, *supra* note 3, at 676.

43. *Id.* at 677-78 (emphasis added).

44. Frankenberg, *supra* note 5, at 440.

45. *Id.* at 433.

46. Mathias Reimann, *supra* note 3, at 673.

47. *Id.* at 674.

parative Law.⁴⁸ And public law does not often get as much ink even within Europe as Asia, Latin America and Africa.

To answer the question of why there has not been work in public or criminal law, it is worth looking at “*The Treaty of Lisbon: an impact assessment, 10th report of session 2007-08*,”⁴⁹ published by the European Union Committee of the British House of Lords. In the report, the authors stated that “[o]ne problem we have is that little is known about continental systems of criminal justice. It is an area that has hardly ever been studied. There are no university chairs of comparative law that specialize in comparative criminal procedure, anywhere in the British Isles.”⁵⁰

Vivian Curran not only offers a critique of functionality, she also offers an alternative. She points out that in relying upon functionality, they assume away the object of inquiry.⁵¹ The question “*Is there a similar function?*” is not asked, according to Curran, but rather it is assumed there is, and the method launches itself from this assumption into determining *what* function is in operation. More importantly, she says Zweigert and Kötz are assuming that it is possible to carry out the old goal of comparative law—to distill a global, common, and unified system of private law—and to do so, they begin by assuming they will find similarities. This critique is like that of the old-time magician, who claims to be able to pull a rabbit from his hat, only because he knows he has already put the rabbit in the hat.

If one is attempting something like an objective or neutral science of comparison, it is indeed peculiar to advocate beginning from a perspective that is admittedly biased toward finding similarities, just as it would be to acknowledge and employ a bias in search of differences. Yet there does not seem to be much reflection on the quick abandoning by many comparativists of both the attempt at a neutral scientific vantage point of observation and an exploration of the biases of their own vantage point.

Curran’s critique is related to a more general critique based upon the “identity-difference principle.” In the identity-difference

48. One count of articles published from 1952-1997 of that journal contained 41.12% about Europe, 8.6% about Asia and only 1.79% about Africa, see Upham, *The Place of Japanese Studies in American Comparative Law*, 1997 UTAH L. REV. 639, 641 (1997), in Reimann, *supra* note 3, at 674 n.12.

49. HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, *THE TREATY OF LISBON: AN IMPACT ASSESSMENT, 10TH REPORT OF SESSION 2007-08*, 2008, London: Stationary Office, at E-131 (2008).

50. *Id.*

51. CURRAN, *supra* note 28.

principle, it is said that for any two phenomena, one can of course find one basic similarity (they exist, they are both made of molecules and so on), and also at least one difference (even two pencils, mass-produced and side-by-side, do not exist in the same physical space, for example).⁵² Curran's preferred alternative mode of comparison is through immersion in the new legal culture.⁵³

Much of the work in comparative law compares civil law problems and solutions with common law problems and solutions. Here too, a type of legal ethnocentric bias is possible. Civilists, due to the structure of civil legal systems might assume that all of law must be capable of a grand, unifying system not because comparative law must be able to make that possible, but because civil law behaves that way. As a result, civilists might conclude that "Only the Continental systems, with their tendency to abstraction and generalization, develop the grand comprehensive concepts, while the common law, with its inductive and case-by-case habits, produces low-level legal institutions especially adapted to solve isolated, concrete problems."⁵⁴

Even at the height of critical legal studies, and after a long and convincing exposé of the weaknesses of comparative law in practice, Günter Frankenberg concluded that:

To abandon comparative legal studies would be wrong-headed, I think, for it would freeze the tradition and current conditions into an eternal pattern. It would be equally wrong to go on with a comparative muddling-through. And from reading through the various approaches and from such highlights as Pound's *Comparative Law in Time and Space*, I infer that it is not just a more complex and longer process of comparison that is needed. Comparative law never had too little baggage in the overhead compartment. To this very day it is crammed with thoughts and oughts, with aims and claims.⁵⁵

52. Here one must be careful not to engage in the sophomoric practice of "compare and contrast," as a substitute for comparative method. Simple juxtaposition is not the comparative method. I am reminded of a colleague who once observed that most papers presented at academic conferences could be boiled down to one of two themes: "X and Xa may appear to be similar, but I will show you how they are really different," or "X and Xa may appear to be different, but I will show you how they are really the same."

53. CURRAN, *supra* note 28.

54. Frankenberg, *supra* note 5, at 440.

55. *Id.*, at 441.

Curran's work guides things in the direction of addressing the language questions of comparative law, and away from pure discussions of method or ideology. There are other current perspectives of course that adhere to neither functionalism nor critical legal studies thinking, like that of Bernhard Grossfeld. Grossfeld not only offers his own method, but presents a critique of orthodox comparison method, while addressing the core questions.⁵⁶ In Grossfeld's critique, he unequivocally states that "[t]o give order to connections and to render them comprehensible also is the scholarly duty of comparative law."⁵⁷ He says that "we should not take the functional method too narrowly."⁵⁸ He goes on to write that comparison in the mode of translation not only has all the advantages of immersion over functionalism, but also has the added advantage of being more easily executed by the comparativist.⁵⁹

Bernhard Grossfeld instead mobilizes translation as method for comparative law.⁶⁰ But he means more than an analogy. Whereas I made the analogy above to comparative law as translation, Grossfeld would say, for example, that Eastern law, like pictograms, is not comprised of language, but is instead right brain thinking and therefore not comparable to other legal systems in which law is language-based.⁶¹ Elsewhere, Grossfeld notes that law:

[A]rises much the way language does, as was so clearly pointed out by Friedrich Karl Savigny, who stated early in his classic work: In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward ne-

56. See GROSSFELD, *supra* note 7.

57. *Id.* at 93.

58. *Id.* at 7.

59. *Id.*

60. *Id.* at 89-104.

61. Jack A. Hiller & Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?* 50 AM J. COMP. L. 175 *passim* (2002).

cessity, excluding all notion of an accidental and arbitrary origin.⁶²

Bernhard Grossfeld seems to allow the *praesumptio similitudinis*, but then offers both a critique of functionalism and an alternative that he builds through language study. Insofar as he allows for the *praesumptio similitudinis*, one could level that same critique against Grossfeld, who posits that comparative law should be focused not on the differences, but on the perceived commonalities: “They form intercultural ‘bridges,’ enabling agreement across borders. If we total up the differences, we distort the picture. Comparative law first and foremost must be ‘bridge seeking’ and ‘bridge building.’”⁶³ The “must” in that statement is of course a matter of choice.

He tells us to remember the process of learning any second language. It was mechanical—one learns the structure of grammar and then inserts as much vocabulary as one can memorize. That is not how we learn our native language. In addition, when learning languages after the mother language is learned, we do so by comparison to our own first language. But beyond my analogy in which learning another legal system is *like* learning another language, Grossfeld maintains that learning another legal system *is* learning another language, for we accomplish this practice of comparison by *creating*—not *finding*—relationships that we say are equal. In the same way that we cannot learn a second language as we learned our mother tongue (with the exception of course of those who have learned a second language at early age and are truly bilingual), we must at least become conscious of these realities of learning by translation, and not fool ourselves into believing that we can learn another culture, even a legal culture, simply by reading the same texts that a native reads.

By seeing the act of comparison as an act of translation, “[c]omparative law goes beyond textual comparison into order and relationship comparison.”⁶⁴ According to Grossfeld, “the reading of a foreign legal text often gives us a false picture. . . . In order to avoid this, we need to recognize the context of the text. Yet we are

62. Jack A. Hiller & Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?*, 50 AM J. COMP. L. 175, 178-79 (2002) (quoting FRIEDRICH CARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24 (1814) (A. Hayward transl., 1975)) (internal quotation marks omitted).

63. GROSSFELD, *supra* note 7, at 12.

64. *Id.* at 125.

not able to observe foreign contexts in an unbiased way, for each system responds to observation, observes itself.”⁶⁵ Grossfeld connects the science of comparativism to the natural sciences when he cites physicist Werner Heisenberg: “the connection between two different closed conceptual systems always must be a very painstaking analysis.”⁶⁶ Grossfeld observes that “comparative law ‘is not for ‘clever boys’ or ‘clever girls.’ It requires patience and the capacity to empathize.”⁶⁷ Elsewhere he adds: “Only rarely does one read anything about the execution [of law] in practice. We remain thus always at risk of taking the representation for life, and dead law for living law.”⁶⁸

Like natural languages, we all begin our lives doing everyday things within our own legal system. We typically spend years in that system, accumulating knowledge of it in the same way as other laypersons before we ever begin to study it scientifically or professionally. Thus the categories in our mind called ‘language’ or ‘legal system’ are in fact biased by the fact that we have learned our language and our legal system, not some neutral category called ‘language’ or ‘legal system,’ and we thus learn any second language or legal system by translating it into our own. This is not a disastrous state of affairs, so long as we remain conscious of it. But if we assume that our legal system is in some way *the* legal system, with some sort of natural or objective connection to the world, then we have made the same error as if we had assumed the same about our spoken language.

Grossfeld begins the final chapter of his work with a discussion of method:

We have dealt with some basic problems of comparative law; we found ways to approach them, but we did not find sure answers: Great tasks lie ahead for comparative law; it must let itself be challenged if it wants to win the future in a world that is not European in imprint. A technical-functional comparison without a study of national customs, without cultural-research and without loving empathy (Bernhard von Clairvaux . . . : *Res tantum intelligitur quantum amatur* (a matter is understood to the extent that it is loved)) remains a

65. *Id.* at 90-91.

66. WERNER HEISENBERG, *PHYSIK UND PHILOSOPHIE* 77 (1984) as quoted by GROSSFELD, *supra* note 7, at 110.

67. GROSSFELD, *supra* note 7, at 110.

68. *Id.* at 91.

study of words, letters and numbers, touches only the superficial level and leads into error.⁶⁹

Grossfeld's disquisition on what he calls the core questions of comparative law are the closest that one comes to a focus, or re-focus on issues of the act of comparison, rather than a focus on the laws themselves or ideological problems. This focus on comparison leads me to offer one of my own.

II. RHETORIC AND LAW

Lawyers know law. Lawyers are trained in law according to the particular structures and institutions of the society in which they are trained. Formalism and functionalism focused upon sources of law. Critical legal studies insisted that the social and cultural ideologies of the source state and the target state (to borrow terms from translation studies) must be part of the comparison. While the critical legal studies lesson is of course culturally valuable and fair, it threw the sense of unity that functionalism had accomplished back into a situation of multivariance, which unsurprisingly makes it difficult for scholars to feel there is a single, unified science that builds on this work. Rather than look for a unifying theory of law through which to achieve a sense of building, I suggest we focus on the act of comparison itself.

Mathias Reimann, after surveying comparative law literature, concluded that "The problem is that these books, articles, ideas, and critiques do not add up to a sum that is larger than its parts. Instead, they constitute a potpourri of disparate elements that coexist side-by-side but rarely relate to any overarching themes."⁷⁰ It is my contention that the lack of unity to which Reimann and others allude in the development of comparative law is due to focusing on the laws, instead of comparison itself. Even those relatively few scholars who have attempted to focus on comparison, have typically done so without reference to a solid disciplinary foundation for comparison. To improve upon the discipline, I would therefore put forward an established foundation to facilitate the task of comparison that is thoroughly related to civil, ecclesiastical and common law. A thorough and considered reflection on the act of comparison in human thought has been available to Western culture since the fourth century B. C. Comparison may

69. *Id.* at 245.

70. Reimann, *supra* note 3, at 686.

well have been discussed earlier and elsewhere, but it comes to us best preserved through Aristotle in his work, *Rhetoric*. In an age in which we have scientized all that we think about human thinking, one might question why we should bother with pre-Enlightenment liberal arts when trying to understand comparison. The mere fact that comparison is explicitly considered at all by Aristotle, the most-cited author of all time,⁷¹ over an entire chapter of his work, ought to be reason enough to consider the impact of what he has to say about comparison. But more to the point of comparative law, it was the discipline of rhetoric up to, and through the medieval trivium, that was a basic part of the education of civil, ecclesiastical and common law lawyers. I will first address the connections of the discipline of rhetoric to law, then return to the specific treatment of comparison within the discipline of rhetoric.

A lesson learned from the study of comparison is that although focus upon, and critiques of presumptions of similarity or difference are capable of locating material to compare, they are just the beginning of the comparison process. Most comparison is made difficult precisely because there are both differences and similarities between any phenomena under examination, and so much more focus needs to be placed upon the “degrees” of difference and similarity, as Aristotle called them. As Mary Ann Glendon notes in the lead article to this volume, “After all, most cases that reach the Supreme Court involve choices between positions that are supported by weighty moral and legal arguments, and the Court more often than not must make choices that, either way, will entail substantial individual or social cost.”⁷² In other words, all the discussion about whether to proceed from the presumption of similarity *or* difference is misleading. Most, if not all cases are both similar and different by matters of degree, and the choices must be made on grounds beyond simple categorical similarities or differences. In the fourth century B. C., Aristotle had already writ-

71. RICHARD F. HAMILTON, *THE SOCIAL MISCONSTRUCTION OF REALITY: VALIDITY AND VERIFICATION IN THE SCHOLARLY COMMUNITY* 277 n.38 (1996) citing Eugene Garfield's studies in the 1970s and 1980s of nearly a million citations in the *Arts and Humanities Citation Index*. Garfield did count more citations to Marx in one study, but added that half of those citations were limited to philosophy journals and nearly two-thirds of those come from one journal *Deutsche Zeitschrift für Philosophie*. Aristotle's work can be said to have formed the basis of Jewish, Christian and Muslim Medieval philosophy, according to Robin Smith, *Aristotle's Logic*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 23, 2011), <http://plato.stanford.edu/entries/Aristotle-logic>.

72. Mary Ann Glendon, *Law in the Age of Globalization*, 52 DUQ. L. REV. 11 (2014).

ten on comparison. In Book I, chapter 7 of his *Rhetoric*, he focused on comparison by the degree to which things were comparable. After “determining the sources from which we must derive our means of persuasion about good and utility,”⁷³ Aristotle writes that “[s]ince however it often happens that people agree that two things are but useful but do not agree about which is the more so, the next step . . . will be to treat of relative goodness and relative utility.”⁷⁴

Aristotle’s discussion of making comparisons by degree then runs through seven exercises. First, a greater number of things can be considered more desirable than a smaller number of the same things. Second, that which is an end is a greater good than that which is only a means. Third, that is scarce is greater than that which is abundant. Fourth, what a person of practical wisdom would choose is a greater good than what an ignorant person would choose. Fifth, what the majority of people would choose is better than what the minority would choose. Sixth, what people would really like to possess is a greater good than what people would merely like to give the impression of possessing. Seventh, if a thing does not exist where it is more likely to exist, it will not exist were it is less likely to exist.⁷⁵ Since the Enlightenment, we have tended to want to quantify degrees of difference and make our choices based upon numbers. That too might be helpful, but not all differences and similarities of degree are quantifiable, so we are still left with the task of choosing when qualities differ. One may well ask whether these conceptions of comparison have ever been applied directly to law. There are strong implications that it has.

The relationship to law comes about because at the beginning of what we now know as both the university and the common law, rhetoric featured heavily in all upper-level education. The curriculum in Bologna and at Oxford that same century would have consisted of the liberal arts, beginning with the trivium of rhetoric, logic and grammar.⁷⁶ These three subjects were the most im-

73. ARISTOTLE, *Rhetoric*, in THE COMPLETE WORKS OF ARISTOTLE I.6.1363bb3-4 (W. Rhys Roberts, trans., Jonathan Barnes, ed., The Revised Oxford Translation, 1985).

74. *Id.* at I.7.1363b5.

75. See EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 97-99 (4th ed. 1999).

76. See H. RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES (3 Volumes, F.M. Powicke, A.B. Emden eds., 2nd ed. 1936).

portant of the seven liberal arts for medieval students.⁷⁷ If a student wished to continue, then he could study the arts of harmonics, geometry, arithmetic and astronomy.⁷⁸ Furthermore, Irnerius himself had already been teaching rhetoric at Bologna when he went to Rome and returned to Bologna, bringing his idea of teaching jurisprudence, and founding the first civil law school of jurisprudence in 1084.⁷⁹

In the eleventh and twelfth centuries, European jurists revived Roman law that had not been practiced for centuries. Their methods were similar to what theologians of the time were using to systematize and harmonize the Old Testament, the New Testament, the texts of church fathers and other sacred writings. Importantly, these jurists “took as a starting point the concept of a legal concept and the principle that the law is principled.”⁸⁰ Furthermore, “[t]he conceptualization of general legal terms, like the formulation of general principles underlying the legal rules, was closely related not only to the revived interest in Greek philosophy but also to developments in theology. . . .”⁸¹ And they practiced comparativism in constructing the general legal principles. Not only did they practice comparativism, it was the heart of their newly-established legal science.

There were connections between the developments in evidence, namely the proof of facts in court, with the study of rhetoric itself. Today, one often disparages the word “rhetoric” by calling it “mere,” “only,” or “just” rhetoric, thus limiting reference to the connotation of empty speech. But at that time, rhetoric still referred to the Aristotelian connotation of persuasion by appeal to reason. With the twelfth century, the historical record reveals that increasing emphasis was placed on method, including the method of proof. “The concept of the hypothesis was put forward by the rhetoricians to supplement the dialectical concept of the thesis (*quaestio*). Proof of hypotheses was understood to require the presentation of evidence, which in turn implied the notion of probable truth.”⁸²

77. R.S. RAIT, *LIFE IN THE MEDIEVAL UNIVERSITY* 138 (1912).

78. *Id.*; see also 1 G. LEFF & J. NORTH, *A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN THE MIDDLE AGES*, (W. Ruegg, ed., 1992).

79. Michael Ott, *Irnerius* in *THE CATHOLIC ENCYCLOPEDIA*. (Vol. 8. New York: Robert Appleton Company 1910), available at <http://www.newadvent.org/cathen/08168a.htm> (last visited October 3, 2013).

80. BERMAN, *supra* note 1, at 150.

81. *Id.*

82. *Id.* at 154.

Thus it was with the realities of presenting real evidence, not theoretical propositions, courts and rhetoricians alike were faced with uncertainties. Presumptions took on the importance of logic. Rules of evidence had to be established. “The parallels with law were stressed: A well-known treatise of the twelfth century, *Rhetorica Ecclesiastica*, stated that ‘both rhetoric and law have a common procedure.’ The same treatise defined a case (*causa*) as a ‘civil dispute concerning a certain statement or a certain act of a certain person.’”⁸³ Here one can see the development of a legal case in much the same way that the concept of an hypothesis had been developed in rhetoric. The *Rhetorica Ecclesiastica* additionally asserted that to find the truth of a disputed matter a judge, a witness, an accuser, and a defender were all required. Rules of relevancy and materiality were developed and by the early thirteenth century exclusionary rules had been developed.⁸⁴ “Alessandro Giuliani has shown that this system of ‘artificial reason’ of the law was discarded in most countries of Europe after the end of the fifteenth century and replaced by ‘natural reason,’ which emphasized mathematical logic.”⁸⁵ But, most important for we common law lawyers is that Giuliani’s work also shows that despite the Enlightenment impact of Thomas Hobbes and others in England, in English common law, the system of so-called “artificial reason” survived through the efforts of Edward Coke, Mathew Hale, and their successors.”⁸⁶

The connection of rhetoric to the medieval study of civil law is not the entire picture, however. As we know, the medieval common law lawyer was not educated at the universities of Oxford, Cambridge or London, but rather at the inns of court. Therefore, in order to be able to make the claim that the medieval lawyer was educated in rhetoric, one cannot just assume so as a result of university education. “A realistic point in time to begin a discussion of Anglo-American legal history, then, is with the common law as it stood when it first became the object of study by a distinct legal

83. “Causa est civilis disceptatio de certo dicto vel facto certae personae,” as quoted in BERMAN, *supra* note 1, at 154. (citing Alessandro Giuliani, *The Influence of Rhetoric on the Law of Evidence and Pleading*, JUDICIAL REV., 62, 231 (1969)).

84. BERMAN, *supra* note 1, at 155, again referring to Giuliani, *supra* note 83, at 234-35. Berman comments further in the note that “These rules of relevance were applied first to the propositions (positions) to which parties and witnesses swore oaths and later to the allegations (articuli), proved through witnesses and documents, which gradually replaced the older form as oaths were devalued.”

85. BERMAN, *supra* note 1, at 154-55 (citing Giuliani, *supra* note 83, at 237).

86. *Id.*

profession”⁸⁷ One could best say that the practice of law became an exclusive profession by edict of Edward I. I am persuaded by the legal historian Kempin when he offers that:

Perhaps the crucial event in the beginning of the legal profession was an edict issued in 1292 by Edward I. At that time what passed for a profession was in a sorry state. Legal business had increased tremendously; yet there were no schools of the common law, and the universities considered law too vulgar a subject for scholarly investigation. Edward’s order directed Common Pleas to choose certain ‘attorneys and learners’ who alone would be allowed to follow the court and to take part in court business The effect of putting the education of lawyers into the hands of the court cannot be overestimated. It resulted in the relative isolation of English lawyers from Continental, Roman, and ecclesiastical influence.⁸⁸

But did it result in them not being trained in rhetoric? And if not, did they then not have the training and experience of understanding the role of comparison as a commonplace? The university system may seem remote from the inns of court and chancery at first glance. “It would have been strange, however, if the educational notions of Paris, Oxford and Cambridge, which were taken for granted in university circles, had no influence in London. And we believe that in truth the obvious differences are outweighed by obvious similarities.”⁸⁹ Given what we know of the medieval education in the trivium, we can therefore go one step further and assume⁹⁰ the similarities would have included an exposure to rhetoric for the students of the inns.

While I take it as undeniable that the education, language, procedure and norms of the English legal system greatly influenced the American legal system, it remains for me to make explicit that would include English legal education, such as it was in the early days, regardless of whether we can find explicit one-to-one bridges to American usage. The study of rhetoric often presupposes that a

87. Kempin, *supra* note 8, at 3.

88. *Id.* at 79.

89. J. H. BAKER, *THE LEGAL PROFESSION AND THE COMMON LAW* 9 (1986).

90. We are forced to make assumptions because the first record of the inns is not until 1388, do we have a written record of the goings-on at the inns, as Baker indicates. Prior to that, “The most we can say with confidence is that the town-houses where the apprentices of the Bench lived in term-time had acquired by the 1350s educational as well as purely residential functions, and the inns had thereby become societies.” *Id.* at 3.

speaker, such as a student, is in need of help in composing a speech, while law will assume the material that might be under discussion is extant and already known and available for comparison. Thus, “both Cicero and Quintilian maintained that the most valuable background for an orator was a liberal education because they recognized that such a broad education was best calculated to aid a person faced with the necessity of inventing arguments on a wide variety of subjects.”⁹¹ With centuries of recorded experience and observation behind them, the rhetoricians noticed that for a given culture, reflection, education and reading would lead to “‘places’ where certain categories of arguments resided.”⁹² Rhetoric is cognizant that this social phenomenon is subject to change over time and place, but when one properly observes where these places are here and now, his or her argument will have greater resonance with the audience of that time and place. The system by which one can know these places is the topics. “The rhetoricians saw, for instance, that one of the tendencies of the human mind is to seek out the nature of things.”⁹³ So they identified “definition” as a topic.

“Another tendency of the human mind is to compare things and when things are compared, one discovers similarities or difference—and the differences will be in kind or degree.”⁹⁴ In this simple exercise, the rhetoricians see that one must first know his purpose in order to determine if it presents an opportunity for definition or comparison. Thus, consistent with the orthodoxy of Zweigert and Kötz, one must ask why one is comparing, rather than assume that comparison is natural, normal or inevitable. As Quintilian said, “it is no use considering each separate type of argument and knocking at the door of each with a view to discovering whether they may chance to serve to prove our point, except while we are in the position of mere learners.”⁹⁵ According to Edward Corbett, “Quintilian envisioned a time when, as the result of study and practice, students would acquire that “innate penetration” and “power of rapid divination” which would lead them directly to those arguments suited to their particular case.”⁹⁶

91. CORBETT & CONNORS, *supra* note 75, at 85.

92. *Id.*

93. *Id.* at 86.

94. *Id.*

95. V QUINTILIAN, *INSTITUTIO ORATORIA* x, 122 (Harold Edgeworth Butler trans. Harvard University Press 1921), as quoted by CORBETT & CONNORS, *supra* note 91, at 86.

96. *Id.* at 86.

Insofar as the students' powers, as described by Quintilian, enabled them to read different cultures differently in different places and times, the question for law becomes whether now, in an era known as globalization, is the time for comparison in looking for legal solutions to social problems? My question takes the lessons of rhetoric for the student seeking to write a speech and applies them to a lawyer in search of solutions for his client and the legal scholar in search of system wide solutions for his systematic legal problems.

III. THE FOCUS ON COMPARISON APPLIED

In his assessment of the style of writing judicial opinions, Sir Konrad Schiemann, a judge on the European Court of Justice (ECJ), and formerly a judge of the High Court in England, made a subtle but scientifically important conclusion. Throughout a short article, he compared writing judgments in England to those of the ECJ, using the criterion of style in his explorations and explanations. In the end, however, his comparison made a conclusion based not only upon style as an isolated criterion, but upon social purpose *relative to the stated purpose of the court*. And from that assessment, he concluded that: "the ECJ's practices have the advantage over English practices—at any event for the task that this court has to fulfill. I have the feeling that there is a genuine attempt to arrive at the best common solution that the brains of the court can reach."⁹⁷

In her review of the three U.S. Supreme Court cases of *Roper v. Simmons*,⁹⁸ *Lawrence v. Texas*,⁹⁹ *Washington v. Glucksberg*,¹⁰⁰ Professor Glendon lays out the disparate positions of Justices Breyer and Scalia.¹⁰¹ She notes that the debate seems to be about the propriety of foreign norms in American culture, but in practice might have much more to do with the balance of power between courts—especially the U.S. Supreme Court—and the state legislatures. She points out that Justice Breyer ought to have noticed that the foreign norms were legislated, not opined by the courts, and that that difference mattered when it came to implementation or the "starting point," as Justice Breyer calls it, of foreign

97. Schiemann, *supra* note 21, at 741- 49, 747.

98. 543 U.S. 51 (2005).

99. 539 U.S. 558 (2003).

100. 521 U.S. 702 (1997).

101. See Glendon, *supra* note 72.

norms. She further cautions that foreign law should be used with attention to detail of its own particulars, rather than transpose assumptions from one's own particular system. That is of course a solid critique. We might go further.

Many other jurisdictions in the world now have a separate constitutional court, although unlike the United States, the names and reputations of the individual judges on those courts remains largely unknown. But more importantly, the majority of the world's jurisdictions are based on the civil law tradition. I would not bother to trot out the mechanics of *stare decisis* and say that is of utmost importance here. There is something I regard as less mechanical, but more powerful. The citizens of civil law jurisdictions do not expect authoritative interpretations of legislation from their judges. When they seek it at all, they seek it from scholars in the field. So just as Justice Breyer ought to have noticed that foreign countries' norms on juvenile death penalties or homosexual acts are legislatively-determined, it should also be noted that they are most often legislatively-determined in civil law countries where no one would expect explication of norms by courts anyway.

Judge Schiemann's surprising article on judicial style suggests something further to be said about the judicial opinion as a forum in which a common law judge may expound on legal theory in ways that legislators cannot. Legislators may make records of deliberations in various jurisdictions of the world, just as the U.S. Congress does with the Congressional Record, but those records are not law. The common law judicial opinion, however, is law.

IV. CONCLUSION

The problem (or "exigency" as rhetors would call it) that I have attempted to address is the lack of focus on comparison in the study and practice of comparative law. This problem has become more severe with each increment of unreflective globalization, including in our legal practices. Treating comparison as a common topic helps us to minimize the rabbit-in-the-hat searches for similarities and differences, within and apart from functionalism, and focus instead on comparisons by degree. Looking at the cases provided by Mary Ann Glendon in this volume, not only might we conclude that Justice Breyer missed the fact that the other jurisdictions accomplished the norms in question through the legislature, but by applying the distinction of degrees from Aristotle, we would also see that other jurisdictions accomplished their distinc-

tions with a public that does not expect judges to make or interpret norms. And legislatures do not and cannot include their legal theories and rationale within the legislation itself. The disciplined study of problems and solutions to comparisons by degree have been available for millennia. Globalism is an exigency that warrants the focus of law upon comparison.

Comparative Law in a Time of Globalization: Some Reflections

Thomas C. Kohler*

“Now it seems to some people that everything just is merely legal, since what is natural is unchangeable and equally valid everywhere—fire, e.g., burns both here and in Persia—while they see that what is just changes from city to city. This is not so, though in a way it is so.”¹

“There are, it is said, one hundred and fifty-four customs in France which possess the force of law. These laws are almost all different in different places. A man that travels in this country changes his law almost as often as he changes his horses The Lord pity us!”²

“The simpler the laws and the more general the regulations become, the more despotic, arid and wretched a state becomes.”³

I will use this happy occasion celebrating the work of Mary Ann Glendon for some short reflections on some ancient questions that have appeared in a new guise, and upon which analysis from a comparative perspective can shed some light. The problems strike at the heart of the very idea of law itself. Is law merely conventional, a set of local, customary (and thereby divergent) practices, whose legitimacy or reasonableness is implied from long use? Or,

* Concurrent Professor of Law and Philosophy, Boston College Law School.

1. ARISTOTLE, NICOMACHEAN ETHICS 133 [1134b 25] (Terence Irwin trans., Hackett Publishing 1985) (c. 384 B.C.E.).

2. FRANÇOIS-MARIE AROUET (VOLTAIRE), *A Philosophical Dictionary, vol. IV (“Customs-Usages”)* in VIII THE WORKS OF VOLTAIRE: A CONTEMPORARY VERSION (William F. Fleming trans., 1901).

3. JUSTUS MÖSER, *Der jetzige Hang zu allgemeinen Gesetzen und Verordnungen ist der gemeinen Freiheit gefährlich [The Current Tendency to Universal Laws and Administrative Regulations is a Danger to Common Freedom]* (1772) in 5 JUSTUS MÖSERS SÄMMTLICHE WERKE: HISTORISCHE-KRITISCHE AUSGABE IN 14 BÄNDEN 22, 23 (1943).

can only a norm universally recognized and applied enjoy the status of being law?

A brief address given by Professor Glendon at a small conference held in Florence in June of this year, in which we both participated, triggered these ruminations. In the course of her remarks, entitled, "The Adventure of Comparative Law," she noted that, until recently, American lawyers had precious little interest in foreign law. However, with the advance of globalization, the situation has changed. American law schools, she observed, have quickly expanded their international programs. Today, any law school worth its salt has offerings in international business law and public international law. Nevertheless, she remarked, it is not clear what role, if any, comparative law will have in this new atmosphere. Becoming a comparatist, she points out, involves some rather heavy and sustained lifting: "Just as it takes considerable investment of time and effort to acquire a working knowledge of one's own legal system, it takes similar investment, and additional years of study, to become familiar with that of another country, especially if other languages must be mastered."

Of course, the work involved in becoming a comparatist does not stop there. Law mirrors a people's history, values, beliefs, and culture, within and through which it seeks to deal with specific problems and crises in some normative way. As students of our own law, we begin our work as beings steeped in our culture. Even if not well examined, as "natives" we bring to our undertaking at least some aboriginal sense of the history and the shared meanings within which our legal system developed. Perspectives from the human sciences, and perhaps particularly intellectual history and philosophy, play a crucial role in informing and deepening our understanding of our own legal system, and assist us in developing a critical framework by which to evaluate the evolution and trajectory of our law and its specific doctrines. No one, absent such work, could be considered a well-formed lawyer, but at best, a severely myopic technician.

If such perspectives represent an important aspect of the study of one's own law, they stand as an absolute requisite to even the most basic understanding of a foreign system. By its very nature, comparative law constitutes an interdisciplinary undertaking, and one that is so at several levels. As Lord Wedderburn has remarked of comparative work in labor law, "the language of a labour law system can be learned only from its social history, above all the history of its labour movement. Without a smattering of

that vocabulary comparative conversation is impossible.”⁴ His comments hardly restrict themselves to the labor field. Successful comparative investigation in any area involves a wide and deep familiarity with another culture, and an ability to see how various aspects of the law and its historical development come together. The advice given by the great medieval scholar, Hugh of St. Victor, to students generally applies with special force to would-be comparatists. “Learn everything,” he counseled, “you will see afterwards that nothing is superfluous.”⁵

So, what distinguishes a comparatist from an internationalist? Perhaps one goes not too wide of the mark by answering, detail, and a lively sensitivity to and respect for the experiences, ideas and cultures of others. International law constitutes, more or less, a closed and self-referential system. By and large, it represents the creation of elites. It tends to serve the needs of large, transnational organizations that want uniformity and predictability and that typically have only tenuous particular or local ties, even to the increasingly powerless nation-states. International law has developed its own norms at an abstract level, generating universals and prescinding from the creative if messy diversity of indigenous rules, doctrines and practices. As a result, Glendon notes, “public international lawyers, international civil servants, and international NGOs are often impatient with, or even dismissive of, national differences.” That from which an internationalist typically abstracts or ignores constitutes the core of the comparatists’ work.

The tension between local ordering and the demand for a universal scheme based on “rational” principles is an old one. In large degree, it congeals the arguments between the champions of the Enlightenment project who both proposed and imposed a new order, and its critics, such as Edmund Burke, Alexis de Tocqueville, and Justus Möser, who is quoted at the start of these reflections.

In response to the “geometrical and arithmetical” plans of “mechanics of Paris,” for example, Burke demanded of their authors, “do you seriously think that the territory of France, upon the republican system of eighty-three independent municipalities (to say

4. Lord Wedderburn of Charlton, *The Social Charter in Britain—Labour Law and Labour Courts?*, 54 MOD. L. REV. 1, 1 (1991).

5. HUGH OF SAINT VICTOR, *THE DIDASCALICON OF HUGH OF SAINT VICTOR: A MEDIEVAL GUIDE TO THE ARTS* 137 (Jerome Taylor trans., 1991). “A skimpy knowledge,” he continues, “is not a pleasing thing.”

nothing of the parts that compose them), can ever be governed as one body, or can ever be set in motion by the impulse of one mind?"⁶ How could it be, he insisted, that "three or four thousand democracies should be formed into eighty-three, and that they may all, by some sort of unknown attractive power, be organized into one?"⁷ Not only do these small and varied institutions enable grassroots self-determination. They also, Burke observed, generate the glue that binds people both within and across borders: "to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country and to mankind."⁸

In *The Old Regime and the Revolution*, Alexis de Tocqueville notes that sometime during the middle of the Eighteenth Century, "a certain number of writers appeared who specialized in treating questions of public administration and to whom several similar principles have given the common name of *economists* or *physiocrats*." They may have had less renown than the philosophes, Tocqueville states, but "it is in their writings above all that we can best study the Revolution's true nature." "All the institutions that the Revolution was going to permanently abolish," he continues, "had been the particular objects of the physiocrats' attacks; none had found grace in their eyes."⁹ "Whatever hinders their plans," he observes, "is worthless" and "diversity itself is odious to them." These theorists showed "themselves hostile to deliberative assemblies, to local and secondary powers, and in general to all the counterweights which had been established in different times, among all free peoples, to balance the central power." They demanded the abolition of anything "that disturbed the symmetry of their plans." "They were," Tocqueville points out, "very favorable to the free exchange of commodities, to *laissez faire* or *laissez passer* in trade and industry, but as for political freedoms proper," they demonstrated little or no concern.¹⁰

6. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 142 (Conor Cruise O'Brien ed., Penguin Books 1986) (1790).

7. *Id.* at 144.

8. *Id.* at 135.

9. ALEXIS DE TOCQUEVILLE, 1 THE OLD REGIME AND THE REVOLUTION 209 (François Furet & François Mélonio eds., Alan S. Kahan, trans., Univ. of Chicago Press 1998) (1856). Tocqueville also notes that one of the physiocrats "proposed to eliminate at once all the old territorial divisions and to change all the provinces' names, forty years before the Constituent Assembly did it." *Id.* at 210.

10. *Id.* at 210.

Examples of the tension that Burke and Tocqueville describe can be multiplied many times over. The widespread displacement of local laws and customs through the “reception” of the Roman law throughout much of Europe during the late middle ages,¹¹ or the imposition of the *Code Napoléon* in the Western German territories after the French-imposed reforms in the wake of 1806¹² provide just two further instances. As Aristotle instructs us, however, diversity in laws and customs does not imply that all law is merely conventional or simply an expression of power and lacking in reason. In the tradition that he represents, law constitutes an expression of practical wisdom, of what we might call prudence. As he also points out, prudent action depends on the circumstances, which vary just as reasonable responses to those circumstances may vary. A number of approaches to a common problem may be equally sensible. Circumstances change. What does not is the operation of the normative person in being attentive, intelligent, reasonable, and responsible in making judgments about what to do in concrete situations. The patterns of human experience vary, but the operations of human reason do not. The old “internationalism,” as it were, focuses on the invariant operations of the person in deliberating, valuing, and choosing. The modern, in contrast, shifts the focus from persons and their reasonable operations to the rules themselves, emphasizing their abstract universality and uniformity.

Of course, none of this denies the significance or the role of international law. It has assumed a quickly growing role, and its higher profile seems with us to stay. Local does not necessarily mean good, and some matters, *e.g.*, environmental concerns, often cannot be treated effectually on a local or even a national basis alone. Moreover, efforts like the creation of the European Union inspire admiration and bear real promise, despite the various difficulties and complications that have attended it. I simply want to point out that in a time of globalization, where the drive to uniformity and homogenization threaten to uproot and displace local orders and indigenous responses to problems, not to mention entire cultures, insights from comparative law can play a usefully corrective role. Comparative perspectives not only leave us with a

11. On this theme, see GERALD STRAUSS, *LAW, RESISTANCE, AND THE STATE: THE OPPOSITION TO ROMAN LAW IN REFORMATION GERMANY* (1986).

12. For a thorough and insightful treatment, see ELISABETH FEHRENBACH, *TRADITIONALE GESELLSCHAFT UND REVOLUTIONÄRES RECHT: DIE EINFÜHRUNG DES CODE NAPOLÉON IN DEN RHEINBUNDSTAATEN* (1974).

greater appreciation for the strengths and weaknesses of our own legal schemes. Such perspectives also highlight the unique aspects and institutions of other systems, thereby alerting us to the costs of their being supplanted by transnational norms.

One could undoubtedly pose a long string of examples of this sort of displacement and supplanting, but I find the decisions of the European Court of Justice in the highly controversial *Viking*¹³ and *Laval*¹⁴ cases particularly poignant and illustrative. Both cases deal with the collision between private, grassroots-level lawmaking between the parties through collective bargaining, as protected and structured by national law and the transnational legal scheme erected through the European Union. These are somewhat complicated cases that raise a number of issues, and any extended discussion or analysis of them would be out of place here. A short recitation may give a sense of threats and potential problems, however.

In *Viking*, a Finnish company operated a ferry, the *Rosella*, which sailed under the Finnish flag and travelled between Finland and Estonia. The crew of the *Rosella* were members of the Finnish Seamen's Union and covered by a collective bargaining agreement. Because Estonian labor costs were significantly lower, the company proposed re-flagging the *Rosella* in Estonia and entering into a collective agreement with an Estonian union. The Finnish union, with the support of the International Transport Workers Federation, which opposes re-flagging when the company's seat would remain in another country, took fully legal steps under Finnish law to boycott the *Rosella* and to employ other legally sanctioned economic pressure. As a result of this collective action, the company withdrew the proposal to re-flag its ship, but sought an injunction in an English court on the grounds that the unions' actions breached Article 49 of the European Union treaty, which guarantees the "freedom of establishment," *i.e.*, the freedom to carry on business in EU member states.¹⁵

13. *Viking Line ABP v. Int'l Transp. Workers' Fed'n, the Finnish Seaman's Union*, Case C-438/05, [2007] E.C.R. I-10779 [hereinafter *Viking*].

14. *Laval un Partneri Ltd. v. Svenske Byggnadsarbetareförbundet*, Case C-341/05, [2007] E.C.R. I-11767 [hereinafter *Laval*].

15. Consolidated Version of the Treaty on the Functioning of the European Union art. 49 (ex EC Treaty art. 43), May 9, 2008, 2008 O.J. (C 115) 47, 67 [hereinafter TFEU]. Article 49 is supplemented by TFEU art. 56 [ex E.C. Treaty art. 49] 2008 O.J. (C 115) 47, 70, which guarantees the freedom to provide cross-border services. It is not always clear under which Article activity might be protected or affected.

The much commented upon and criticized decision¹⁶ of the European Court of Justice (“ECJ”)¹⁷ in this matter points in two directions. The Court first brushed aside contentions that questions dealing with workers’ associational freedoms, the right to strike and the right to impose other forms of economic pressure fall without the scope of EU law, in part because the extension of Community-protected economic freedoms would interfere with national social policy as embodied in national legal schemes.¹⁸ Citing cases dealing with matters such as social security and taxation, the Court noted that even while legislating in areas that lay outside Community competence, enactments and regulations in these areas promulgated by member states had to comply with Community law. The Court further made clear that the Treaty on the Functioning of the European Union (“TFEU”) provisions guaranteeing freedom of movement for workers,¹⁹ as well as freedom of establishment and the right to provide cross-border services, applied to unions as well as to state actors—the so-called “horizontal effect.”²⁰ As Catherine Bernard points out,²¹ this ruling places unions—private associations charged with the duty of protecting their members’ interests—in the same position as states and with

16. See, e.g., CATHERINE BERNARD, *EU EMPLOYMENT LAW* 202 n.75 (4th ed. 2012) (collecting sources); A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 *INDUS. L.J.* 126 (2008). For a concise analysis and critique from the perspective of German law, see Bertram Zwanziger, *Arbeitskampf- und Tarifrecht nach den EuGH Entscheidungen “Laval” und “Viking”*, *DER BETRIEB*, Feb. 8, 2008, at 294.

17. Renamed by the Treaty of Lisbon and now known as the “Court of Justice of the European Union” (CJEU). Consolidated Version of the Treaty on European Union art., May 30, 2010, 2010 O.J. (C 83/01) 13, 22.

18. TFEU, art. 153, ¶ 5, May 9, 2008, 2008 O.J. (C 115) 47, 114 provides that “[t]he provisions of this Article [dealing with the power of the Community to legislate or impose standards concerning the social rights of workers] shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.” These matters are reserved to national regulation.

19. TFEU, art. 45 (ex EC Treaty art. 39), May 9, 2008, 2008 O.J. (C 115) 47, 65-66.

20. The Court stated that “according to settled case-law,” TFEU Articles 45, 49 and 56 “do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provisions of services” *Viking*, Case C-438/05, [2007] E.C.R. I-10779, ¶ 33. “Since working conditions in different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons,” the Court explained, “limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application” *Id.* ¶ 34.

21. BERNARD, *supra* note 16, at 204.

the same responsibilities, but leaves them unable to rely upon the defenses to decisions provided to states by TFEU Article 52.²²

Having ruled that unions would be governed by the same duties as states, the Court proceeded to recognize the right to strike “as a fundamental right which forms an integral part of the general principles of Community law,”²³ but then required that it be limited by the other economic rights stated in Community law. As a result of this ruling, employers may challenge a union’s use of otherwise legal economic pressure as infringing on an employer’s free movement rights. Community law now trumps the underlying ordering scheme established by national law, at least in transnational settings. That point raises the question of threshold: in an integrated economy, the parties to a dispute cannot confine the economic impact of strikes, boycotts, or other permissible economic pressure tactics solely to themselves. How much economic impact does it take to turn a “local” dispute into one that has impermissible effects on another’s freedom of establishment or rights to offer cross-border services? Could a third party, disadvantageously affected by a strike or other union economic pressure, but not the primary object of it, nevertheless claim that its freedom to conduct business or to offer services across borders has been interfered with unlawfully?

These questions aside, the union’s defense in situations like that in *Viking* will depend upon a judicial determination that its actions were justified and were proportionately exercised. In other words, employee associations—unions—bear the burden of justifying the use of any form of economic pressure. Although a fundamental right, a strike appears to begin with the presumption of invalidity, and the unions bear the risk in employing it. The standards for legality are rather hazy and the potential costs of misjudging how a court retrospectively will view the application of economic pressure are potentially high. Nevertheless, the ECJ’s judgment betrays no sense of concern with the chilling effect its ruling may have on the exercise of what it recognized as fundamental rights. It also ignores the fact, long recognized by the United States Supreme Court, that the ability to control the tim-

22. TFEU, art. 52, May 9, 2008, 2008 O.J. (C 115) 47, 69. For a roughly analogous situation that placed a union in an invidious position by legally requiring it to represent a minority interest against the majority of its members, as embodied in the application of the neutral principle of seniority, see *Smith v. Hussman Refrigerator Co.*, 619 F.2d 1229 (8th Cir. 1980).

23. *Viking*, Case C-438/05, [2007] E.C.R. I-10779, ¶ 44.

ing and the rationale for the use of economic pressure leads to the ability to control the outcome of industrial disputes.²⁴ The ruling threatens to juridify considerably a process originally conceived of as autonomous norm-setting, one described by Gunther Teubner as a scheme of “reflexive” lawmaking.²⁵

In the *Laval*²⁶ case, Laval, a Latvian contracting firm, won a contract to perform construction services on a school building in Sweden. Laval posted thirty-five of its own workers from Latvia to work on sites operated by “Baltic,” a firm incorporated under Swedish law whose entire share capital was owned by Laval.²⁷ The posted workers were paid at rates substantially lower than Swedish construction workers.

To protest Laval’s payment of sub-standard wages, and with the goal of having Laval adopt standards established by Swedish collective agreements, Swedish construction trade unions picketed the worksite and employed other economic pressure tactics, all of which were in accord with and protected by Swedish law. With the backing of the Swedish employers’ association, Laval successfully challenged the unions’ actions as a breach of the freedom to provide cross-border services under TFEU Article 56. Confirming that Article 56 applied to unions as well as to states,²⁸ the Court ruled that since Laval had paid its posted workers in accord with standards applicable in Latvia, any attempt to impose the standards applicable in a host state violated Article 56.²⁹ The judgment

24. Nat’l Labor Relations Bd. v. Ins. Agents’ Int’l Union, 361 U.S. 477 (1960).

25. See, e.g., Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC. REV. 229 (1983). Reflexive law refers to a scheme intended only to erect procedural and organizational norms within which private ordering can occur. The goal of such ordering is “regulated autonomy.” Such a scheme also represents an expression of the subsidiarity principle. Subsidiarity emphasizes self-administration by putting authority for decision-making at the lowest possible social or political level. It also requires larger bodies to supply assistance (subsidiium) where required to support the smaller body or take over tasks they cannot perform.

26. *Laval*, Case C-341/05, [2007] E.C.R. I-11767.

27. The Court dismissed arguments that because:

the share capital of Laval and of Baltic were held by the same persons, and those companies had the same representatives and used the same trademark, they should be regarded as one and the same economic entity from the point of view of Community law, even though they constitute two separate legal persons. Therefore, Laval was under an obligation to pursue its activity in Sweden under the conditions laid down for its own nationals by the legislation of that Member State, for the purposes of the second paragraph of Article 43 EC.

Laval, Case C-341/05, [2007] E.C.R. I-11767, ¶ 43.

28. *Id.* ¶ 95.

29. For further analysis of this case and its implications under EU law, see sources in *supra* note 16.

also analyzed the provisions and applicability of the Community's Posted Workers Directive.³⁰

Laval and *Viking* illustrate the enormously strong undertow embedded in transnational schemes that act to de-tether and supplant both national and more localized, grassroots systems of ordering. They also exemplify the elevation of concern for the functioning of efficient markets over political freedoms and self-governance that Tocqueville had warned of in the plans of the physiocrats.³¹ In this, *Laval* and *Viking* do not stand alone.

In its *Schmidberger*³² judgment, for example, the ECJ suggested that a duty could exist on the part of Member States to restrict constitutionally protected freedoms of expression and assembly when their exercise would disproportionately burden the fundamental right to the free movement of goods. The *Schmidberger* Court stated that, "unlike other fundamental rights enshrined" in the European Convention on Civil Rights ("ECHR"), "such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose."³³ Having concluded that rights to the free movement of goods stand on an equal footing with rights of expression and assembly, the Court balanced the interests.³⁴ It found, on the facts of the instant case, that Austria had not infringed Community law by failing to enjoin a citizen demonstration that closed the roadway through the Brenner Pass for about twenty-eight hours to protest the danger to public health posed by increasing heavy goods traffic through the Pass, and to persuade authorities to reduce traffic and pollution in that environmentally sensitive region. Once again, it appears that any restriction on commercial activity such as the free movement of goods presumptively enjoys protection against interference, even if that interfer-

30. Directive 1996/71/EC, of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services, 1997 O.J. (L 18) 1.

31. See text accompanying *supra* notes 9-10.

32. Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria, Case C-112/00, [2003] E.C.R. I-5659.

33. *Id.* ¶ 80.

34. While observing that "competent authorities enjoy a wide margin of discretion," the Court stated, "Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights." *Id.* ¶ 82.

ence comes through the means of protected speech and assembly. The burden is on the Member State to demonstrate that its “failure to ban can be objectively justified.”³⁵ If nothing else, the case spurs some interesting speculation, if not dark concerns, about the way the Court may strike the balance in the future.

Manfred Weiss sagely but undoubtedly controversially observes that criticism of the Court for these decisions is unfair.³⁶ The creation of the European Economic Community in 1957 aimed at the establishment of a common market. Consequently, he points out, it comes as no surprise that the free movement of goods and capital and the freedoms of services and establishment constituted the cornerstones of the Treaty and its successors. The Court, he argues, has little wiggle room, and out of considerations for its own legitimacy, it must work within the strict confines the Treaty establishes for it. The question for the Court in *Viking* and *Laval* “was merely whether national law on industrial action was an unlawful restriction of the market freedoms of establishment, as guaranteed in the EC Treaty.”³⁷ The Courts’ authority to balance rights or account for equities is, Weiss points out, quite limited: “the Court took the market freedoms and the fundamental rights as conflicting entities of equal value, trying to find a balance between them.”³⁸ “The two judgments show the general dilemma resulting from the construction of the EU,” he states. “Since the Treaty [TFEU] . . . is still shaped according to the philosophy of promoting market freedoms as much as possible,” the Court has limited ability to engage in balancing, which in any event “only can be done by the Court incrementally.”³⁹ Even if the Court’s “interpretation of public policy derogations is rather restrictive,” Weiss observes, the Court finds itself confined by the “architecture of the Treaty.”⁴⁰ Perhaps Tocqueville would not have been surprised.

We hear a great deal today about multiculturalism, but the trends associated with globalization appear headed much more

35. *Id.* ¶ 64.

36. Manfred Weiss, *The Potential of the Treaty has to be Used to Its Full Extent*, 2013 EUR. LABOUR L.J. 24 (2013). In light of the decisions in *Viking*, *Laval*, and some companion cases, Weiss states, “court-bashing has become a favourite sport of all those who do not like the outcome of these Court rulings.” He states that “[t]his court bashing is based on a very narrow-minded and ill-founded perspective.” *Id.* at 25-26.

37. *Id.* at 26.

38. *Id.*

39. *Id.*

40. *Id.* at 27.

strongly in a monocultural direction. Just over a century ago, Max Weber resignedly warned that a deracinated and instrumental version of reason had come to dominate modernity, confining us within an “iron cage” wherein all aspects of social life have been progressively bureaucratized, and where relentless economic calculation has flattened and displaced all previous “irrational” patterns of living, while squeezing out all of the humane pleasantries that once characterized them.⁴¹ Caught between the large structures of market or state, human possibilities limit themselves to living, as Weber so pungently put it, as “specialists without spirit, sensualists without heart.”⁴²

Globalization *in its present guise* carries precisely this danger for human societies, since its illumination springs from just the ideas, forces, and embedded tendencies that Weber described. The classic or pre-Enlightenment understanding described law as “an ordinance of reason made for the public good,”⁴³ or in its form as the law embodied in the *Corpus iurus*, as representing “an unrivaled model of natural and civil rationality, if not an expression of an authentic and immutable juridical metaphysics.”⁴⁴ A growing demand for uniform, homogeneous international norms, justified by claims of their rationality (in the Weberian sense), predictability, and as representing “best practices,” has accompanied the rise and spread of globalized trade, and transformed these understandings fully. Rather than acting as an autonomous architectonic structure designed to order social relations and to secure some rough version of human flourishing and the common good, law as we now know it increasingly functions simply as the handmaid of economic efficiency. We regard norms that obstruct such “efficiency” as irrational and illegitimate (and one should keep in mind that goodness and legitimacy are, at bottom, entirely different criteria).

The demotion and restriction of reason as representing merely the ability to calculate the most effective and economical means to an end necessarily has had a substantial impact on our under-

41. On this point, see JOACHIM RADKAU, *MAX WEBER: DIE LEIDENSCHAFT DES DENKENS* 32-33 (2005) (discussing Weber’s views concerning the effect of competition and market structures on family relationships).

42. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 124 (Talcott Parsons trans., Routledge 1992) (1905).

43. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. Ia-IIæ q. 90, art. 4 (Treatise on Law) (1274).

44. ALDO SCHIAVONE, *THE INVENTION OF LAW IN THE WEST* 15 (Jeremy Carden & Antony Shugaar, trans. 2012)

standing of the significance and role of the law. It has other costs and carries with it other long-term tendencies as well. “Instrumental reason,” Charles Taylor observes:

has also grown along with a disengaged model of the human subject, which has a great hold on our imagination. It offers an ideal picture of human thinking that has disengaged from its messy embedding in our bodily constitution, our dialogical situation, our emotions, and our traditional life forms in order to be pure, self-verifying rationality.⁴⁵

In a world increasingly fascinated with and dominated by “virtual reality,” where many spend much of their lives in a sort of parallel existence, we easily can forget that we are embodied intellects, conditioned by our moods and emotions, and the state of our “lower conjugates,” our biochemical, cellular, neural, and other physical systems that support and become sublated into our conscious life. Since the time of Descartes, the tendency has existed to regard ourselves as pure mind, disengaged reason that exists apart from our scruffy clay shells. However, as Eric Voegelin reminds us, our bodily existence forms the basis for our social existence. “Human consciousness,” he observes, “is not a free-floating something but always the concrete consciousness of concrete persons.”⁴⁶ Voegelin warns that when we attempt:

to liberate consciousness from man’s corporeality, there arise symbols of order like the realm of the spirits, or the perfect realm of reason to which mankind is approaching, or the withering away of the state and the coming of the *Third Reich* of the Spirit, or the realms of perfection that are expected as the result of the metastasis of man to a *homo novus* or a superman, be it that of Marx or of Nietzsche.⁴⁷

We forget what we truly are only at great peril.

Comparative approaches represent no panacea to these trends and dangers. There is no magic about them. Comparative law, however, offers an approach that puts the person back at the center, in a cultural and historical context, one subject both to development and decline, to intelligent responses as well as silly or

45. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 101-02 (1992).

46. ERIC VOEGELIN, *The Concrete Consciousness*, in *ANAMNESIS* 200 (Gerhart Niemeyer, ed. & trans., University of Missouri Press 1978).

47. *Id.* at 201.

short-sighted regimes. By paying attention to the diverse ordering solutions that communities have mounted, comparative law also can encourage an appropriate sense of intellectual modesty, one that warns us of the dangers inherent in attempts to erect model regimes that pay scant attention to the experiences of humans over time, and that ignore the cultures and concrete circumstances of others. Done correctly, comparative approaches can help to shift the focus of our work from concerns with mere efficiency, from abstraction, from a forgetfulness of our full humanity. In other words, by focusing our attention on the whole, it can help us re-engage with ourselves, and remind us that the real subject of the law is the human. Today many celebrate “disruption,” the Rousseauian-tinged motto of the moment, and use it as something of a programmatic theme. What could be more disruptive, at least of typically unexamined trends and ideas, than seeking to make law more human? That task constitutes the role of comparative law in a time of globalization.

Through Our Glass Darkly: Does Comparative Law Counsel the Use of Foreign Law in U.S. Constitutional Adjudication?

Kenneth Anderson *

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I. A CONVERSATION LONG AGO WITH PROFESSOR GLENDON

Some twenty or so years ago, Mary Ann Glendon said something to me in a conversation in her office at Harvard Law School. There's no special reason why she would remember it or the conversation itself; I was a visiting professor that term, teaching international human rights and the laws and ethics of war, and she was suggesting that I needed to reach beyond public international law into comparative law. This was a field about which I knew

* Professor of Law, American University, Washington College of Law; Visiting Fellow, The Hoover Institution on War, Revolution and Peace; Stanford University Member, Hoover Task Force on National Security and Law; Non-Resident Visiting Fellow, The Brookings Institution (Governance Studies); Senior Fellow, The Rift Valley Institute.

very little, and in explaining why I should find it important, she said, “We see through our glass darkly, after all.”

I was puzzled by her use of “our.” Why “our” rather than the usual scriptural “the” or “a” glass darkly? She explained, however, with reference to different societies and their different legal systems—the very stuff of comparative law—that each sees through its own glass and each sees in some way “darkly,” peering through the accreted overlays of its own customs, traditions, bureaucratic and administrative processes, toward a moral and rational reading of that society’s law. Every society’s “glass” carries with it obscuring layers, both moral and rational, and part of the value of comparative law as a field of study is that it provides tools for seeing and understanding those blinders—the motes in others’ eyes and the beams in one’s own, if all goes well—in order to bring light to the darkness.

We don’t have unmediated access to any perfectly moral, perfectly rational, perfectly idealized or abstract legal form—even if, in principle, there were such a thing. What we do have, however, is the ability to compare ways of doing things in different societies and their legal systems, in order to see through the exercise of perspective, what might be a better (or sometimes worse) way of doing things in our own legal system and society. But then Professor Glendon added (I paraphrase the conversation from memory), “I said ‘ours’ because it matters that it’s ‘ours.’ There’s nothing wrong with preferring your own way of seeing through the glass, just because it’s yours—the product of your society, your history, your attachments and affections and those of your people. That’s especially true of the founding texts of a political society and law—a society’s constitution.”

I did not take up comparative law as a field of scholarship, but some years later, I did take up a question deeply implicated here: the question of the proper role, if any, of other legal systems and societies and their law in interpreting one’s own fundamental, founding constitutional law. I took up that question because, in the late 1990s up through the late 2000s, a distinct intellectual climate had taken hold, particularly among influential academic legal elites as well as some U.S. Supreme Court Justices, that foreign law ought to have a role to play—perhaps a significant one—in the interpretation and adjudication of U.S. constitutional questions.

Beginning to write on this topic in the early and mid-2000s, this conversation with Professor Glendon immediately came to my

mind. It has had a framing influence on my views ever since. There's no reason why Professor Glendon would recall this conversation, and I certainly don't want to put onto her any of my views. But despite my failure to become a "comparativist" in the legal academy, and as with so many other things in my thinking in law and ethics, Mary Ann Glendon has had a profound and salutary influence on my work—on my work, but also (however improbable those who know me might think this) on *me* as a reasoning, moral person.

Comparative and international law, yes, international human rights law, yes, just war and the ethics of war, yes. But also, I feel personally compelled to add, a long list of other and deeper matters: my thinking about the religion in which I was raised but had since departed, Mormonism, and its place in the world, by comparison (that *method* of comparativism again) to the faith of my wife and daughter, American Catholicism; the role and meaning of intellectual elites within a faith-and-reason religious tradition; communitarianism, civil society, private and public, and individual rights and liberties; the place of love and the bonds of affection in ethics and politics; and, finally, the Catholic insistence on the irreducibly *social* as a category in law, morality, politics, and thus, social theory.

I owe Professor Glendon a great personal and intellectual debt stretching back over decades; this particular topic is among them. In the remainder of this brief essay, however, I won't try to offer a commentary as such on Professor Glendon's Duquesne lecture, but instead will simply reflect on the proper role, in my view, of where foreign law has a place in U.S. constitutional adjudication (and where it doesn't), but, more especially, I will comment on the trajectory that the "foreign law in U.S. constitutional adjudication" has been on since the high water mark of that debate that occurred somewhere around 2006.

II. COMPARATIVISM AS METHODOLOGICAL PERMISSIONS AND LIMITATIONS: ACADEMIC LAW'S ANTHROPOLOGISTS

Implicit in Professor Glendon's remarks is a double message. On the one hand, because any particular society and its legal system, its substantive law as well as processes and institutions of adjudication and interpretation of law, will necessarily be partial—partial to itself, and the product of its own history—comparativism counsels looking to other legal systems and societies in order to understand and, perhaps, amend one's own.

Knowledge of what is done in other places, why it is done, and how it is done provides a form of expertise that comparative law offers to one's own legal system.

Comparativism does more than merely offer expertise, however; on the other hand, it gives a normative reason to use it, at least to consider how one's own society addresses certain legal questions by comparison to other places. In this normative regard, at least as compared to some idealized legal system, comparative law offers comparisons in the real world. As an academic field, it makes such knowledge available; as a normative proposition, it gives permission to and affirms the positive value of knowing and considering how and why other places do things differently.

That's in the way of "permissions" offered by comparative law. But, as Professor Glendon has pointed out many times in many places, comparative law as an academic endeavor insists equally upon "limitations" that derive from comparative law methodologies themselves. Judges, as Professor Glendon has eloquently noted, are sometimes wont to cherry pick holdings, rulings, cases, and decisional language that happen to support whatever substantive proposition the judge endorses in the case. Yet the methodology of comparative law says that this is never a justifiable way to proceed comparatively. Merely quoting substantive holdings or language from cases fails to place them in the historically, socially, politically, ethically, and legally special context in which substance finally obtains. Only within that matrix can one properly understand or interpret the substance; it scarcely if ever substantively "speaks for itself."

Basic procedural functions do not necessarily translate accurately across systems; for example, Spain's "*juez de instruccion*" does not have an easy legal homologue in the U.S. system. The basic doctrines of legal authority, precedent, interpretation, and even whether the language of a decision has a precedential role at all in that legal system for future cases will all have potentially large impacts on how and what a decision says; little if any of this can be understood and taken into account merely by finding language in a foreign case that appears to come from that legal system's highest court. What constitutes the "highest court" can mean different things in different legal systems, for that matter. Those who don't live in federal systems often find surprising the U.S. insistence that the federal courts cannot intervene in some kinds of state cases, even in such controversial matters as the death penalty or what, to the rest of the world, appear to be clear

cases of federal sovereignty over states in matters mandated by treaty (consular access for a criminal suspect, for example). But Americans often find puzzling how to fit the special “constitutional courts” of some legal systems into the hierarchical system of the U.S. federal courts.

American-style judicial review? It’s been adopted some places, but puzzles many other people abroad. The U.S. Constitution’s religion clauses—as seen by those whose constitutions mandate a serious, real commitment to a particular religion, such as juridically Islamic states? This leads to serious confusions. Many Islamic states have ratified many human rights conventions dealing with women’s or children’s rights, after all, but with the reservation that it is all subject to Shari’a law and its meanings. This makes it easy to carp about the United States being the terrible human rights outlier, one of a small number of states that has not ratified the women’s rights convention¹ or the children’s rights convention.² But a micron or so below the surface of purely formal treaty ratification numbers lies a quite different reality as to what places and states are least respectful of the rights of women and children or religious minorities. Moreover, the differences are not merely between the judicial processes or constitutional doctrines within the field of judicial activity; the role of the judiciary in a constitutional order means very different things in a parliamentary versus presidential system, a constitutional order with a deliberate separation of powers versus a constitutionally unitary understanding of the state.

One could go on and on, but the point is two-fold. Comparativism counsels permissions, and indeed, an obligation to look comparatively in order to seek to see through the dark glass of one’s own system, views, and presuppositions. At the same time, it counsels limitations, because undertaking this comparative work requires deep knowledge of how anything apparently substantive is embedded in the dense web of its own system, history and derivation. Comparativists, we might say, are the “anthropologists” of academic law—and, in ways not entirely dissimilar to the traditional methods of cultural anthropology, propositions of apparently universal substance are hedged up and located deep

1. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

2. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

within local structures of knowledge and ways of establishing knowledge. These must be excavated, framed, studied and examined within their contexts. Otherwise, the process of grabbing this bit or that of some foreign legal system and proudly displaying it as part of your legal system resembles less anthropology than Indiana Jones-style grave robbing. Real anthropology is hard; likewise, the real work of comparative law is hard.

From that perspective, the obligation to undertake comparison across systems will rarely yield “useable” propositions from the standpoint of what American judges and courts do every day—which is to say, rarely will American courts be able to use propositions from other systems to directly address particular cases in our system. In some kinds of cases, however—those that are not about a legal system’s fundamental, constitutive documents, its constitution—comparative work is necessary and unavoidable in adjudication. Jurisdictions do touch each other; they interact, and, as the proponents of robust global governance never tire of saying, a globalized economy makes this increasingly true.

Everyone from Justice Stephen Breyer to Justice Antonin Scalia agrees, for example, that judges must consult foreign law in many cases involving the meanings in domestic law giving effect to treaty provisions or adjudication in domestic law that a treaty regime might mandate shall be undertaken by the domestic courts of all states party to the treaty. Indeed, in some instances, the treaty at issue, as embraced by the political branches in ratifying it, calls upon judges to seek convergence with other states’ courts in its interpretation. The Convention on the International Sale of Goods (CISG), for example, contemplates that the commercial courts of all states-party to the treaty shall hear cases arising in their jurisdiction under the CISG and adjudicate them within the meaning and intent of the treaty and informed by the decisions of other tribunals in the world doing the same.

Yet these necessary points of contact between legal systems, requiring rules for determining jurisdiction and venue in an increasingly interconnected world, as well as substantive law on many things, are still different from the constitutive, constitutional documents of a polity and its legal system. These constitutive matters touch on the disciplines of “anthropology” and “intellectual history” that are so much a part of comparative law methodology. But they provide profoundly cautionary arguments, much of the time, for why there is so little that can be drawn by judicial action on its own from one legal system into another at the level of genu-

inely constitutive law. Constitutive legal documents—a system’s constitution—have meaning only within the webs of legally formal and socially informal understandings and commitments that give those documents legitimacy.

Comparative constitutionalism in considerable part teaches, in other words, that knowledge of a society’s constitutive legal documents includes the knowledge of just how embedded they are in thick social relations of all kinds. The implication is that, as a matter of descriptive fact, what one might want substantively to take from one legal system into another at the level of constitutionalism and constitutional interpretation necessarily takes with it large parts of the documents’ background, history, and informal social understandings—because they are part of what it *is*, part of what constitutes the social and political order codified in, or, more precisely, *coded into*—a constitution. Those social relationships are not merely interesting background and history that are useful in interpretation.

This is not to say that some legal systems are not sufficiently close in common culture and history, shared political experience, and shared social relationships, that they cannot inform each other. Jurisprudence among states that inherit the common law or the civil law traditions sometimes share enough that this process can carry its own legitimacy: Australia and Britain, for example. But this can only get one so far, because the intellectual work of cross-fertilization between states and their legal systems is done, not by reference to some universal rule of law that is supposed to undergird all (genuine law-driven) legal systems, but instead by highly particularized commonalities of history, culture, and society that operate in the background.

Conflating one with the other is intellectually fatal. In this regard, one sorrows to recall that the eminent legal and moral philosopher Jeremy Waldron, at the height of the great debate of the mid-2000s over this “comparative constitutionalism,” wrote a short and elegantly argued book in favor of a great deal of comparative constitutional embrace.³ Although the argument was subtle and more persuasive than I suggest here, the cases cited, alas, were largely so much those of developed Anglo-common law states that they could prove only the unremarkable proposition that New Zealand and Canada could indeed share constitutional

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

jurisprudence—as they not so long ago once shared a Queen, which is to say, shared a constitutional order.

The United States and, say, Zimbabwe, China, Saudi Arabia, or Bhutan, by contrast? Were we to take the methods of academic comparative law seriously, they would force to the fore a great many questions that cases shared by New Zealand, Canada, and the United Kingdom could not answer.

III. POPULAR SOVEREIGNTY AS THE U.S. CONSTITUTION'S SOURCE OF LEGITIMACY

Academic comparative constitutional law teaches us both the necessity of comparative understandings, but also just how limited the available scope to use that knowledge is in actual constitutional adjudication, in actual American constitutional cases, where the U.S. Constitution carries its own history and source of legitimacy. That history and source of legitimacy impose their own limits on how much U.S. adjudicators are able to engage in constitutional comparativism as a basis for decision—or even as a citable source with some analytic purchase or relevance to U.S. constitutional adjudication. This point has been made extensively in the academic literature and, not insignificantly, in judicial opinions (particularly those of Justice Scalia) calling out the use of foreign law in U.S. constitutional adjudication.⁴

The point, in sum, is that the particular constitutional tradition that gives rise to the U.S. constitution is popular sovereignty. The people are sovereign. Popular sovereignty as a basis for constitutional legitimacy might be normatively a bad theory, incoherent, or just morally wrong, of course. But it is hard to get around the descriptive fact of its centrality, particularly given that some version of it underlies most of the differences between the United States and many other states that otherwise share our commitment to liberal, rights-protective democracy and the rule of law. The post-war constitutions of Western Europe, for example, make

4. *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting) (“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 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.”); *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting) (“Equally irrelevant [to the Court’s decision interpreting the Eighth Amendment] are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”).

treaties, as international law, *pari passu* if not superior to existing constitutional law; cannot fathom a “last in time” rule as between a treaty and a later domestic statute; find inconceivable a federalism that kicks the federal government out of state law conflicting with an apparent treaty obligation or its judicial interpretation; and so on. They are liberal democracies and the United States is a liberal democracy, but their histories lead them to constitutive incompatibility with the U.S. on exactly this point. The U.S. Constitution calls international law part of “our” law (as American international law academics never tire of saying, as though it were a union card), but it simply means something altogether different in U.S. law by comparison to what it would mean in many other countries. Yale constitutional law scholar Jed Rubenfeld—no conservative, he—put the *descriptive* point definitively, by comparison to the European tradition:

It’s essential here to distinguish between two conceptions of constitutionalism. The first views the fundamental tenets of constitutional law as expressing universal, liberal, Enlightenment principles, whose authority is superior to that of all national politics, including national democratic politics. This universal authority, residing in a normative domain above politics and nation-states, is what allows constitutional law, interpreted by unelected judges, to countermand all governmental actions, including laws enacted by democratically elected legislators. From this perspective, it’s reasonable for international organizations and courts to frame constitutions, establish international human-rights laws, interpret these constitutions and laws, and, in general, create a system of international law to govern nation-states. I call this view “international constitutionalism.”

....

The alternative to international constitutionalism is American, or democratic, national constitutionalism. It holds that a nation’s constitution ought to be made through that nation’s democratic process, because the business of the constitution is to express the polity’s most basic legal and political commitments. These commitments will include fundamental rights that majorities are not free to violate, but the countermajoritarian rights are not therefore counter democratic. Rather, they are democratic because they represent the nation’s self-

given law, enacted through a democratic constitutional politics. Over time, from this perspective, constitutional law is supposed to evolve and grow in a fashion that continues to express national interpretations and reinterpretations of the polity's fundamental commitments.

In American constitutionalism, the work of democratically drafting and ratifying a constitution is only the beginning. Just as important, if not more so, is the question of who interprets the constitution. *In the American view, constitutional law must somehow remain the nation's self-given law, even as it is reworked through judicial interpretation and reinterpretation, and this requires interpretation by national courts.* By contrast, in international constitutionalism, interpretation by a body of international jurists is, in principle, not only satisfactory but superior to local interpretation, which invariably involves constitutional law in partisan and ideological political disputes.⁵

One understands why the Europeans, or at least their academic elites, find this so troubling. Their own history tells them that this is a recipe for the world's worst wars, plain and simple. The experiences of those wars, in turn, have wired into their hearts and minds that a constitution must be a top-down affair; it is not something to be left to the people. It is the distinction—a part of practical political theory since the French Revolution at least—between the general and the popular will. They are likely always to embrace the enlightened general will over the un-wisdom of the “people.” But by the same token, popular sovereignty is wired into the hearts and minds of Americans as the source of constitutional legitimacy.

True, it has always been less so among American elites, which often incline to see the risks of “populism”—which they conflate sometimes too quickly with popular sovereignty. But Lincoln, one could argue, was no populist, and saw popular sovereignty as the constitutional ability of the people to choose their leaders wisely in a genuinely republican form of government. Elites today arguably prefer a diminution of popular sovereignty in favor of the rule of experts—today's expert elites, for example, whose claim legitimately to rule (and the distinction from “governance” here would

5. Jeb Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, <http://www.wilsonquarterly.com/essays/two-world-orders> (emphasis added).

be an instructive digression) rests mostly upon their claims to expertise and technocratic skills. Not all American elites are impressed by this, to be sure. Professor Glendon is among those who pointed out (decades ago in her book *Rights Talk*⁶) that a republic based around popular sovereignty requires a reasonable level of civic virtue—a people whose liberty is secured by their own self-discipline. Technocratic elite rule, that is, rule by experts, cannot substitute for a minimum level of enlightened self-restraint among the citizenry if it is to keep its republic.

One can debate nearly endlessly whether top-down universalist constitutionalism or popular sovereignty is the better way. But if one holds popular sovereignty as one's vision and source of fundamental legitimacy, then it is simply a practical fact that drawing in comparative constitutionalism from constitutional systems grounded in very different conceptions of legitimacy will be more difficult, even in principle, than it otherwise would be—and if one is faithful to a thick-description method of comparativism, perhaps impossible. It's difficult because it becomes hard to answer Judge Posner's quip, made back in the midst of this grand debate, rejecting foreign law in constitutional adjudication: "No thanks, we already have our own laws."⁷

IV. JUDGES IN THE NEW GLOBAL LEGAL ORDER

The reason a public intellectual and prominent judge such as Richard Posner would offer such a remark at all is the rise and (mostly) fall of certain ideas at the heart of judging. They are the source of a judge's legitimacy: the role of national judiciaries and especially supreme constitutional courts in the processes of globalization; and the mechanisms of global governance that played themselves out from roughly the early 1990s to the late 2000s, but have since faltered in the U.S., if not necessarily elsewhere. The idea (in Tweet form) is that national judiciaries should see themselves, at least in part, as an elite global fraternity whose confrères (within, to be sure, the range of discretion that legal systems regard as a necessary feature of judging, and especially within the rhetorical and justificatory discretion permitted judges ac-

6. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993).

7. Richard Posner, *No Thanks, We Already Have Our Own Laws*, *LEGAL AFF.* (July/Aug. 2004), http://legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp.

ording to the terms of their particular legal systems) should strive to promote harmonization across constitutional systems, in the service of global governance. Judges, though legally creatures of their national political orders, should be socialized toward a globalized, universal-minded cosmopolitanism, so to help midwife the institutions of global governance of the future.

There was never anything untoward or unseemly about this, let's be clear. Part of what judges do in any system not run by robots is exercise discretion, including discretion in how to frame, declare, and justify their actions. Even in judicial systems where judges are far more hedged up in what they can do and how they can explain it than American judges (not many legal systems, it can safely be said, would be able to accommodate the frankly glorious tradition of a Judge Richard Posner or Judge Stephen Reinhardt or Judge Jack Weinstein), some discretion is still part of judging and there is room in many instances to reach to one kind of justificatory or explanatory material over another.

What was urged during this period was that judges across the globe should view themselves as part of a loose, but nonetheless real, global network, fraternity, consortium or what have you extending horizontally across the world's legal systems. Judges should embrace this judicial cosmopolitanism within the permissible national limits of their regulatory roles—regulating constitutional law and, in turn, its regulation of a nation's relationship to the international community as a community of *governance*. But this embrace is a matter of the psychological and social orientation of judges, motivated in no small part by the desire to have the respect of one's judicial peers, who increasingly will be understood by judges themselves to be other judges across the world also in this peer network. The dynamic that Anne-Marie Slaughter, in particular, urged in *A New World Order*⁸ is not a legal mandate as such, and she is careful to emphasize that it has to remain cabined within the limits of judicial discretion as a matter of national law. Nonetheless, it encourages the socialization of judges into a global network that might most accurately be called seeking a global judicial peerage.

The effect, then, is to transform an argument about what it means to be a judge in a national legal system into a strategy for promoting a *sensibility*—promoting a psychological and social sense of judicial self that prizes elite judicial cosmopolitanism. It

8. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005).

is psychological because it consists of individually internalized attitudes about ideals of judging; it is social, however, because it promotes actions by judges to internalize those attitudes themselves, and then impart them to other judges as a process of peer group socialization. One way to do this is through sharing and approving judicial acts in favor of some particular global jurisprudence by members of the network. Judges are not paid in material wealth, after all, and psychological compensation in the form of prestige, respect, and so on is important. Judges ought to be inculcated, therefore, to look to the respect and approval of judges of other states and international tribunals, and from the international community's self-appointed *moralistes*, the international human rights NGOs. This sensibility would provide an important bulwark in the framework of legitimacy by which aspects of state sovereignty could be transferred over time to mechanisms of global governance.

Put in these very simple, abbreviated terms, it is hard not to make this out to sound shady, illegitimate, or conspiratorial, the stuff of 1950s Cold War science fiction novels about the subtle wiles of propaganda. I don't mean anything like that. It's a story about a battle of ideas about governance, globalization, and sovereignty after the fall of the Berlin Wall and the end of the Cold War. Those events unleashed a period of remarkably unbridled optimism among various global elites for the emergence of forms of global governance that would defang sovereignty and pick up the task of constructing a liberal international order of governance that was the original conception of it by the Americans in 1945, put on hold by the Cold War.

In that case, "defanging sovereignty" meant the rise of liberal internationalism as global governance, usefully defined by Francis Fukuyama as a belief in international law and institutions overcoming the anarchic power relations of sovereign states.⁹ Yet despite liberal internationalism's impeccable American pedigree, dating back to 1945 and the founding of the UN, this would also necessarily mean dismantling sovereignty, at least in the meaning

9. FRANCIS FUKUYAMA, *AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY* 7 (2007); see also Kenneth Anderson, *Goodbye to All That? A Requiem for Neoconservatism*, 22 AM. U. INT'L L. REV. 277 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=973883.

that Abraham Lincoln famously gave it: a “political community, without a political superior.”¹⁰

Learned and eminent scholars—Anne-Marie Slaughter, as already noted, for example, in her *A New World Order*, Abram Chayes, and Antonia Chayes, or renowned political scientist Robert Keohane—debated whether the rise of liberal internationalism as global governance meant the loss of sovereignty or merely its transformation. And even if I was having none of it, many of the finest minds in the legal academy, in Europe and elsewhere, invested considerable energies in theories of post-sovereign global governance, and equally in the paths that might lead the world there. So, for example, should “global government” prove too difficult, we could retreat to “global governance”—governance without government. Or we could scratch expressly political theory, jettison (at least on the surface) the commitment to one substantive political view over another, and simply aim for a world efficiently run by its necessary bureaucracies; legitimacy would be reduced to technocracy, and legitimate governance would be redefined as that which makes the Internet run on time. Others (in Europe, especially) devoted themselves to celebrating the emerging constitutional theory of the European Union—the “post-sovereign” constitutional order *par excellence*—and elaborating ways in which the constitutional model of the EU could be scaled up to the whole globe, the “global constitutionalism” movement.

Still others decided not to announce a path, but simply to contemplate changes since 1990 and discern in them self-organizing global governance—whatever actually happened somehow could always be seen as leading to political shifts in the world toward the dismantling of the anarchic relations of sovereign states. Others looked for causal material and economic drivers of political global governance—as the world globalized economically, the pressures of a global economy would drive forward political global governance in order to overcome the economic limitations imposed by a politically fragmented world and squeeze out the unneeded political entities known as “sovereign states” as merely rent-seeking sovereign transaction costs on the global economy. Sovereignty, then, would be nothing gloriously political, but merely a monopolistic, hold-up, rent-seeking charge on global economic transactions. Still others believed in a psychological shift in the

10. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), available at <http://www.fordham.edu/halsall/mod/1861lincoln-special.asp>.

hearts and minds of ordinary people, enabled by communications technology to make people and events around the globe effectively immediate to them, thus permitting the emergence of a cosmopolitanism that would underpin shifts away from sovereignty and toward a unified global order.

There were always skeptical voices, of course, but they customarily came from the ranks of “hard” international relations realists; their skepticism was directed toward whether the world could arrive at the dreams and visions of the global governance idealists. It was not about the content of the vision as such – not about the desirability of the vision. They were skeptics, not dissenters. Genuine dissenters from the normative vision (who might or might not also be skeptics about whether it was coming to pass) were far fewer in the precincts of elites, academics and policy folk, who paid attention to this stuff. I count myself as one, since the 1990s—normative dissenter and factual skeptic.

But Professor Glendon, too, in her always measured way, drew upon her work on human rights and its history as an idea in 1945 to urge that those announcing radically different orders of power and authority in the world might reflect carefully on the moral risks of disconnecting universal human rights from the authority of democratic sovereign states. I myself have been less measured, remarking that human rights universalists should be very, very careful what they wish for in the way of retreating sovereignty. The moral universalism that the human rights community has imagined for itself, since the 1990s to today, might be universal in its self-conception, but in practical fact it has always dwelled under the sheltering sky of a specifically *American* hegemony.¹¹

V. COSMOPOLITANISM AT THE U.S. SUPREME COURT

This was life among the intellectuals and academics. But judges can be intellectuals, too, sometimes academics as well, and during this same time period, several Justices of the U.S. Supreme Court began to explore—in a tentative way, in bits and pieces of judicial decisions as well as other venues—the legitimacy of embracing global governance and what that might mean for a national judiciary. It was premised upon the prevailing ethos of globalization, economic drivers of globalization that, in the form of

11. See KENNETH ANDERSON, *LIVING WITH THE UN: AMERICAN RESPONSIBILITIES AND INTERNATIONAL ORDER* 268 (2012).

international commercial and trade disputes, make up significant parts of the judiciary's daily work.

"Cosmopolitanism" as used here is not intended to be a theoretically deep idea. All that's meant is a way of looking at the world and acting toward it, by reference to the whole and not a single, narrow part of it; seeking not precisely abstract universalism, but principles for dealing with the world that nonetheless prioritize interconnections across it; identifying with impartiality over partiality, engagement with many parts of the world while retaining a slightly distanced, toward engagement with any particular part of it; the universal over the particular or the merely parochial.

A full account of cosmopolitanism at the U.S. Supreme Court, however, might also distinguish between two varieties as expressed in constitutional law: one that we might call "rationalist cosmopolitanism," associated with Justice Breyer, and the other "affective cosmopolitanism," associated with Justice Kennedy. Under the "rationalist" approach, references to constitutional courts of other states simply continue, as a matter of degree rather than kind, the way in which courts take each other and their jurisprudence into account in a world of increasingly dense economic, but also social, cultural, technological, and every other form of globalization. In this rationalist account, canvassing the positions of the courts of other nations considering similar problems might "cast an empirical light on the consequences of different solutions to a common legal problem," as he put it in his dissent in *Printz v. United States*.¹²

Critics like myself have raised any number of objections with this seemingly rational interest in learning about how other jurisdictions handle a common problem that is then expressed as a citation in an opinion on U.S. constitutional law. Many of the objections are implied by the aforementioned difficulties of comparison in comparative law. For that matter, if the point about globalization is about "common" problems, then a question regarding the application of the death penalty in the United States is not a "common" question, it's merely a "parallel" one. Absent special facts in which other jurisdictions are involved (such as execution of another state's national with claims of lack of consular access), "common" problems are those in which the answer given by one nation's courts might have cross-border effects on another state or its court system, raising a more-than-academic interest in at least

12. 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

considering coordination. The most important situations of such “common” legal problems are commercial or trade issues that might have consequences for the U.S. or for some other sovereign in international economic relations, and they are not ordinarily constitutional problems. And yet, as the example of *Printz v. United States* demonstrates, leading foreign law citations in U.S. constitutional cases are not about “common” problems in that sense, but instead a rhetorical invitation to see the superiority of another jurisdiction’s answer to an arguably similar issue, almost always about core issues of values—the death penalty, for example.

Cool rationalism, particularly the anodyne suggestion that this is mere “empiricism,” somehow doesn’t seem quite right when the actual cases are those that implicate deep values. What is really at issue, it would seem, is whether constitutional law is supposed to instantiate not the values as expressed through the political processes of popular sovereignty within a sovereign political community, but instead to channel the universal values of global human rights, in which the role of the Supreme Court Justice’s role in constitutional matters takes on the sense of bringing the universal light of human rights—as found in foreign and international tribunals—to the less than enlightened people of the United States and their political representatives. It is easier to see this, however, by looking past the cool rationalism of Justice Breyer to the nakedly transcendental jurisprudence of Justice Kennedy.

Justice Kennedy’s leading citation to foreign and non-U.S.-accepted international law, as far as this argument over universalism goes, is found in *Roper v. Simmons*,¹³ a 2005 Supreme Court case holding unconstitutional the imposition of the death penalty for crimes committed by those under the age of eighteen. Justice Kennedy’s opinion was remarkable because it specifically considered a treaty—the UN Convention on the Rights of the Child—to which the U.S. has considered becoming a party, but has not done so.¹⁴ For many critics, myself included, this amounted to looking to a constitutional human rights ether dwelling somewhere above in the heavens and discerning in it moral propositions that must be embraced as law. Cosmopolitan, yes, but not in the coolly rationalist fashion of Justice Breyer—less rationality than soothsaying, a deeply emotional connection to notions of human rights

13. 543 U.S. 551 (2005).

14. *Id.* at 622.

whose actual status in American law turned out to be curiously irrelevant.

VI. WHATEVER HAPPENED TO CREATING A “GLOBAL LEGAL SYSTEM” THROUGH GLOBAL NETWORKS OF JUDGES?

But that’s cosmopolitanism at the level of citations to the law itself. The more fundamental question, in order to understand the high water mark for such embrace in constitutional law, is to what extent the Justices at the time accepted the arguments made, most notably by Anne-Marie Slaughter, in favor of a sort of global elite of judges, looking horizontally to each other to create what she called a “global legal system.”¹⁵ A benign extension, with some modest accommodations to other legal systems, of essentially American constitutional values? In Slaughter’s formulation, it is benign only if one does not especially value the robustness of the First Amendment, or any number of different American practices in civil liberties¹⁶—a prominent function of the global networks of judges would be to create distinctly social pressures on American judges to see themselves and American standards on such things as free speech as global outliers.

The general idea (popular with some legal academics, human rights activists, and others of the international community equally eager to shut down Rwandan radio stations making an entirely serious call to genocide, and also shut up, say, conservative commentator Mark Steyn) was that American judges needed to be shorn of their historical sense that truly robust free speech was something honorable and the sacred obligation of an independent judiciary to defend against a government or a mob eager to shut down dissenting speech. American judges needed to be socialized into a different sort of society—an international one of fellow judges, whose good opinion would come to matter to them, and who would gradually cause them to feel (not just understand, but genuinely *feel*) that America’s commitment to free speech was, effectively, yet another American vulgarity, and that in any case, it set a bad example in a world in which American arguments for robust free speech were really just permission to incite genuine mass slaughter.

15. SLAUGHTER, *supra* note 8, at 65.

16. *Id.*

This amounts to a sort of shame-and-blame campaign—the standard playbook of human rights NGOs—to embarrass American judges into a sort of generalized embarrassment over the purity of American First Amendment jurisprudence, and to see the need to embrace the sort of “hate speech” limitations embraced by the countries of Europe or Canada. As a campaign, it is intended as a means to push U.S. constitutionalism back to the supposed global center occupied by those possessed of the better angels of universal values. But in order to have traction, such a reshaping requires a particular social context that invites such affect and emotion. Slaughter argued that the proper context was a global network of judges who, although “vertically” appointed by and accountable to their national authorities, would be shaped in their judicial character, so to speak, by this horizontal society¹⁷—a real society that would produce a genuinely global social orientation among judges and that would express itself in the underlying background assumptions that shape the discretionary and rhetorical practices that necessarily infuse judging.

This sounds conspiratorial; it is not and was not intended that way. It merely drew upon the fact that judges necessarily operate against a largely unstated set of background assumptions and world-view; it is perfectly legitimate to suggest that the sensibility of the attentive judge ought to be shaped and educated with particular values in mind. In a globalizing world, in which constitutions do not merely encode values, but human rights—the global mother of all other proper and universal values, on a certain way of seeing things—it’s perfectly legitimate to say that judges ought to be inculcated with a culture of global norms and look for their social approval not parochially to their own society, but to that of the more universal, more impartial and, hence, more *moral* rest of the world. No more judging merely through *our* glass, darkly.

Back in the early 2000s when it was first published, Chapter 2 of Slaughter’s *A New World Order* offered an elegant vision of judges being shaped by global networks of other judges¹⁸ in order to help bring about a convergence of values at a global level, in light of international human rights and, seemingly, anything but the mechanisms of a sovereign people. Today, a decade later, in the resurgence of sovereignty, this seems almost an alternative universe, a fantasy—but in its moment, it *was* elegant and spoke

17. *Id.*

18. *Id.*

to the sense of many global intellectuals that there *was* a genuine pathway forward.

Did Justices of the U.S. Supreme Court of the time lean toward it in any serious way? There were a handful of citations in cases. There were a handful of speeches that excited many. In retrospect, we academics seem to have over-read the commitment behind an address by a Supreme Court Justice to the American Society of International Law annual meeting: one says many flattering things about comparative and international law in such speeches, but in practice one does not quite mean them.¹⁹ The most important statement on the subject turned out to be the public discussion of the use of foreign law in U.S. constitutional adjudication offered by Justice Breyer and Justice Scalia in 2005 at American University Law School.²⁰

In the American University discussion, Justice Breyer was cautious about embracing anything close to the “networks of judges” view, let alone the emergence of the “global legal system” that Slaughter pressed in *A New World Order*. On the contrary, he embraced notably modest grounds for such citation—merely empirical expertise gleaned from how other judiciaries address certain similar problems, combined with an observation that such citation is not that big a deal. It’s not claimed as controlling precedent, or anything much like “precedent” or “legal authority.”²¹ It’s not so different from a judge citing a line from Shakespeare.

Justice Breyer added (I paraphrase) that of course judges read all sorts of things, and if a judge reads opinions from other jurisdictions and draws insight from them, surely the judge ought to acknowledge them.²² We can gloss that to say that it’s not as if judges are special ascetics, isolated in monastic chambers in order

19. The speech was by Justice Ruth Bader Ginsberg from the 2005 American Society of International Law (ASIL) Annual Meeting. See Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. TIMES (Apr. 2, 2005), <http://www.nytimes.com/2005/04/02/politics/02ginsburg.html>.

20. Washington College of Law, “A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer,” (Jan. 13, 2005), *transcript available at* <http://www.wcl.american.edu/secl/founders/2005/050113.cfm>.

21. Justice Breyer, at one point in the discussion, stated: “[F]irst, of course, foreign law doesn’t bind us, constitutional law. Of course not. But these are human beings, more and more, called judges, who are human beings despite concern about that matter -- (laughter) - human beings, called judges, who have problems that often, more and more, are similar to our own.” *Id.*

22. Justice Breyer stated: “If here I have a human being called a judge in a different country dealing with a similar problem, why don’t I read what he says if it’s similar enough?” *Id.*

to ensure that, when they come to judge, they have had no contact with anything other than the “law” or the briefs of the parties. And of course we would not want them to be that; the life of the law, at least American law, is experience of the world as lived, and we want our judges alive to the currents of our times, while still being able to separate themselves from the currents of society in order to be able to judge cases impartially.

The problem in part, however, is that *A New World Order* offered an elegant and convincing explanation of how the gradual accumulation of apparently authority-less citations by American judges to foreign cases in constitutional adjudication could eventually build a tower of authority that would move from mere adornment to “persuasive” authority. It might or might not ever formally be denominated “controlling” authority—triumph for liberal internationalist global governance though that would be—because persuasive authority will often be sufficient. Although it’s not difficult to construct a path by which Justice Breyer’s rationalism could make these moves, it is much plainer in the gradual, but actual slide down this slope represented by Justice Kennedy. The slide is easier to see, in part, because Justice Kennedy’s cosmopolitan commitments are rooted less in coolly instrumental rationality than in “affective” attachments to certain values. It’s an emotional attachment to deeply felt values about human rights, about their universal appeal and propagation, as well as an unabashed desire to use the tools of law to bend the arc of history to the good. Which is to say, it wears its constitutional heart on its sleeve.

The legitimacy, then, that Justice Kennedy seems to view as inherent in these judicial acts appears to derive from a deeply felt sense of their universality. Universality matters because, if these values (inevitably expressed as judicially enforceable rights) *are* universal, then the fact that they don’t have authority in *our* law is neither here nor there; it describes a defect of our law and its failure to properly value universal justice. Given, however, that as mere human beings we don’t have direct access to the commands of universal justice, the next-best test of universality lies in the approval of other legal systems and other judges, the overlapping consensus of the embryonic global network of judges.

This is not a crazy theory of constitutional adjudication in values-laden cases—even if the natural law theory that it implicitly relies upon is quite out of fashion and simply unworkable in a pluralistic society insofar as it is supposed to drive down from broad moral principles to settle particular instances and cases. But its

reliance upon the opinions of others in a global peer community for confirmation of universal values that ought to be made, even imposed, as *our* values, turns a method of nearly transcendental discernment of natural law into a process of seeking social, peer group approval as a way of confirming moral approval. Considered as social practice, in the sense that Slaughter describes as the socialization of judges to a global outlook, it looks an awful lot like the craving for social approval—and social approval, moreover, from everyone who would otherwise *not* be relevant. Journalists and other observers of the U.S. Supreme Court of the period under discussion here made note—a New Yorker profile by Jeffrey Toobin leading the way²³—of Justice Kennedy’s engagement with such international networks, and offered a variety of essentially psychological explanations of it. Some of them were crudely patronizing—a need for approval by a provincial lawyer who still suffered from social insecurities, quite the opposite of the born-to-cosmopolitanism Justice Breyer, being the accompanying thought, expressed openly or not.

The armchair psychologizing is unworthy, in my view, and its underlying social arrogance causes it to miss the core point. Justice Kennedy’s philosophy of judging has seemed to many smart lawyers and legal academics to be intellectually second-rate, vacuous, expansive but empty, rhetoric rather than reason—yet there is, in my view, a role in constitutional judgment for something that is not about syllogism. Justice Kennedy’s constitutional method, at least in regard to the use of foreign or international law sources, is rooted in a worldview of universal values and a core belief that these values are not so much “derived” as “apperceived.” This is usually expressed by saying that Justice Kennedy embraces the “natural law” tradition, but I think the aspects of discernment and apperception are his defining characteristics, for present purposes. In my view, this more than anything else accounts for Justice Kennedy’s otherwise quite bizarre citation to a treaty that the United States has quite consciously declined to ratify and an article of which addressed exactly the issue in the case, *Roper v. Simmons*. Shocking and wrong, yes, bizarre, no.

But if this is true of Justice Kennedy’s constitutional methodology, there is a critique with much stronger bite. While this kind of apperceptive, discerning constitutional philosophy is a long and

23. Jeffrey Toobin, *Annals of Law: Swing Shift*, NEW YORKER (Sept. 12, 2005), http://www.newyorker.com/archive/2005/09/12/050912fa_fact.

valued part of the American constitutional tradition, the apperception of these values customarily has been by reference (even if only tacitly) to America: to Americans, *we* the sovereign people, *our* values, the better angels of who *we* are. In that regard, even the appeal to universal values is still an appeal to us and to our judgment, and so, even if imposed by the Court, it is nonetheless an imposition in the form of an invitation to our better natures. When the appeal to universality is said to receive its greatest confirmation precisely because it is by reference to everyone but us, its imposition is just that, an imposition lacking in legitimacy.

Our law has moral *lacunae*, sure, and there is a time-honored, though limited, legitimate appeal to morality to respond to them—but the legitimacy therein is not by reference to the universal, but to us. It's not by using the "universe" of "universal materials" to apperceive "universal values," and still less so measured by the "international." There's no reason to believe that the "international"—as expressed by any supposed consensus of foreign law or international law not assented to by the United States—is identical to the "universal." "International" and "global" are not the same as "universal."

The legitimacy of "apperceiving" moral values and giving them nearly unmediated application in constitutional law (at least in the constitutional cases where they cannot be legitimated by application of direct syllogisms of the law itself) lies in its appeal to *our* values. It is not Justice Kennedy's affective constitutional method that creates this particular problem; it is, rather, that he invests his affections in universal values (in the admittedly small set of cases in which foreign or un-assented international law is at issue) that are then tested by reference to the planetary whole rather than the American community. That would seem to create a legitimacy problem for a system premised on popular sovereignty. But we must also acknowledge that there is a reply to this: the universal values drawn from the international community are *also* American values. There is no genuine gap between them. They are just, in a word, universal human rights. Since when are Americans against universal human rights?

Well, of course Americans think that human rights are real and important and universal. But we *also* think it perfectly acceptable for their meaning and content to be determined for us—for this political community, through the processes of popular sovereignty and the American Constitution. This is not moral relativism, though it is often mistaken for it: the objection is not from relativ-

ism but from skepticism. The quarrel is not with the objective existence of certain universal rights and values (though their content might be disputed in any given case); the quarrel is with *who* is entitled authoritatively to pronounce them and through what process. The international community (and arguably both Justice Kennedy and Justice Breyer, in this period of their jurisprudence) makes an assumption that has long received little skeptical attention. It is to assume that the “universal” and the “international” or “global” are the same thing, so that merely national constitutional processes for determining the content of universal rights and values must necessarily be “partial” and inferior to the supposedly universal, and therefore “impartial,” processes of the international community.

But this identity is suspect. Global does not mean universal; it merely means not attached to particular geographies. The “interests” and “partialities” of the international community might not be attached to a particular chunk of territory—but is merely the partiality of those who are rootless and geographically detached, elites who live in the jet stream between New York and Geneva, the “interests” and “partialities” of those who do not have a territorial geography. Why should anyone accept that these people have any special moral authority to instruct everyone else on the content of universal values? Why shouldn’t the U.S. constitutional system, which has, after all, been doing this for a long time, be thought by its own people to have at least as good a claim on articulating the “universal”?

In other words, it’s not merely by reason of American parochialism or small-minded nationalism that, during this period, judicial confirmation hearings in Congress began to take sharply critical account of what appeared to be a growing affection for “universal” values, as defined by the “international community.” It is not improper for senators to inquire as to the sources of law that a nominee to judicial office regards as legitimate authority and in what ways; the question that goes to the heart of what a nominee regards as the ground of the Constitution’s legitimacy. The answers signal important commitments under the Constitution. There is nothing dishonorable, of course, in affirming the “global” as the “universal” to which one is committed as the ultimate source of authority. But it is also not easily reconciled with being a Supreme Court Justice in a system committed to *we* the people as sovereign.

VII. THE U.S. SUPREME COURT IN RETREAT FROM UNIVERSALISM
TO EXTRATERRITORIAL JURISDICTION

That was then. It was a moment in constitutional time lasting perhaps fifteen or twenty years, from around 1990 until the late 2000s. Although for convenience this essay has frequently used the present tense to refer to this period, in fact, it is largely in the past. The period of time in which one could talk of a “global legal system” and global judicial networks and convergence around norms by national judges is, on a genuinely global scale, done and over. With it largely, too, the flirtation by some Supreme Court Justices in those years with citation to foreign courts in constitutional adjudication. Never say never, of course, but it does seem likely that future citations will seem more like one-off oddities. They will be isolated and unmoored, lacking an intellectual apparatus standing ready to sustain them and grounded in some larger ideological agenda of the kind that *A New World Order* was ready to offer the judges of the world a dozen years ago.

What happened? After all, this process still moves forward within Europe, and not just among international law academics, who continue to produce volumes on global constitutionalism and the ways it is supposedly happening and how it is supposed to move forward. Among jurists in the EU, one could debate at length to what extent judicial discourse has changed, if at all, but in order to make relevant comparisons to the U.S. Supreme Court, one would have to carefully explore the systemic similarities and differences. A good place to start would be the decisions of Germany’s constitutional court in recent years addressing actions of the European Central Bank responding to the euro crisis of the past five years and whether they violate inviolable terms of the German constitution. German nationalism—national judicial nostalgia for the discipline of the Deutschmark and the Bundesbank? Or the German constitutional court acting in accordance with German constitutional law—but, in the very same judicial decision, acting on behalf of the EU’s greater good and from a concern to maintain the march toward sustainable, long-run EU? On that latter interpretation, a national constitutional court’s decision aims at saving the EU from the tendency of ideal-and-ideology enterprises to be unable to correct course, in their zeal to fulfill the grand political plan without deviation, and so march themselves off the cliff?

In the United States, though, any alleged judicial march toward embracing some set of global norms in constitutional interpreta-

tion (evidenced by a willingness to look to the practices of other countries, in order to draw the U.S. back to the supposed global center on important questions of values) appears quite dead. It might return sometime and in some way, but not in its current form. Nor is this a matter of U.S. legislators exercising sway over the process by pressuring nominees to publicly repudiate the practice and what it signifies, or an executive branch understanding the political need to select nominees to the bench with this political caveat in mind. It appears for now that the Court as a whole has retreated from some of the key tenets of universalism that were once thought to undergird the practice.

The place to see this best is in the recent trajectory of universalism in American courts defined (as likewise in the foreign citation debate) by values issues and human rights is the Alien Tort Statute (ATS)²⁴. The ATS is the famous statute dating back to the First Judiciary Act of 1789, providing a federal court remedy in tort for suits by aliens for violations of the law of nations or a treaty of the United States. Long dormant and forgotten, it was revived by human rights advocates in the 1970s and 80s as a way of bringing civil lawsuits against persons alleged to have participated in rights abuses, such as alleged torturers. The statute is “universal” in the sense that it permits suits by aliens against aliens for alleged acts taking place entirely outside of the United States. In that sense it was regarded as a national statute providing for universal jurisdiction by U.S. courts, because it required none of the traditional bases of international law for a national court to assert jurisdiction, save for universal jurisdiction itself. Because defendants rarely showed up to defend themselves, cases were won by default, and district and circuit courts sometimes took the opportunity to deliver ringing statements about human rights and endorsement of the universalist view.

By the late 1990s and early 2000s, however, the targets of ATS suits had shifted from judgment-proof defendants to multinational corporations with operations conducted through nationally separated, legally distinct, limited-liability corporate entities. These corporate entities had deep pockets (at least collectively), and although in many cases U.S.-headquartered or chartered multinationals were the defendants, in other cases, the corporate defendants might be Canadian, or British, or Dutch, or Chinese. The ATS required no ordinary jurisdictional connection to the U.S.—

24. 28 U.S.C. § 1350 (1948).

an exemplary universal jurisdiction statute in that regard—so a Chinese multinational corporation might just as easily be sued as an American one.

America's closest friends and allies—the UK, the Netherlands, Canada, Australia, and others—had long expressed concern about the apparently limitless (which is to say, universal) reach of the ATS, even after the Supreme Court made (what turned out to be ineffectual) moves to rein it in and tighten up its subject matter requirements in the case of *Sosa v. Alvarez-Machain*.²⁵ Their concerns were partly about the ATS' universality—but universality in the context of a statute that had the effect, whatever its original intention, of establishing a regime of civil liability in international law along with liability in international law beyond states that reached to entities (such as corporations) rather than individuals for criminal violations such as genocide or crimes against humanity. But the Supreme Court took no action, even as lower court cases endorsed all of these things as, in the first place, not contrary to the literal language of the single-sentence ATS, and permitted by the gradual accumulation of expanding lower court precedent. The Court finally agreed to hear a case providing a clear circuit split once the Second Circuit ruled, in sweeping language in its decision in *Kiobel v. Royal Dutch Petroleum Co.*,²⁶ that the ATS did not apply to corporations because, under international law, they were not entities subject to the “law of nations.”

After hearing argument on the question of corporate liability under the ATS, the Court took the surprising move of asking the parties for additional briefing—setting the case for the following Term—on the quite separate, and logically prior, question of whether cases like *Kiobel*, which involved a foreign plaintiff, foreign defendant, and entirely foreign activity (so-called “foreign-cubed” cases) had any business in federal courts at all.²⁷ The Court handed down its decision in April 2013,²⁸ in a superficially unanimous decision with a five-vote majority opinion by Chief Justice Roberts and a concurrence in result only by Justice Breyer that was endorsed by four justices.²⁹

25. 542 U.S. 692 (2004).

26. 621 F.3d 111 (2d Cir. 2010).

27. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (directing parties to file supplemental briefs).

28. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

29. It should be noted that Justices Kennedy and Alito also filed concurrences.

Another ideologically-driven, 5-4 decision from the Court? Surprisingly not. For the purposes of understanding the end of the constitutional moment of a genuinely globalized judiciary based around convergence on universality, the majority and the concurrence shared the most important fundamentals. All nine Justices appear today to share a view that the proper way to see ATS cases—with judicial reasoning that draws upon and extends to different kinds of cross-border disputes, as will almost certainly be seen in the Court’s decision in *Bauman v. Daimler*,³⁰ to make a guess based upon its oral argument—is not by reference to universality, but instead by an analysis based upon traditional bases of jurisdiction (apart from universal jurisdiction itself) found in international law. In effect, this turns the inquiry into one centered around the grounds for asserting extraterritorial jurisdiction, in which the jurisdictional question is not settled simply by reaching to universal jurisdiction but instead requires a nexus under territory, nationality, and subject matter, as well as the related doctrines of comity, closeness and contacts, and so on.

This will leave plenty of room to reach different conclusions about different cases, but at a minimum, the universality that allowed *Kiobel* itself to proceed as a foreign-cubed case has been banished. Chief Justice Roberts adopted a test based on the judicially created “presumption against extraterritorial application” of a statute (absent a clear intent of Congress).³¹ Justice Breyer adopted a more holistic contacts-based approach that, he made clear, would draw under it the serious human rights abuser who is either present or (it seems likely as a reading of the concurrence) has assets in the United States.³² And yet Justice Breyer’s test was framed, not in the universality terms—often sweeping, moralistic, and categorical—that generally characterized ATS opinions of the 1980s onwards, but instead in traditional jurisdictional terms: who would have sufficient contacts with the United States to sustain jurisdiction?³³

VIII. SOVEREIGNTY AFTER HEGEMONY

The U.S. Supreme Court’s shared assumptions in *Kiobel*—majority or concurrences—suggest a very different climate of rea-

30. 133 S. Ct. 1995 (2013) (memorandum opinion granting certiorari).

31. *Kiobel*, 133 S. Ct. at 1665.

32. *Id.* at 1671 (Breyer, J., concurring).

33. *Id.*

soning at the Court today.³⁴ The earlier period was characterized by a hesitant, mostly cautious, but still fundamentally approving, embrace of universality through a globally shared set of judicial values. Citation to opinions of foreign courts in constitutional adjudication is one modest marker of that.

Or maybe not: it's perfectly possible to argue the contrary and say with a shrug that there's little reason to believe that foreign citation ever had the importance that this essay, among many other academic writings, has attributed to it. It was never a harbinger of things to come within constitutional jurisprudence and still less as some grand ideological vision of globalization. For that matter, if it's a mistake to see the foreign citation dispute as anything other than a minor squabble over what to put in largely unnoticed string cites in an opinion, likewise pumping up *Kiobel* into some replacement ideology is even less convincing. Moreover, whereas the citation to foreign law in constitutional adjudication is by way of justification for how to impose a norm otherwise unsupported or only weakly supported internally in U.S. law on the American people as a constitutional matter, ATS cases such as *Kiobel* are the obverse, this normative force turned inside-out—the imposition of American interpretations of supposedly universal norms externally, outwards on others in the world not otherwise connected to the United States. The two are not necessarily inconsistent.

The best way to see the decline of the foreign citation argument, in other words, is exactly what Justice Breyer said—it's not big deal, but if you think it's *that* big a deal, I won't bother to do it any more, because (*A New World Order*, Chapter 2 notwithstanding) there's no grand plan here. As for Justice Kennedy, even assuming the transcendental apperception view suggested in this essay is right, it's not as if he can't perform the same act of discernment on purely domestic legal materials and reach exactly the same result. In any case, to the extent that there's been an evolution here, it has not been driven by any grand political, ideological, sociological, economic, or psychological causes or explanations. The simplest explanation—*entia non sunt multiplicanda praeter neces-*

34. For a discussion of what *Kiobel* and the ATS mean for “sovereignty after hegemony,” see Kenneth Anderson, “*Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute’s Jurisdictional Universalism in Retreat*,” CATO INSTITUTE (2013), <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2013/9/anderson.pdf>.

*sitate*³⁵ and all that—is internal to the law in this case: the Justices have learned the lesson that the comparative law scholars had been saying for a long time: citation to foreign opinions is a lot more complicated and subtle than it looks. It's not illegitimate as such, but it requires a thick understanding of the legal ecology in which that opinion dwells and has meaning. That's important, says the skeptic, because it doesn't require recourse to the larger, external issues that this essay has raised.

Skeptical take-down duly noted. But while accepting the force of the internal comparativist argument, it still seems to me that there's a larger, external agenda in play. It is partly ideological and partly political; more precisely, it is an ideological affinity *blocked* by a political reality. The ideological affinity is simply the tug and pull of liberal internationalism as global governance upon several of the Justices. Though never much more, in my estimation, for any of the Justices on the Court so inclined than a sensibility of cosmopolitanism, even so, it is far from irrelevant in the fundamental jurisprudential approach to universal normative claims. It is some evidence as to whether one's orientation—which is to say, sensibility—in constitutional adjudication looks fundamentally to a theory of popular sovereignty (a theory, of course, that has always accepted a role for counter-majoritarian institutions such as an independent judiciary so long as constrained by the fundamental terms of democratic constitutionalism). Or whether, instead, it senses legitimacy in drawing into constitutional interpretation the general will, the universal will, by comparison to which the people's will is barely relevant and certainly not a source of legitimacy.

The politics that have blocked this path are, in a word: China. China's rise has signaled a resurgence of sovereignty—sovereignty with a very different, very *old* meaning—that renders the dream of a rising liberal internationalism as global governance just that—a dream. It was still possible to hold that dream during the constitutional moment that has just passed; I would have objected to its normative character, but today, it is simply not descriptively plausible, at least not without some heroic assumptions about politics and the normative pull of law. Yet why, someone will ask, is sovereignty any greater a bar today than it was any time before?

It's a good, brutal question and the answer is equally brutal. The dream of universal human rights, liberal internationalism,

35. "Entities should not be multiplied beyond necessity."

and global governance was only possible, it turns out, when it dwells under the sheltering sky of American hegemony. A loose and undemanding American hegemony that doesn't much care even if those who benefit from America's rough order and security noisily reject the terms of hegemony in favor of liberal internationalism and demand that America transfer the instruments of its hegemony over to the international community.³⁶ Or at least be willing to act as an instrument of the international community, rather than as the hegemon acting in its own interest (which is, *nota bene*, why the hegemon is trusted in things that truly count rather than the international community's collective-action-failure-prone "collective security") but which provides significant global public goods as well, such as the security and freedom of the high seas and the airspace above it.

This is a complicated account, because it requires an explanation of hegemony and its relationship to the international community, and the relationship of hegemony to claims of universal values. But the conclusion is the same: the dreams of global governance in a liberal internationalist world, universal values and universal human rights, are possible only under a broadly liberal democratic hegemon. And it was only under that hegemony that both the dream of an emerging "global legal order" or, for that matter, the American ATS or other states' mechanisms of universal jurisdiction, were ever possible.

But American hegemony is seemingly under pressure and in retreat. Nowhere so much as in the eastern Pacific, where America's security commitment and with it, the perception that a belligerent shift of the status quo would meet with a vigorous American military response, are both in some doubt. Whether American hegemonic security in the Pacific is actually in doubt, I do not know—but it is clear that American allies and China all harbor questions about it. Take the decline of American hegemony by assumption, however. Does it seem possible that this really has no implications for the possibility and nature of international legal relations, through such jurisdictional mechanisms as the ATS or (fondly held) background assumptions about the rise of liberal internationalism and global governance?

It's hard to imagine that the international political perception of hegemony (which is never a matter of mere power alone, but instead of a broad, rough legitimacy that transforms the use of pow-

36. See generally ANDERSON, *supra* note 11.

er into authority) does not impact how governments and courts see the claims of normative universalism and universal values. The claims of universalism might start to seem an unaffordable, unsustainable sentimentalism: do the United States government, the Obama Administration, and the administrations that come after really think it will be politically prudent to allow Chinese corporations to be sued in American courts by non-Americans for activities, none of which take place in America? It is a mistake to attribute political motives of this kind to Justices of the Court in a single case, at least not without clear evidence of it. Yet a reasonably clear general incentive for both government and the judiciary might predict an overall trend toward replacing expanding concepts of universal jurisdiction with much more limited, sovereignty-linked tests found in traditional bases of extraterritorial jurisdiction—whether *Kiobel*, or *Daimler*, or other cases of extraterritorial jurisdiction.

Yet, by the same token, the decline of universalism makes global governance claims that depend upon giving up important aspects of sovereignty less attractive because there is no good reason to think they will be reciprocated by anyone who matters. And in any case, even such seemingly unimportant activities by the judiciary—citing foreign law or un-assented international law in constitutional cases—is not likely to seem attractive in a world in which the rising sovereigns, the new powers or great powers, are more likely to be, if not themselves illiberal authoritarians, less impressed with arguments that promoting liberal democracy is a priority of the new world order. That was a reality of the international community that could long be masked—the totality of the international community could be reduced to the views of the “good guys,” the Nordics or Costa Rica or New Zealand, while the much more dicey moral reality of the world could be suppressed. But the actual nature of the “international community” can’t be suppressed in a world in which American hegemony is in serious retreat and China’s version of illiberal, undemocratic sovereignty, not liberal internationalism, is ascendant and admired as a path to economic success that eschews liberal democracy as a snare and a trap and simply unnecessary.

IX. CONCLUSION

The question for the future, then, is whether *any* member of the U.S. Supreme Court is going to think it a prudent or attractive exercise to cite to foreign courts, or to international law to which

the U.S. has not assented, in cases interpreting its own Constitution, as a way of underscoring the moral authority of the international community in channeling universal values—in a world in which the international community takes on much more of the character of China than Sweden. And, in the absence of the restraining weight of the world's security and economic hegemon, an international community whose members embrace exercises of sovereignty that owe little to liberal internationalism and its form of global governance.

It's possible that citation or deeper forms of judicial integration—in case law or common interpretations—will take hold as a form of solidarity among liberal democracies that sense the pressures coming at them from a new world order that takes its cue from sovereignty unconstrained by liberalism. Indeed, I believe something like this might well take place among societies with pre-existing affinities: Britain, Canada, Australia, or New Zealand, for example; or within the EU as part of its ongoing process of integration; or even among liberal democratic Latin American states (perhaps as they address issues such as labor rights or environmental issues arising from foreign investment, or seek to revise increasingly controversial Bilateral Investment Treaty regimes). Perhaps even the United States would join in; but whether from a position of strength (as the hegemon citing the courts of weaker states in support of its liberal democratic struggles) or weakness (as the declining hegemon seeking strength in numbers) is an open question.

With one important exception—Justice Kennedy's reliance upon an un-ratified treaty for a deeply values-laden proposition on human rights³⁷—actual citations to foreign law in U.S. constitutional jurisprudence date have been little more than adornments—little more than what Justice Breyer said they were. The concern among critics was always to nip it in the bud before it could grow into something widely grounded in judicial opinions at all levels of courts as a basis for appealing to international human rights law as a ground for imposing supposedly universal claims on Americans in an end-run around domestic sovereign practice. It's easy to scoff, now that the practice has largely been stopped in its tracks, that it never was more than what it was; like the ATS and other judicial mechanisms that reach to open-ended international

37. *Roper v. Simmons*, 543 U.S. 551, 622 (2005).

law moralizing, once embedded, they have no natural stopping points.

This is an observation that Mary Ann Glendon has emphasized many times in her writing: rights-talk is self-inflating. It's one of the reasons why Professor Glendon's work, even dating back twenty or more years, bears re-reading. The political feedback processes that tend to put the brakes on the one-way ratchet of rights-talk in U.S. domestic law are much less able to do so when the claims come from vague declarations of universal human rights law, the formulation and claims to authority of which lie in the hands of constituencies largely outside the U.S. political process. In a world in which the persistence of American hegemony is in genuine question, foreign law citation in constitutional adjudication is part of a cluster of extraterritorial jurisdiction practices that are likely to be revisited if the international political environment continues to shift away from American power. Universalist versions of the ATS or universal jurisdiction claimed by national courts in an expanding way are likely to contract—as they already are. There are excellent internal legal explanations for this, but the external political factors surely play some kind of role. It's always possible that predictions like this come a cropper, of course. But absent some kind of serious resurgence of American hegemony in a way that is not just about power, with America's security and economic power underwriting the fundamental conditions of stability (particularly in the Pacific), supporting players such as the judiciary must eventually follow the decline.

In that case, universal jurisdiction by national courts or reaching extraterritorial jurisdiction doctrines are likely to contract over time, at least in part because their universalist claims depend not upon universality but upon hegemony. In a world of American hegemony in retreat, however, what's rising is not a global community of shared values, but instead sovereigns far less constrained by U.S. power and far less attached to liberal values. Judiciaries of the diminished powers are less likely, it seems to me, to embrace universalist or reaching extraterritorial claims because they can't back them up and because the political branches of those governments see a sharp increase in political risks.

Sustained American hegemony would be better. The proudly universal claims of values and rights proffered by the "good guys" of the international community have always depended (far more than many might want to admit) on a hegemonic order that allowed them to portray their claims as universal rather than simp-

ly as the overlapping values of the hegemon. Claims of universal human rights owe far less to America paying a decent respect to the opinions of mankind—at least if that is supposed to mean embracing the norms and authority of the international community as global governance—than America’s long-run exercise of global power in as decent a way as would yet be effective.³⁸

38. THOMAS BERGER, *ARTHUR REX: A LEGENDARY NOVEL* 484 (1978).

The Role of Comparative Law in Shaping Corporate Statutory Reforms

Marco Ventoruzzo*

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I. INTRODUCTION

A broad but useful definition of comparative law states that:

Comparative Law is not a body of rules and principles. Primarily, it is a *method*, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of that method it becomes possible to make observations, and to gain insights, which would be denied to one who limits his study to the law of a single country.¹

More specifically, according to some scholars, comparative law “was not solely the isolated study of foreign legal systems by specialized scholars, but was seen as a commitment to comparative

* Professor of Law, Bocconi University School of Law, Milan, Italy, and Pennsylvania State University, Dickinson School of Law, University Park, PA, USA; Vice-director, Paolo Baffi Research Center, Bocconi University, Milan, Italy; External Scientific Member, Max Planck Institute Luxembourg; Research Member, European Corporate Governance Institute, Brussels, Belgium..

1. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 1 (5th ed. 1988).

methodology throughout legal scholarship aimed to produce actionable knowledge for domestic reform.”²

Based on these definitions, it is clear that comparative law can play an important role in shaping the development of national or state law. This is particularly true in the case of business law, and specifically corporate law, a field in which international and inter-states transactions are common and in which all the actors involved (legislatures and regulators, the judiciary and legal scholars) often have the opportunity, if not the need, to consider foreign systems and to understand their rules. From this knowledge a natural dialogue should follow among scholars, practitioners and policy-makers of different jurisdictions regarding the adoption (or rejection) of new rules or procedures unknown in one particular country but developed in others. This dialogue is essential to solve the practical problem of coordinating different regulations and legal approaches to specific issues. Legal history indicates an almost endless list of “legal transplants” (defined below) in this area.³

This Essay focuses on how comparative law played, and plays, a role in the statutory development of corporate laws. To be sure, comparative law also plays a role in the development of case law: often judges look at other systems, treating their legislation or case law as persuasive authority, especially when there is a lack of precedents helpful to resolve the case before them in their own jurisdiction. The role of comparative law in the development of judge-made law is, however, subtler than and often not as clear as in the case of statutory reforms. This is only natural, as judges are primarily required to apply the law of the land, and only in relatively rare situations do they explicitly turn to foreign examples, generally only as obiter dictum or as supporting argument to sustain a conclusion based on local law. In addition, as courts develop their own body of precedents, the influence of foreign deci-

2. Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT'L L. 477, 510 (2012).

3. See Alan Watson, *THE MAKING OF THE CIVIL LAW* 38 (1981); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995) (considering Watson's theory of legal transplants). A very interesting look at the development of corporate law from a comparative perspective, and insights on the diffusion of rules elaborated in some jurisdictions to others is offered by Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791 (2002).

sions tends to wane.⁴ Several Justices of the U.S. Supreme Court, for example, are explicitly against the citation of foreign precedents in their decisions.⁵

The influence of laws of other systems on the development of statutory law is, on the contrary, more common and explicit. It represents a tradition that accompanied legal reforms since the very beginning of the development of legislation. For these reasons I will concentrate on statutory law.

Concentrating our attention on modern corporate law,⁶ I argue that it is necessary to distinguish two basic ways in which comparative law influences legal reforms in a particular jurisdiction. The first one is through regulatory competition among different systems. In order to make a system more competitive and attractive, or to remove disadvantages affecting the economic development of a system, legislatures can respond to the threat of competition from foreign economies by changing their laws, either by borrowing rules and institutions from other systems (“legal transplants”), or by adopting rules designed to protect their own interests vis-à-vis the effects of foreign law.

The second “channel” through which comparative law plays a role in shaping local rules is a top-down harmonization process. Various factors can incentivize a harmonized regulation of corporations: the need to create a common market in which all economic actors can operate in a leveled playing field, the removal of barriers to commerce among states, the desire to reduce regulatory arbitrage, the goal of ensuring to all constituencies of different juris-

4. See Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008 (observing the decreasing influence of U.S. Supreme Court decisions on the Supreme Courts of Canada or Australia).

5. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 114 (2002). For example, Chief Justice Rehnquist, in his dissent in *Atkins v. Virginia*, 536 U.S. 304, 324-325 (2002), a capital punishment case addressing the execution of mentally retarded defendants, observed, “I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination.” Other justices have, on the other hand, advocated the utility of considering foreign law as a guide, especially in certain hard cases: for example Justice Breyer, but also Justices Stevens, O’Connor and Ginsburg. For a discussion of their positions, see Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POLY 291 (2005). An interesting article on the use of comparative law in judicial opinions in Europe is Martin Gelter & Mathias M. Siems, *Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, available on www.ssrn.com and forthcoming in 62 AM. J. COMP. L. ___ (2014); for a broader discussion of this issue, see Mary Ann Glendon, *Comparative Law in the Age of Globalization*, 52 DUQ. L. REV. 1 (2014) in this issue.

6. And the argument can obviously be extended to many other legal fields, from taxation to securities laws, from bankruptcy law to intellectual property, to name a few.

dictions a similar level of legal protection, and so on. Typically, international agreements can foster harmonization. The paradigmatic examples of this are corporate law (and securities regulation) directives in the European Union, but examples are also present in the U.S. Consider, for example, the Sarbanes-Oxley Act of 2002, which introduced some common rules into the field of corporate governance at the federal level, or the role played by the Model Business Corporation Act (“MBCA”).⁷ The rules contained in these legal instruments are rarely developed out of the blue. Generally, they take into account regulations already existing in one or more jurisdictions, and through a negotiation process, tend to extend them also to other systems.

In the following pages I will discuss several examples of how comparative law influenced the development of statutory corporate law either through the mechanism of regulatory competition or through harmonization, both in the U.S. and in the European Union. I will conclude by considering the role of comparative law in corporate law’s statutory evolution. A final caveat is important: in this Essay, I will include in the definition of comparative law also comparisons among different legal systems belonging to the same nation, such as in the case of U.S. states, and not limit the notion of comparative analysis only to comparisons with foreign legal systems.

II. REGULATORY COMPETITION IN THE U.S. AND THE ROLE OF COMPARATIVE LAW: THE EMERGENCE OF DELAWARE

Regulatory competition among states has been defined as “the genius” of American corporate law.⁸ In the U.S., corporations are free to choose the state of incorporation, and then simply file the governing documents of the corporation with the local secretary of that state.⁹ Once the choice is made, the internal affairs of the

7. For a critical overview of the corporate governance provisions of the Sarbanes-Oxley Act, see Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Houman B. Shadab, *Innovation and Corporate Governance: The Impact of Sarbanes-Oxley*, 10 U. PA. J. BUS. & EMP. L. 955 (2008). For a rich discussion of the evolution of the Model Business Corporation Act, see the contributions in James D. Cox & Herbert S. Wander (special editors), *The Model Business Corporation Act at Sixty*, 74 LAW & CONTEMP. PROBS. (2011).

8. See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993).

9. On the features of the U.S. “market” for corporate charters, see Marco Ventoruzzo, “Cost-based” and “Rules-based” Regulatory Competition: Markets for Corporate Charters in the U.S. and in the E.U., 3 N.Y.U. J. L. & BUS. 91, 102 (2006), where the reader can also find a bibliography.

corporation are governed by the laws of the state of incorporation, even if the corporation does not have any specific connection with that state, apart from being incorporated there.¹⁰ States compete to attract corporations both because of franchise taxes paid by the corporation, and to maintain a vibrant market for legal services. Scholars have discussed whether this competition among states leads to a race to the top, i.e. the development of the most efficient corporate law rules, or a race to the bottom, to the advantage of states that offer a lower level of protection of shareholders. It is well known that the “winner” of this competition is Delaware. This feature of the American system has been discussed so extensively in the literature that it is not necessary here to offer a full account of how it works.¹¹

It is, however, interesting to consider the role played by comparisons among different states’ corporate statutes in this race among U.S. states. A phenomenon that is necessary to consider is the expectation that states that want to compete with Delaware for a slice of the “market for charters” would simply “copy” its statutory provisions. Interestingly enough, however, this is not so common.¹² One possible explanation is that the real advantage of Delaware is not so much in its statutory provisions (notoriously flexible, but also somehow vague and convoluted), but rather in the expertise and efficiency of its judiciary, an element that is much more difficult to replicate in other states, and in network externalities connected to the very fact that most publicly held corporations are incorporated in Delaware.¹³ Notwithstanding this obser-

10. See 1 JAMES D. COX & THOMAS LEE HAZEN, *COX & HAZEN ON CORPORATIONS* 123 (2d ed. 2003).

11. Among many contributions on the role of state competition in corporate law and securities regulation, as either a race-to-the-top or to-the-bottom, see the classical works by William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *YALE L.J.* 663 (1974); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. LEGAL STUD.* 251 (1977); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 *NW. U. L. REV.* 913 (1982); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 *YALE L.J.* 2359 (1998); Merrit B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is Not Investor Empowerment*, 85 *VA. L. REV.* 1335 (1999). For a comprehensive bibliography on the role of regulatory competition in U.S. corporate law, see Kagan Kocaoglu, *A Comparative Bibliography: Regulatory Competition on Corporate Law* (Georgetown Law Working Paper 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103644.

12. Most states (thirty nine) have in fact preferred to adopt – with some local variations – a version of the Model Business Corporation Act. See DOUGLAS M. BRANSON ET AL., *BUSINESS ENTERPRISES: LEGAL STRUCTURES, GOVERNANCE, AND POLICY* 184 (2d ed. 2012).

13. See Peter V. Letsou, *The Changing Face of Corporate Governance Regulation in the United States: The Evolving Roles of the Federal and State Governments*, 46 *WILLAMETTE L.*

vation, comparisons among states have played a role in shaping modern corporate law. I will briefly discuss here three examples, in chronological order: the very initial stages of Delaware supremacy, the adoption of anti-takeover statutes, and the enactment of provisions aimed at increasing the power of shareholders in the election of directors.

In the 1880s, New Jersey was looking for a way to improve its finances. The state provided for a franchise tax for corporations incorporated there. Following the advice of a New York attorney, James B. Dill, the state decided to try to attract corporations by making its laws more appealing to managers. In particular, toward the end of the century, with a series of acts, New Jersey allowed corporations to buy, hold and sell the stock of other corporations, making it possible to create holding corporations. Legal reforms in those years also simplified other relevant aspects of corporate law, as other states began to feel the competitive pressure exercised by New Jersey.¹⁴ In 1892, for example, New York granted a special charter to General Electric, containing provisions very similar to the ones of the New Jersey legislation; this charter was explicitly motivated by the fear that the corporation might reincorporate in New Jersey.¹⁵

In this context, Delaware was a follower of New Jersey. In 1899 it enacted a general corporation act that borrowed—in fact copied—many of the provisions of the New Jersey legislation that were more attractive to managers, such as the possibility of perpetual existence for a corporation, the fact that filing documents with the secretary of state was sufficient to incorporate (without judicial control), and rules allowing corporations to hold shares of other in-state and out-of-state corporations.¹⁶ In the following years, Delaware started eroding the advantage of New Jersey, in part due to its lower taxes for business incorporated in the state, and in part because of additional legislative measures designed to

REV. 149, 196 (2009). “Network externalities” are defined by economists as positive or negative effects on the user of a product or service of others using the same or compatible products. A good and simple example is the effect of owning a popular car: it is easier and often cheaper to find spare parts and mechanics able to work on the car.

14. William E. Kirk, III, *A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence*, 10 J. CORP. L. 233, 246-50 (1984). See also Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 820 (2012); Joel Seligman, *A Brief History of Delaware’s General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249 (1976).

15. Kirk, *supra* note 14, at 249.

16. *Id.* at 255.

favor corporate insiders. Particularly important in this respect was the 1911 amendment of its general corporation law limiting directors' liability for illegal payments of dividends or capital reductions to cases of willful or negligent violation.¹⁷

The true watershed came, however, with Woodrow Wilson, then governor of New Jersey. As part of his presidential campaign in 1912, while he was still governor, Wilson took a strong position against monopolies.¹⁸ As a consequence, state legislation against monopolies and holding companies was enacted in New Jersey.¹⁹ Almost immediately New Jersey started losing its competitive edge in the market for corporate charters, and most corporations turned to neighboring Delaware for a more business-friendly legal environment. New Jersey saw a strong decline in the number of businesses incorporating in the state, and Delaware became the new leader. Although New Jersey repealed the anti-monopolistic statutes adopted in 1912 just a few years later, it never regained its original preeminence.²⁰

The rise of Delaware as the most important state for corporations, especially publicly held ones, was largely the result of a comparative study of the legislation of the sister state of New Jersey. By borrowing the measures that were attractive to corporations, and rejecting the ones unfriendly to business, Delaware built its competitive advantage and attained a position that lasts to these days.²¹ We can, therefore, observe that the very phenomenon of regulatory competition in U.S. corporate law developed through legal transplants made possible by a comparative understanding of corporate statutes.

A. *Anti-takeover Statutes*

Another interesting and more recent example of how the corporate laws of one jurisdiction can influence, through regulatory competition, the development of legal rules in other systems concerns anti-takeover statutes. Beginning in the 1960s, due to a wave of hostile acquisitions, states' legislatures started to attempt

17. *Id.*

18. *Id.* at 256.

19. *Id.* at 256-57.

20. *Id.* at 257-58.

21. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 609-10 (2003) (observing how Delaware "copied" New Jersey's corporate laws in order to attract corporations).

to protect corporations doing business or incorporated in the state from possible hostile takeovers.

A “first generation” of anti-takeover statutes adopted a very simple, and somehow naïve, approach introducing specific disclosure requirements, waiting periods to launch a tender offer, and the need for a merit-based approval of the acquisition by a state authority.²² A good example of this first generation of statutes was the Illinois Business Takeover Act.²³ The Supreme Court declared this statute unconstitutional in *Edgar v. Mite*,²⁴ both because it violated the Commerce Clause of the federal Constitution, and because it was pre-empted by the Williams Act,²⁵ the federal statute regulating takeovers, which aimed at creating a level playing field between the acquirer and the target corporation.²⁶

Other states, observing the outcome of this case, drafted anti-takeover rules designed to avoid the constitutional hurdles raised by the Illinois Act (so-called “second and third generation” statutes).²⁷ The key feature of these statutes was that they implemented defensive barriers regulating the internal affairs of the corporation, a subject strictly within the competence of states, and that they only applied to domestic corporations (i.e., corporations incorporated in the state).²⁸ These statutes take several forms: most of them are modeled after one of the following regulatory schemes. There are “control share acquisition statutes” that prevent a bidder acquiring more than a set threshold of the shares from voting her shares unless a majority of disinterested shareholders votes in favor of the acquisition. “Business combination statutes” limit certain transactions that typically follow a successful acquisition, such as mergers, sale of assets, and liquidation for a number of years after the acquisition if the board of the target

22. Under a “merit-based” approach, a state authority is granted the power to review the tender offer and allow it to go forward only if it determines that the price and conditions offered are fair for the shareholders. The first anti-takeover statute was enacted in Virginia in 1968; soon enough more than thirty states followed in its footsteps. See John C. Anjier, *Anti-Takeover Statutes, Shareholders, Stakeholders and Risk*, 51 LA. L. REV. 561, 69 (1991).

23. Ill.Rev.Stat., ch. 121 1/2, ¶ 137.52-9 (1979), *invalidated* by *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). See Guhan Subramanian, Steven Herscovici & Brian Barbetta, *Is Delaware’s Antitakeover Statute Unconstitutional? Evidence from 1988-2008*, 65 BUS. LAW. 685, 692 (2010).

24. 457 U.S. 624 (1982).

25. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m(d)-(e), n(d)-(f)).

26. See *Edgar*, 457 U.S. at 639.

27. See THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 675 (3d ed. 1996).

28. *Id.*

corporation does not approve the transaction. “Fair price statutes” require a bidder to offer a “minimum price” if the acquisition is not approved by a supermajority of the shareholders. “Cash-out statutes” provide that the acquirer of a set threshold of shares must buy all the remaining shares at the highest price paid.²⁹ “Other constituencies’ statutes” allow the directors of the target to take into account the interests of stakeholders different from shareholders, like employees or the local community, in adopting defensive measures. Finally, some statutes explicitly allow and regulate the use of “poison pills” by the target corporation.³⁰

One of the most significant examples of these second generation statutes is the Indiana Control Share Acquisition Act of 1986.³¹ Under this piece of legislation, the board of directors of an Indiana corporation could opt into a regime in which, if a buyer passed a specific threshold of the voting shares (twenty percent, thirty percent, or fifty percent), she would not have the right to vote her shares unless a majority of the remaining disinterested shareholders granted her the right to vote.³² In this case, the corporation might redeem the shares from the buyer at their fair value, if authorized by the articles of incorporation or the bylaws.³³

The constitutionality of this statute was challenged before the Supreme Court in the famous case of *Dynamics Corp. of America v. CTS Corp.*³⁴ In this case Dynamics, a New York corporation, intended to raise its stake in CTS, an Indiana corporation, from approximately ten percent to almost twenty-three percent.³⁵ Because CTS had opted into the Indiana Control Share Acquisition Act, Dynamics sued, arguing the unconstitutionality of the statute.³⁶ The Court of Appeals ruled that the statute was invalid, following *Edgar*.³⁷ The Supreme Court, however, granted certiorari and ultimately decided that the statute was valid, both with

29. See STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 411 (2d ed. 2009).

30. See Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the “Race” Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1827 (2002).

31. IND. CODE ANN. § 23-1-42 (West 1986).

32. See STEPHEN M. BAINBRIDGE, *supra* note 29, at 411.

33. See Russell D. Garrett, *Third-Generation Anti-Takeover Statutes in Oregon and Indiana after Dynamics: Target Corporations Control the Ship and Raiders are Foiled*, 24 WILLAMETTE L. REV. 73, 83-84 (1988).

34. 481 U.S. 69 (1987).

35. *Id.* at 75.

36. *Id.*

37. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 263 (7th Cir. 1986), *rev'd.*, 481 U.S. 69 (1987).

respect to the Commerce Clause and to the issue of preemption by the Williams Act.³⁸

What is relevant to our discussion is how other states adopted the Indiana approach after it passed constitutional scrutiny: Oregon, for example, introduced its first anti-takeover statute on the basis of the approach followed by the Indiana legislature.³⁹

It is not necessary in this Essay to dissect the technicalities of these laws, and it would be beside the point here to discuss the economic effects of these provisions on the different stakeholders.⁴⁰ It is interesting, however, to observe how quickly different states copied legal instruments developed through experimentation in other jurisdictions, yet another indication of how comparative analysis led legislatures to use legal transplants to regulate the market for corporate control.

B. Proxy Access and the (Failed) Challenge of North Dakota.

Continuing our analysis of examples of the influence of comparative law through regulatory competition in the U.S., another interesting case is offered by the recent debate on proxy access. In short, in the last few years, institutional investors have been pressing corporations to allow shareholders to include their nominees in the proxy statement sent out by the corporation for the election of directors. Traditionally, in fact, corporations could exclude shareholders' proposals concerning the election of directors from the corporate proxies.⁴¹

In 2007, North Dakota tried to exploit investors' requests for a stronger voice in the election of directors by enacting the North

38. *Dynamics*, 481 U.S. at 94. See Garrett, *supra* note 33, at 85.

39. Garrett, *supra* note 33, at 89.

40. It is worth noting, however, that the adoption of anti-takeover statutes tells us something about the dynamics of regulatory competition in the U.S., and more specifically about whether it leads to a race to the top or to the bottom. According to a very interesting study by Subramanian, in fact, corporations seemed to stay away, or move, from states with anti-takeover statutes too favorable for the target (such as Massachusetts, Ohio and Pennsylvania). This empirical evidence suggests that the incumbents that make the decision on where to incorporate or reincorporate do not necessarily choose the jurisdiction that offers them the highest level of protection, but look for systems that also protect adequately the interests of minority shareholders to receive, under certain conditions, a premium for control. See Subramanian, *supra* note 30, at 1801.

41. See Marco Ventoruzzo, *Empowering Shareholders in Directors' Elections: A Revolution in the Making*, 8(2) EUR. CO. & FIN. L. REV. 105 (2011).

Dakota Publicly Traded Corporation Act (“NDPTCA”).⁴² In brief, the Act is a sort of investors’ “wish list” that includes shareholders’ access to corporate proxy statements, majority voting in directors’ elections, shareholders’ advisory votes on executive compensation, and limitations to supermajority rules and antitakeover provisions. The rationale was to enter the competition for corporate charters by offering a legal regime valued by institutional investors, with the idea that some corporations might opt to incorporate in the state under pressure from these institutional investors. In this way, North Dakota hoped to compete against Delaware in attracting corporations offering a new “product”: its pro-investors rules. As far as we can tell a few years after the enactment of the North Dakota Act, the experiment has not really been successful.⁴³ It is, however, interesting for our purposes to point out that, once again, an idea derived from comparative analysis of corporate statutes formed the basis of statutory reform in the field.⁴⁴

Even more interesting and relevant to our discussion is that, shortly after the enactment of the NDPTCA, Delaware responded. In particular, in 2009 the Delaware legislature amended Section 112 of the Delaware General Corporation Law to provide that the bylaws of a corporation can grant shareholders access to the corporate proxy statement in directors’ elections under certain conditions.⁴⁵ Two caveats are important. First, the Delaware move did not really add much to the pre-existing regime because, even before this amendment, the governing documents of the corporation could allow proxy access to shareholders. Secondly, as also pointed out in general by Mark Roe,⁴⁶ the Delaware legislature probably did not act out of fear of competition from North Dakota, but rather to avoid federal rules on this issue that might preempt state law (federal rules were in fact introduced later on).⁴⁷

Once again, however, the point of this story is not so much about the specific rules adopted, but rather to emphasize how regulatory competition (either horizontal, among states, or vertical,

42. N.D. Cent. Code § 10-35 (2010). For a critique of the possible success of the Act in attracting corporations, see Stephen M. Bainbridge, *Why the North Dakota Publicly Traded Corporation Act Will Fail*, 84 N.D. L. REV. 1043 (2008).

43. Ventrizzo, *supra* note 41, at 112.

44. *Id.*

45. DEL. CODE ANN. tit. 8, § 112 (West 2013)

46. Roe, *supra* note 21, at 600.

47. Ventrizzo, *supra* note 41, at 117.

between state and federal law) creates the conditions through which comparative analysis influences the development of statutory corporate reforms.

III. HARMONIZATION OF CORPORATE STATUTES IN THE U.S. AND THE ROLE OF COMPARATIVE LAW

Corporate statutes develop not only due to competitive pressure among legislatures, but also as a result of harmonization efforts. One of the best examples of successful harmonization that can be found in the U.S. is the MBCA. This is a peculiar type of harmonization in the sense that it is not imposed top-down, as in the case of the European Union's directives, but rather, it is a spontaneous harmonization. The MBCA is not in fact a statute but, as the name suggests, is instead a model adopted by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association in 1950 and frequently updated and revised throughout the following decades.⁴⁸ States are free to borrow all or part of the provisions of the Act. As of 2005, approximately twenty-four states had adopted—to a large extent, even if often with some local variations—the MBCA.⁴⁹ Other calculations suggest a higher number of states following the MBCA.⁵⁰ It might be argued, as mentioned before, that more states have preferred to turn to the MBCA rather than copying the Delaware General Corporation Law, notwithstanding the role of Delaware in the market for corporate charters.

A comparison of the structure of the MBCA with that of the Delaware corporate statute illustrates why this is not surprising. To the extent that it is possible to generalize, Delaware statutory provisions leave a lot of room to case law, while the MBCA offers a more detailed and comprehensive set of statutory provisions. It is therefore easier for a state to copy the latter model, which gives guidance to businesspeople, practitioners and judges. In addition,

48. For a recent collection of contributions discussing different aspects of the development of the MBCA, see Cox & Wander, *supra* note 7. Interestingly enough, Canada also shows a degree of harmonization with the MBCA. See also Cally Jordan, *The Chameleon Effect: Beyond the Bonding Hypothesis for Cross-Listed Securities*, 3 N.Y.U. J. L. & BUS. 37, 71 n.126 (2006).

49. See Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 844 (2005).

50. Thirty nine, according to BRANSON ET AL., *supra* note 12.

at least, according to its drafters, the MBCA was (and arguably is) “better organized and more clearly drafted than the DGCL.”⁵¹

The MBCA, however, was not born and did not develop out of the blue. Quite the contrary, it can be considered something between a restatement of the best corporate laws and a compilation of new rules designed to address specific problems emerging from existing corporate laws. From this perspective, if one takes a closer look, it is clear that between the MBCA and the DGCL itself there is a “symbiotic” relationship, because one influenced the other.⁵² In other words, the MBCA and its harmonizing strength derive from comparative law.

For example, due to a historical accident, the first drafters of the MBCA were predominantly members of the Chicago bar and, therefore, the original structure of the MBCA resembled the Illinois Business Corporation Act of 1933⁵³ quite closely.⁵⁴ This Act, however, had in turn been at least partially inspired by the Delaware General Corporation Law, as were other modern corporate statutes enacted during that period.⁵⁵ The MBCA quickly became very successful, and several states amended their corporation laws to adopt provisions and approaches of the Act.⁵⁶ Partially as a response to this development, in the 1960s Delaware revised its corporation statute, and the 1967 reform of Delaware law paid close attention to the MBCA.⁵⁷

The development of the MBCA has also been influenced by changes in the business environment. As an illustration, one can consider that in 2006 the MBCA was amended to provide for majority voting to elect directors in response to growing pressure from investors to adopt majority voting as opposed to plurality voting.⁵⁸

The MBCA represents a form of spontaneous harmonization. Convergence of corporate rules toward one single model can, how-

51. Jeffrey M. Gorris, Lawrence A. Hamermesh & Leo E. Strine, Jr., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 LAW & CONTEMP. PROBS. 107, 108 (2011). See also Jule E. Stocker, Book Review, 16 BUS. LAW. 748, 748 (1961) (reviewing Model Business Corporation Act Annotated).

52. Gorris et al., *supra* note 51, at 107.

53. 1933 Ill. Laws 310.

54. Gorris et al., *supra* note 52, at 109.

55. *Id.*

56. See BRANSON ET AL., *supra* note 12, at 7-8.

57. Gorris et al., *supra* note 52, at 109-11.

58. John F. Olson & Aaron K. Briggs, *The Model Business Corporation Act and Corporate Governance: An Enabling Statute Moves toward Normative Standards*, 74 LAW & CONTEMP. PROBS. 31, 38 (2011).

ever, also be achieved, somewhat more effectively, by the federal government, to the extent that it can impose, directly or indirectly, standards of corporate governance. This is what happened with the Sarbanes-Oxley Act of 2002⁵⁹ (“SOX”), a statute adopted to respond to corporate scandals with, among other measures, new governance rules.⁶⁰

Some of the most important reforms introduced in this area by the SOX are: (a) the provision of an audit committee composed of independent directors, (b) limits on the non-auditing services that the audit firm can render to the corporation, (c) limitations on corporate loans to executives, (d) executive certification of financial statements, and (e) the creation of an accounting industry regulator.⁶¹ The common denominator among these provisions was to increase the independence of corporate actors in order to empower them to react to accounting frauds. It is interesting to point out that no U.S. state has mandated any of the governance rules introduced with the SOX.⁶²

There is no strong evidence in the legislative history of the SOX to suggest that Congress took into account foreign experiences in crafting the new rules. It cannot be ignored, however, that several foreign jurisdictions already provided for rules similar to those enacted in the SOX. For example, most civil law countries have a system of corporate governance in which the shareholders’ meeting appoints both a board of directors and a separate controlling body composed of independent members (such as Italy’s “collegio sindacale”). This controlling body has functions at least partially overlapping with the ones entrusted to the audit committee regulated by the SOX.⁶³ Again, in most European jurisdictions, even before the SOX, auditing firms were subject to public oversight by independent agencies (often the local equivalent of the Securities and Exchange Commission).⁶⁴ It seems natural to think that

59. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

60. See generally Romano, *supra* note 7; Shadab, *supra* note 7.

61. For an analytical discussion of these new rules, see Romano, *supra* note 7.

62. *Id.* at 1528.

63. In fact, the SEC rules list the Italian “collegio sindacale” as a body that satisfies the government requirements of the Sarbanes-Oxley Act. See Maria Camilla Cardilli, *Regulation Without Borders: The Impact of Sarbanes-Oxley on European Companies*, 27 FORDHAM INT’L L.J. 785, 803 n.96 (2004).

64. David A. Skeel, Jr. et al., *Inside-Out Corporate Governance*, 37 J. CORP. L. 147, 181 (2011); Lorenzo Segato, *A Comparative Analysis of Shareholder Protections in Italy and the United States: Parmalat as a Case Study*, 26 NW. J. INT’L L. & BUS. 373, 407 (2006); Luca

these comparative insights played a role in shaping the new rules introduced in 2002 in the U.S.

IV. REGULATORY COMPETITION IN EUROPE AND THE ROLE OF COMPARATIVE LAW

Regulatory competition in the European Union does not play the same role that it plays in the U.S. The difference is due to a number of factors that I have discussed in another article.⁶⁵ To the extent that a market for corporate charters exists in the European Union, however, its features are very different from those of the American market. More specifically, in the U.S., corporations that shop around for more favorable corporate laws generally do so when they decide to go public.⁶⁶ Small, closely held corporations tend to incorporate locally, where the actual seat of the corporation is located; only at a later stage, when they are about to be listed, do they reincorporate (often in Delaware). In Europe, on the contrary, the corporations that have their real seat in one Member State and incorporate in another are generally small, closely held corporations that often opt for a different jurisdiction that offers more flexible rules on capital formation and on incorporation.⁶⁷ Empirical evidence suggests, for example, that in the last few years a significant number of firms located in continental Europe decided to incorporate in the U.K., due—among other reasons—to less strict rules concerning the legal capital (the minimum capital that the corporation needs to maintain in order to operate) and a swifter incorporation process.⁶⁸

It is interesting to note how this particular kind of regulatory competition prompted legal reforms in continental Europe. Several states in particular relaxed their rules on legal capital and amended their corporate statutes to curb the attractiveness of the U.K.⁶⁹

Enriques, *Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms*, 38 WAKE FOREST L. REV. 911, 923 (2003).

65. See generally Ventoruzzo, *supra* note 9.

66. *Id.* at 102.

67. *Id.*

68. Marco Becht et al., *Where Do Firms Incorporate?* 24 (European Corporate Governance Inst., Working Paper No. 70/2006, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=906066.

69. Evidence of regulatory competition responses to the U.K.'s ability to attract closely held corporations have been found in Germany, the Netherlands, and France. See Becht, *supra* note 68, at 29. As reported by Giuseppe B. Portale, *La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato*, 1 EUROPA E DIR. PRIV. 101, n.70

Once again, regulatory competition leads to the circulation of legal rules and models among different countries: comparative analysis is a key element of this competition and states quickly adapt their corporate statutes due to competitive pressure from other jurisdictions, often mimicking, at least partially, the more attractive rules adopted abroad.

Regulatory competition in the field of corporate law does not only occur vis-à-vis the concrete fear of incorporation or reincorporation abroad. Virtually every major corporate law reform presents an occasion to study the rules adopted in other jurisdictions and imitate the ones that might contribute to the efficiency and competitiveness of the business legal environment. The history of corporate law (but also of other fields) clearly demonstrates this comparative attitude of legislators. A good and relatively recent example of this dynamic in Europe is offered by the reform of corporate law enacted in Italy in 2003.

The reform was largely inspired by comparative corporate law. In fact, it introduced into the Italian legal system several rules borrowed from other jurisdictions. Just to mention two of the most relevant cases, consider the rules on governance models and on preemptive rights in the case of the issuance of new shares. Traditionally, the Italian legal system was characterized by a corporate governance model that provided that the shareholders' meeting would appoint both a board of directors, entrusted with the task of managing the corporation, and a board of statutory auditors with controlling functions.⁷⁰ The reform of 2003 introduced a richer menu. The bylaws can now opt for one of three alternative models of corporate governance: the traditional one mentioned above, a two-tier model inspired by German law, and a one-tier model inspired by British (and generally Anglo-Saxon) governance models. In the case of the two-tier system, the shareholders' meeting appoints a supervisory board of directors, and this body appoints a managing board. The former is entrusted with

(2005), in France, a statute, Article L. 223-2 of the Commercial Code (as modified by the law of August 1, 2003), abolished minimum legal capital for limited liability corporations. In Spain, law No. 7/2003 of April 1, 2003, allows the "Sociedad Limidada Nueva Empresa" to be incorporated with a capital of little more than 3,000 euros. See RODRIGO URÍA ET AL., CURSO DE DERECHO MERCANTIL, VOL. I 1131 (2006); see also Marco Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition*, 40 TEX. INT'L L.J. 113 (2004) (noting that amendments to Italian law in 2003 have added flexibility to the rules governing the formation of capital and the financial structure of the corporation).

70. For a more detailed discussion, see Ventoruzzo, *supra* note 69, at 146.

controlling functions; the latter manages the corporation. In the case of the one-tier model, the shareholders only appoint a board of directors, which must include a certain number of independent directors. The board appoints, among its members, an auditing committee that closely resembles the one that can be found in common law systems.⁷¹

As mentioned above, rules concerning the financial structure of the corporation have also been overhauled in light of foreign experiences. For example, before 2003, a corporation that wanted to issue new shares had to offer them to existing shareholders with a preemptive right to purchase the new shares.⁷² There were only three exceptions to this mandatory preemptive right: when the corporation issued shares for consideration in kind, when the “interests” of the corporation required the exclusion of the right (for example, in the case of an IPO, when it is necessary to distribute the shares among many investors in order to be listed on a stock exchange), and in the case of shares issued to employees. Mandatory preemptive rights protect existing shareholders against the risk of dilution, but they might also adversely affect the ability of the corporation to raise funds quickly when market conditions are favorable, if nothing else because the corporation needs to offer the shares to the existing shareholders before other possible investors. The reform of 2003 liberalized this procedure to some extent for listed corporations. It introduced a new basis for limiting preemptive rights: now the bylaws of a listed corporation can exclude the shareholders’ preemptive rights for up to ten percent of the existing legal capital, provided that the issuing price equals the market value of the shares and that this prerequisite is verified by a report issued by the auditing firm.⁷³ This new rule was almost entirely copied from the German corporation law, clearly in an effort to make the financing of Italian listed corporations more flexible and competitive.⁷⁴

71. *Id.*

72. *Id.* at 125.

73. *Id.*

74. See Gaia Balp & Marco Ventoruzzo, *Esclusione del Diritto d'Opzione nelle Società con Azioni Quotate nei Limiti del Dieci per Cento del Capitale e Determinazione del Prezzo di Emissione*, 49 RIVISTA DELLE SOCIETÀ 795 (2004) (It.).

V. HARMONIZATION IN EUROPE AND THE ROLE OF COMPARATIVE
LAW

Traditionally, European corporate law systems have differed among themselves more than the corporate laws of the individual states in the United States. Notwithstanding the existing differences among U.S. states with respect to their corporate laws, their common legal origins and shared language contribute to create a rather harmonized patchwork of legal rules in this field. On the contrary, the different legal origins and legal systems of Europe have produced corporate statutes with more profound differences. As part of the effort to create a common market, and in order to reduce regulatory arbitrage, the European Union has engaged in a significant effort to harmonize corporate law and securities regulation in Europe.⁷⁵ Several directives have contributed to create a common regulatory framework in this area in Europe, notwithstanding that some scholars have dismissed the importance of European law in harmonizing the legal systems of the Member States.⁷⁶

Obviously, European directives are not created out of the blue. They often embrace regulatory solutions adopted in some States, or at least take into account the differences among single jurisdictions in order to create a level playing field. From this perspective, E.U. directives can be influenced by comparative law considerations, and through the harmonizing efforts of the Union, comparative law plays an important role in shaping the corporate laws of the different Member States. In other words, sometimes European law is a “Trojan horse” through which rules and models developed in one system gain entry into others.⁷⁷ Of course, as with any legal transplant, this technique has both upsides and downsides.

An excellent example of this dynamic is offered by the Thirteenth Directive on Takeovers (“the Directive”), which finally saw

75. Christian Kersting, *Corporate Choice of Law--A Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT'L L. 1, 1-2, 51 (2002).

76. Luca Enriques, *EC Company Law Directives and Regulations: How Trivial Are They?*, 27 U. PA. J. INT'L ECON. L. 1 (2006).

77. The image of directives as “Trojan horses” for some rules is used, with respect to the Thirteenth Directive, by Heribert Hirte, *The Takeover Directive: A Mini-Directive on the Structure of the Corporation: Is it a Trojan Horse?*, 2 EUR. COMPANY AND FIN. L. REV. 1 (2005).

the light in 2004 after almost twenty years of discussion.⁷⁸ The Directive is in many ways a compromise among the different views of Member States with diverging opinions concerning the role of the market for corporate control. Its two most important pillars are the mandatory tender offer and the board neutrality rule.⁷⁹ The mandatory tender offer rule provides that anyone who acquires control of a listed corporation (defined, in most states, as a set threshold of voting shares, generally around thirty percent), is obliged to launch a bid on all the outstanding voting shares at the highest price paid for the shares by the bidder over a period of six to twelve months preceding the acquisition of the requisite threshold.⁸⁰ The board neutrality rule, on the other hand, provides that the directors of the target corporation cannot adopt any defensive measure to fend off the takeover without the authorization of the shareholders' meeting.⁸¹ This rule is actually optional in the sense that the bylaws of listed corporations can opt out of it and grant more freedom to incumbent directors in protecting the corporation from hostile acquisitions.

For the purposes of this Essay, it is important to consider that the basic framework of the Directive is modeled after the British takeover regulation. The British approach has become the law all over Europe, once again demonstrating the role of comparative law in the harmonization process.⁸² There is, however, an important and interesting twist. In the U.K., due to the existence of widespread ownership structures, most corporations are controlled with a percentage of shares significantly lower than the threshold

78. Directive 2004/25/EC of the European Parliament and of the Council on takeover bids. On this piece of legislation, see Jesper Lau Hansen, *When Less Would Be More: The EU Takeover Directive in its Latest Apparition*, 9 COLUM. J. EUR. L. 275 (2003); John Eloffson, *Lie Back and Think of Europe: American Reflections on the EU Takeover Directive*, 22 WIS. INT'L L.J. 523 (2004); Dmitry Tuchinsky, *The Takover Directive and Inspire Art: Reevaluating the European Union's Market in the New Millenium*, 51 N.Y.L. SCH. L. REV. 689 (2006-2007); Marco Ventrizzo, *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends*, 41 TEX. INT'L L.J. 171, 203 (2006). On the limited success of the directive in harmonizing the regulation of takeovers in Europe, especially with respect to defensive measures, see Andrew Zwecker, *The EU Takeover Directive: Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses*, 21 TUL. J. INT'L & COMP. L. 233 (2012).

79. See Ventrizzo, *supra* note 78, at 191-203, 205-09.

80. *Id.* at 206-07.

81. *Id.* at 208.

82. For a discussion of how the British regulatory paradigm on takeovers has been incorporated into the Thirteenth Directive and therefore, to some degree, transplanted in continental Europe (and the consequences of this transplant), see Marco Ventrizzo, *Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe*, 11 U. PA. J. BUS. & EMP. L. 135 (2008).

that triggers the mandatory bid.⁸³ In the U.K., in other words, it is still possible that both friendly and hostile acquisitions occur without any need to launch a tender offer on all the outstanding shares. The rationale of the mandatory tender offer in its country of origin is to grant to shareholders an exit at a fair price when someone acquires a share so large that it makes future (hostile) acquisitions unlikely.

This rule, however, has also been transplanted through the Directive into continental European systems, where ownership structures are more concentrated and the controlling shareholder generally owns more than the triggering threshold of the mandatory tender offer.⁸⁴ One of the possible unintended consequences of the mandatory tender offer, therefore, is to operate as a sort of statutory defensive measure in favor of existing controlling shareholders. In fact, whoever intends to acquire control must be ready to buy all of the outstanding shares – a significant financial burden. Interestingly enough, the European mandatory offer rule resembles quite closely some of the anti-takeover statutes or measures adopted in the U.S. and mentioned above.⁸⁵

A similar observation can be made with respect to the board neutrality rule. In the U.K., first of all, directors generally have greater freedom than their continental European counterparts to adopt defensive measures.⁸⁶ On the other hand, in continental Europe, general corporate laws give the shareholders control over several of the most typical defenses, such as issuing new shares or approving a merger.⁸⁷ In this respect, therefore, one might argue that in continental European systems the board neutrality rule did not change the normal division of competencies between the board and the shareholders' meeting in a very significant way. But there is more: due to the presence of a strong controlling shareholder, in these countries the fact that the shareholders'

83. *Id.* at 139-43.

84. *Id.*

85. *See supra* Part II.A.

86. Even if, as persuasively argued by David Kershaw, *The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition*, 56 INT'L & COMP. L.Q. 267 (2007), in the U.K. most defensive measures would require shareholders' approval also in the absence of the board neutrality rule, due to the application of general corporate law rules.

87. On the competences of shareholders vis-à-vis directors in some continental European systems, see Ventrizzo, *supra* note 69, at 130; Ignacio Lojendio Osborne, *La Junta general de accionistas*, in DERECHO MERCANTIL 344 (Guillermo J. Jiménez Sánchez ed., 2006); MAURICE COZIAN, ALAIN VIANDIER & FLORENCE DEBOISSY, DROIT DES SOCIÉTÉS 223 (2006); *see also* GERHARD WIRTH, MICHAEL ARNOLD & MARK GREENE, CORPORATE LAW IN GERMANY 117 (2004).

meeting must approve defensive measures does not take the power to decide whether to resist the takeover away from whoever actually controls the corporation. In fact, it basically gives a say on the adoption of defensive measures to the very subject in conflict with minority shareholders. This result is quite contrary to the experience in the U.K., where the rule was adopted. In this system, due to the prevailing widespread ownership structures and the presence of institutional investors as minority shareholders, letting the shareholders' meeting decide really means taking into account the opinion of minority investors, because the controlling shareholder often does not have enough votes to oppose a value-maximizing offer in order to retain the private benefits of control. Finally, as mentioned above, one of the compromises of the Directive is that the board neutrality rule is optional and corporations can opt out of it. For these reasons, several commentators have questioned whether the directive really empowers minority shareholders in continental European countries as it does in the U.K.⁸⁸

This example shows how the use of comparative law affects the harmonization process of European corporate statutes, but it also shows the possible shortcomings of legal transplants: the effects of a rule developed in a system with certain features can be very different, and have unintended consequences, when the rule is exported to systems with different characteristics.

VI. CONCLUSION

In this Essay we have observed how the evolution of statutory corporate law can be determined by two forces: regulatory competition, generally a spontaneous effort by single legislatures to render their systems more attractive than others; and harmonization, sometimes imposed in a top-down manner. Actually, the distinction between these two "channels" is much more nuanced, and they often intertwine. Regulatory competition can push toward greater harmonization as some states copy the rules developed in other systems, and harmonization can affect the possibility of regulatory arbitrage and, therefore, the level of competition among different jurisdictions to attract corporations. What is interesting, however, is to recognize the powerful role that comparative law, with its tendency to circulate legal models, plays in the case of

88. See Ventoruzzo, *supra* note 82, at 172.

both regulatory competition and harmonization in the U.S. and in Europe.

Often legal reforms are at least partially modeled on foreign experiences. This is sometimes beneficial, as more efficient solutions experimented in one jurisdiction become available in other systems. However, the circulation of models also presents the risk implicit in any legal transplant: similar rules, adopted in different economic contexts, can have very different—sometimes even opposite—effects than the ones they had in their country of origin.

Another conclusion that can be drawn from the discussion is how comparative law in statutory reforms often—and not surprisingly—tends to look more attentively at systems and models that are more similar to the local one. As the reader has noticed, in the U.S. most of the comparative considerations looked at other U.S. states, and the same can be said about European legal reforms. For this reason, it is fair as a final conclusion to observe that “regional comparisons” (i.e., comparisons with systems that are closer geographically, culturally or economically) tend to be the predominant source of legal transplants in corporate law reforms.⁸⁹

In any case, awareness of comparative law is a key element for any statutory innovation. The cases discussed in this Essay demonstrate the role that comparative considerations have always played, and will always play, in the evolution of corporate law, and in particular in case of statutory reforms, both as an instrument of regulatory competition and to support harmonization efforts.

89. Obviously, there are some notable exceptions. It is well known among comparative corporate law scholars, for example, that “[t]he Model Business Corporation Act and the modern Japanese Commercial Code were both created in 1950 and based on the Illinois Business Corporation Act of 1933,” as explained in an article by Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527, 527 (2001), even if, as pointed out by Professor West, the systems tended to diverge over the course of the last few decades.

Introductory Note to Dott. Vito Cozzoli's
*Parliamentary Groups in the Evolving Italian
Political System*

*Dante Figueroa**

This article authored by Dott. Vito Cozzoli, general counsel for the Chamber of Deputies at the Italian Parliament, concerns the role of parliamentary groups in the current Italian political system, and comes at a meaningful time in the development of parliamentary democracies in the Western Hemisphere. In effect, the post-World War II reconstruction of Europe occurred through political regimes centered around the prominent role of parliaments, as opposed to the former regimes based on the unmatched dominion of the executive branch. Italy's most recent political and constitutional upheavals illustrate this reality.

In this context, Dott. Cozzoli's article clearly identifies the current political debate and its constitutional ramifications in Italy: namely, whether the parliamentary system in vogue should be centered in disciplined and solid political parties or directly on the political representatives of the people. The response to this conundrum does not seem to emerge in a clear manner from Italy's current parliamentary scheme. In fact, the current debate, as the author points out, delves into the question of the extent to which the role of parliamentary groups should be protected, increased, or diminished, in order to provide a stable and functional development for the Italian political system. In this sense, neither the Italian nor the American paradigms offer a panorama of full political discipline within their legislative deliberative bodies. However, as the author notes, the Italian structure, which extends meaningful protections to parliamentary groups, goes far beyond the

* Dante Figueroa is a law scholar in comparative corporate and constitutional law. He is an Adjunct Professor at the Georgetown Law Center and the Washington College of Law. He has written or co-authored four books, and his articles are available at <http://ssrn.com/author=1015723>. He is a member of the bar associations of D.C., NY, Chile, the U.S. Supreme Court, and the Court of International Trade, and served as the elected Secretary General of the Inter-American Bar Association for the 2012-2013 period. He is fluent in Spanish, English, French and Italian and can be reached at: df257@georgetown.edu.

perceived legislative autonomy witnessed at the United States Congress.

In turn, the author draws comparisons between the fragmentary parliamentary system currently found in Italy and the somehow unified semi-presidentialist scheme ("semi-presidentialist" is a standard jargon in comparative constitutional law, mainly in Europe) reigning in the United States. Consequently, the author clarifies that the parliamentary "caucuses" in the United States bear no resemblance to the fractured Italian parliamentary groups; the difference resides in the strength of the former as opposed of the nearly unchecked freedom of action benefitting the latter. In a sense, the author conveys the notion that even though both the United States and the Italian forms of government rely on the principle of majoritarianism, over the years the Italian scheme has created a series of mechanisms that have attenuated an overwhelmingly influential majority. Those majority-tempering mechanisms include the assignment of important parliamentary roles to minority political movements and actors through the formation of autonomous parliamentary groups, which are recognized and validated through internal parliamentary regulations.

The author also asserts that the Italian parliamentary system based on parliamentary groups is to be regarded as a "transitional phase." Doubtless, such description would be deemed politically unrealistic if applied to the United States political system, where the principles of checks and balances award, in theory, an equal role to the three branches of government. Ultimately, that is not the situation in Italy, where the legislative branch constitutionally holds the upper hand in the government of the country. This year's political crisis in which Italy was without a government for about two months is an example of the risks inherent to that system.

The comparatively younger American democratic experiment has not (so far) yielded to a multiparty system; in fact, without the support of one the two traditional parties, election to legislative office is extremely unlikely and difficult. The commanding position of the established political parties determines the internal organization of legislative leadership within the United States Congress. In the Italian case, as the author demonstrates, a convoluted internal regulatory framework built upon a push-and-pull scheme secures relevant leverage for parliamentary minorities

and individual parliamentary members in ways which would be unthinkable and unachievable in the current U.S. system.

Furthermore, the landmark institution of the “Mixed Group” existing in the Italian legislative arrangement does not find an equivalent in the United States congressional organization, where such a “melting pot” scheme would simply imply a destruction of the present strict bipolarity defining it. Said differently, while in Italy electoral laws seem to include an intense focus on the internal organization of the legislative branch, in the American model, such laws pivot around the definition of electoral districts and thus center on the composition itself of the legislative body.

The current “transitional” Italian parliamentary *modus* responds to the complex realities of a seasoned political society that has gone through different forms of government throughout its long history. In turn, the American society has known only two political systems, both of them enjoying a high degree of centralization: namely the British monarchy, and the current superseding democratic experiment, which has lasted for a little over two centuries. In sum, Dott. Cozzoli’s well-versed article clarifies concepts about the functioning of the Italian democratic system that are difficult at first to grasp for the average American reader. The author wisely and generously has opened a rich venue for research on the topic of the role of parliaments in Western democracies, and in that way—we hope—he is pioneering more fruitful exchanges between the American and Italian experiences.

Parliamentary Groups in the Evolving Italian Political System

Vito Cozzoli*

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I. INTRODUCTION: WHY ARE PARLIAMENTARY GROUPS IMPORTANT IN A COMPARATIVE PROSPECTIVE?

The nature, work and legislative trends in parliaments across the world are subject to research, analysis, and debate amongst scholars and practitioners.¹ This explains why a study on parlia-

* General Counsel at the Italian Parliament, Chamber of Deputies. With special gratitude for Dante Figueroa, Marco Cerase, and Edward Cervini.

1. For example, a study congress was held in Boston in November 2008 entitled *The Most Disparaged Branch: Congress. The Role of Congress in the 21st Century*. Symposium, *The Most Disparaged Branch: Congress. The Role of Congress in the 21st Century*. 89 B.U. L. REV 335 (2009). Moreover, in 2010 two former officials of perhaps the oldest national Parliamentary institutions in the world—Westminster and the U.S. Congress—published a comprehensive work on parliamentary proceedings and precedent that was presented in many locations around Europe and North America. Many more essays can be found in recent publications about this subject matter. *Id.*; W. MCKAY & C.W. JOHNSON, *PARLIAMENT AND CONGRESS: REPRESENTATION AND SCRUTINY IN THE 21ST CENTURY*, (Oxford University Press, 2010). Before this book, the classical comparison between the UK and the U.S. was that which is quoted above. K. BRADSHAW & D. PRING, *PARLIAMENT AND CONGRESS*, (Quartet Books, London, 1973).

mentary groups (hereinafter also “parliamentary fractions”) could be a contribution in this landscape.

Parliamentary fractions arise from the elected members of a given party in a nation’s parliament or governing body. A fraction is not simply an association of elected members united by a common goal,² and its presence suggests more than the coincidental election of men and women who think alike. Parliamentary groups result from the organization of political parties within legislative bodies and reflect the will of the electorate.³

The study of parliamentary fractions provides a vehicle for debate over the role of parliaments, the way they function, and what relevance they maintain in a world where the public decision-making process sharply diverges from the one that existed for most modern nations’ constitutional framers two, or even three, centuries ago.

This essay is intended to offer analysis on the significant procedural roles the parliamentary fractions play in both Houses of *Parlamento Italiano*, the Italian Parliament. This essay also wishes to offer some comparative remarks and to provide the English-speaking reader with adequate insight into the similarities and differences between the multi-party Italian framework and the two-party system prevailing in the United States Congress.⁴

II. PARLIAMENTARY GROUPS AGAINST THE BACKDROP OF CHANGES IN THE ITALIAN SYSTEM

The examination of parliamentary groups provides a particularly important vantage point for understanding the dynamics of institutional change and the transformations that have occurred in the Italian political system.⁵ It is precisely the parliamentary

2. The Floor of The House approved a change in its Rules—on 25 Sept, 2012—that gives this definition and provides for checks on fractions’ budget. *See* It. Chamber of Deputies R. 14(01). “Parliamentary Groups are associations of Deputies established pursuant to the provisions set forth in this Rule. Inasmuch as Parliamentary Groups are entities necessary for the functioning of the Chamber of Deputies, pursuant to the Constitution and Rules of Procedure, they shall receive funds from the Chamber of Deputies budget to carry out their activities.” *Id.*

3. BRADSHAW & PRING, *PARLIAMENT AND CONGRESS*, *supra* note 1, at 14; *see also* R.H. DAVIDSON & W. J. OLESZEK, *CONGRESS AND ITS MEMBERS* 163 (CQ Press, Washington 2000).

4. BRADSHAW & PRING, *PARLIAMENT AND CONGRESS*, *supra* note 1, at 10-14.

5. *See* V. Cozzoli & F. Castaldi, *I gruppi parlamentari della Camera dei deputati tra rappresentanza democratica e funzionalità politico parlamentare*, *IL FILANGIERI* 339, 350 (2007); *IL PARLAMENTO NELLA TRANSIZIONE*, XIII (S. Traversa & A. Casu, eds. Giuffrè 1970)

groups that constitute the crucial linkage between the government and parliament on the one hand, and coalitions and political parties on the other. Parliamentary groups influenced some of the most significant developments in the transitional period in which the Italian institutional system has been enduring—the crisis of the traditional political parties, the difficulty of new political players to become established, the evolution of electoral law—and thus have had inevitable repercussions on the organization and functioning of Parliament. These developments represent major, symptomatic changes in the institutional process while, at the same time, sending out contradictory signals of instability typical of the Italian situation in recent years.⁶ Indeed, the evolution at the Chamber of Deputies (hereinafter also the “Parliament House”) seems to have surpassed the 1971 reform’s approach in “the real need for the Chamber to be organized by Groups and for the Groups,”⁷ in favor of the emergence of a new operational rule based on the dialectic between majority and opposition.⁸

As stated earlier, this paper will try to examine the different role given to the parliamentary groups under the new bipolar conception of relations between the political forces within the Houses of Parliament in the wake of the largely “first past the post” electoral system introduced in 1993 (which was, however, transformed again in a proportional representation system in 2005) and following the reforms of the Rules of Procedure of the Parliament House introduced in 1997-1999.⁹ More than ten years later, the importance of these changes—which have also affected the role of

(regarding the transition and instability, which has been affecting Italy’s politico-institutional framework for many years).

6. V. COZZOLI, *I gruppi parlamentari nella transizione del sistema politico istituzionale, Le riforme regolamentari alla Camera dei deputati nella XIII legislatura*, 14 (2002).

7. See Report of the Rules Committee on the 1971 Reform of the Rules of Procedure of the Chamber, *Il nuovo regolamento della Camera dei deputati illustrato con i lavori preparatori*, Camera dei deputati, 10 (1971).

8. See M. Manetti, *Riforme istituzionali: qualche riflessione sul metodo*, in *GIURISPRUDENZA COSTITUZIONALE*, 413, n.1 (1998).

9. Laws no. 276 and 277 of 1994 introduced for both Houses of Parliament a hybrid electoral procedure replacing the former proportional system, under which three quarters of the Members of the Chamber of Deputies and three quarters of the Senators were elected with a single-ballot first-past-the post system in single-member constituencies. The remaining seats were allocated under a proportional criterion: seats at the Chamber were apportioned, in the twenty-six constituencies, among those competing lists, which had overcome the four percent threshold on a national basis; at the Senate, seats were divided among groups of candidates in proportion to the votes obtained in individual regional districts by non-elected candidates.

parliamentary groups—is also emphasized by the fact that the Rules of Procedure very often anticipate the changes in the politico-institutional system because of their direct linkage with the Italian Constitution.

With the enhanced emphasis on stability in government, and the development of the Italian political system in the direction of a “first past the post” system,¹⁰ there has been a stronger legitimization of parliamentary majority and opposition “poles,” which enjoy significant parliamentary privileges and prerogatives.¹¹ Indeed, the parliamentary Rules of Procedure explicitly refer to majority and opposition groups as “poles.”¹²

This innovative approach to the parliamentary dynamics—a rejection of the pact-building approach that characterized the 1971 Rules of Procedure¹³ and the so-called “blocked” democracy model¹⁴—strengthens the role of the government and its parliamentary majority, without weakening the role of the opposition. However, this method does not yet seem to be typical of the overall approach adopted by the current Rules of Procedure. The current rules do not provide for parliamentary groups to be structured along the lines of the two-way division of majority versus opposition, partly because the political system has not yet acquired a fully bipolar character. Indeed, the political forces making up the various electoral coalitions have failed after their election to set up a parliamentary group as a single political coalition representing them all. Once again they have split and divided, preserving their separate political identities and their share of the popular vote.¹⁵

10. See Manetti, *supra* note 8, at 413, n.1.

11. Through programming of parliamentary business and going beyond the principle of unanimity, while imposing strict constraints on the distribution of parliamentary time, such as to ensure a predictable timeframe, both to the majority and the opposition, for the consideration of measures; voting on selected representative amendments or by principles, for the sake of procedural economy; time limits for the consideration of bills by Committees; oversight and fact-finding procedures vis-à-vis the Government; Prime Minister Question Time and urgent interpellations.

12. See It. Chamber of Deputies R. of P. R. 16-*bis* (1), 24(3).

13. MAZZONI HONORATI M.L., *Il procedimento legislativo*, in LABRIOLA S. *Il parlamento repubblicano (1948-1998)*, *Quaderni della Rassegna parlamentare*, 271, n.3 (Guiffre ed.1999).

14. According to the formula *conventio ad excludendum*, post-war Italy was a blocked democracy, in which government transformation was virtually impossible due to the presence of the Communist Party in the political system. See ELIA L., *Forme di governo*, XIX ENCICLOPEDIA DEL DIRITTO 658 (1970).

15. Regarding the former aspect, the number of Parliamentary Groups that have been established paradoxically exceeds that of previous parliaments using the pure proportional system: in the Fourteenth Parliament the Chamber of Deputies had eight groups (nine in the Senate) and at the end of the Thirteenth Parliament there were nine groups; in the

The Rules of Procedure of the Chamber seem to have taken account of this complex and contradictory situation¹⁶ by introducing a series of measures to encourage a polarization of parliamentary dynamics, giving specific prerogatives to the majority and the opposition groups.¹⁷ They have also sanctioned the growing fragmentation of the Chamber by adopting new provisions for the Mixed Group.¹⁸ These provisions¹⁹ acknowledge the various component parts or groupings of the Mixed Group as each having an autonomous political and parliamentary personality: mini-groups, as it were, within the Group.²⁰ These phenomena are related to

Twelfth Parliament there were as few as eight, which then rose to eleven, while the Eleventh Parliament had seven *de jure* groups, to which a further six authorized groups were subsequently added. Apart from this, the political situation in the Thirteenth Parliament was even more fragmented because of the formal acknowledgement in the Rules of Procedure of the Chamber of Deputies of the political entities or groupings established within the Mixed Group (in the Fourteenth Parliament there were nine of these groups). Recently, in the Fifteenth Parliament that ended early in 2006, Italian history had never seen such a number of Parliamentary groups: fourteen Parliamentary groups and four political entities of groupings established within the Mixed Group. But in 2010, during the Sixteenth Parliament, there are a smaller number of Parliamentary groups: six Parliamentary groups and six political entities or groupings established within the Mixed Group.

16. Regarding the need for a radical rationalization of the legislative process in a deteriorated context, see A. PALANZA & F. POSTERARO, *Tendenze recenti nella formazione delle leggi: una nota introduttiva*, BOLLETTINO DI INFORMAZIONI COSTITUZIONALI E PARLAMENTARI, Camera dei deputati, 43-44, n. 1-3 (1995).

17. Concerning the amendments to the Rules introduced in 1997 and 1999, see SOI A., *Le modifiche al regolamento della Camera dei deputati*, ITER LEGIS., 35 (2007); N. LUPO, *Le recenti modifiche del regolamento della Camera: una riforma del procedimento legislativo "a Costituzione invariata"*, GAZZETTA GIURIDICA GIUFFRÈ 2, n.37 (1997); S. CECCANTI, *Regolamenti parlamentari: un altro tassello di una "riforma strisciante"*, QUADERNI COSTITUZIONALI 157, n.1 (1998); A. CELLATO & MENCARELLI, *Prime considerazioni sul nuovo art. 96-bis del Regolamento della Camera*, RASSEGNA PARLAMENTARE 653, n.3 (1998); A. MORRONE, *Quale modello di Governo nella riforma del Regolamento della Camera dei deputati?*, QUADERNI COSTITUZIONALI 449, n.3 (1998); C. DI ANDREA, *Sulle ultime modificazioni del Regolamento della Camera dei deputati*, in RASSEGNA PARLAMENTARE 99, n.1(1999); MAZZONI, *supra* note 13, at 269, n.3; G. RIVOCCHI, *Sulle recenti modifiche del regolamento della Camera dei deputati*, in GAZZETTA GIURIDICA GIUFFRÈ, 6, n.18 (1999); L. STROPPIANA, *La riforma dei regolamenti parlamentari: un processo non ancora concluso?*, QUADERNI COSTITUZIONALI 101, n.1 (2000); G. ROLLA, *Riforma dei regolamenti parlamentari ed evoluzione della forma di Governo in Italia*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 593, n.3 (2000); R. BIN, *La disciplina dei gruppi parlamentari*, IL PARLAMENTO, CONVEGNO ANNUALE DELL'ASSOCIAZIONE ITALIANA COSTITUZIONALISTI, 12-14 (2000); M. MAZZIOTTI DI CELSO, *Le funzioni parlamentari*, IL PARLAMENTO, CONVEGNO ANNUALE DELL'ASSOCIAZIONE ITALIANA COSTITUZIONALISTI 111-115 (2000); M.L. MAZZONI HONORATI, *Considerazioni critiche sul rapporto tra regolamenti parlamentari e forma di governo*, in *Il Parlamento, Convegno annuale dell'Associazione Italiana Costituzionalisti*, 343-352 (2000).

18. The Mixed Group brings together Deputies who have failed to declare their membership of a parliamentary group and those who opt for joining it.

19. Further political sub-grouping may be established within the Mixed Group. See It. Chamber of Deputies R. of P. R.14(4-5).

20. See F. LANCHESTER, Presentation at the Seminar on the revision of the Constitution at LUISS University (March 20, 1998) on *La riforma del regolamento della Camera dei*

the weakness of the party system in the current transition and to the impact of the new electoral legislation that tends towards a majoritarian system.²¹ The present stage in the institutional development of Parliament therefore seems to involve a reappraisal of the role and function of parliamentarians in the various forms of democratic representation,²² both through the parliamentary groups and as individual Members of Parliament (hereinafter “MPs”).

More specifically, because of the unifying function performed by the groups with regard to their members and by being the expression of the political parties, the Groups are the necessary benchmark for the structure and the operation of each House of Parliament. Today, more than ever before, the Groups are being required to draw up the political strategies of the parties as well as the coalitions to which they belong, fostering homogenization and political coordination.

However, individual parliamentarians have increasingly demanded greater visibility and scope in political and parliamentary decision-making processes. The majoritarian electoral law is enhancing their role and their position and very significantly is giving them a more immediate and direct relationship with their constituents. This will have to be re-assessed when the new proportional legislation with a majoritarian correction enacted in 2005 is brought into effect.²³

Against this background, the protection of the opposition and individual members is the natural way of balancing the “first past the post” system, thereby avoiding the risks of excessively simplifying the polarized political dynamics.²⁴ This new parliamentary

deputati, in *I costituzionalisti e le riforme. Una discussione sul progetto della Commissione bicamerale per le riforme costituzionali*, 246 (S.P. Panunzio ed.1998).

21. See VERZICHELLI L., *I gruppi parlamentari dopo il 1994. Fluidità e riaggregazioni*, RIVISTA ITALIANA DI SCIENZA POLITICA 410, n. 2 (1996).

22. Through political parties.

23. Legge Dicembre 2005 n.270 (It.) introduced a fully proportional system for election to the Chamber of Deputies, with the possibility of the award of bonus seats for a nationwide majority result, replacing the earlier partly proportional system. The new rules provide that with regard to the candidates, the political parties submitting lists may also form coalitions; parties intending to stand for election to the position of ruling party must also submit their manifesto and announce the name of their leader. The voting procedure permits voters to cast only one vote on their preferred list, with no preference votes. The seats are distributed proportionately nationwide between the coalitions of lists and the lists that have exceeded the statutory minimum thresholds.

24. An organization of parliamentary business totally based on the majoritarian principle does favor a stable government and a transparent interaction between majority and

system is based on the idea of establishing a new identity for Parliament as the forum for political debate and decision-making,²⁵ according to the rationale of “decision-making democracy,”²⁶ thus moving away from the “blocked democracy” model.²⁷ The parliamentary process is thus intended to arrive at decisions by political debate between the majority groups and the opposition groups.²⁸

In short, between 1997 and 1999, the Rules of Procedure in both the Italian Houses were changed in order to adjust parliamentary proceedings to a new political scenario based on the debate between the majority and the minority parties that entailed a more competitive approach to politics and legislation. Since the general election of 1994 there has always been—except in recent times, with a broad coalition supporting a technical cabinet related to economic emergency—a majority party and an opposition party. Therefore, the specific rules regarding parliamentary groups had to be changed.

III. HISTORICAL BACKGROUND TO THE ESTABLISHMENT OF PARLIAMENTARY GROUPS

The creation of parliamentary groups, as permanent organizations of senators or deputies belonging to the same party or at least taking their inspiration from the same political ideology, within the parliamentary assemblies, is not exclusive to the modern status of political parties because the tendency to group together in terms of political kinship is something that is common to all political bodies.²⁹

opposition, but, on the other hand, it may limit political pluralism and constrain the prerogatives of smaller groups and individual MPs.

25. It is also based on improving the quality of legislation. See, e.g., ZAMPETTI U., *Tecniche legislative e procedure parlamentari*, 1 RASSEGNA PARLAMENTARE, 163 (1998).

26. Decision making democracy involves using the right equilibrium between decision and debate. See HON. LUCIANO VIOLANTE, *Forward to the Volume collecting the Preparatory proceedings on Modificazioni al Regolamento della Camera dei deputati approvate dall'Assemblea nel*, at XI (1998) (foreword by the President of the Chamber in the 13th Parliament, Hon. Luciano Violante, to the volume collecting the preparatory proceedings on *Modificazioni al Regolamento della Camera dei deputati approvate dall'Assemblea nel* 1997).

27. See ELIA L., *Forme di governo*, XIX ENCICLOPEDIA DEL DIRITTO, 658 (1970).

28. Compare CERASE M. *Opposizione politica e regolamenti parlamentari*, 133, 216 (2005)

29. For more on the functions and legal status of parliamentary groups, see G. SAVIGNANO, *I gruppi parlamentari*, Napoli 209 (1965); G.U. RESCIGNO, *Gruppi parlamentari*, ENCICLOPEDIA DEL DIRITTO 779 (1970); D. MARRA, *La riforma del regolamento della Camera* QUADERNI COSTITUZIONALI 559-563 (1983); P. RIDOLA, *Divieto di mandato imperativo e pluralismo politico*, SCRITTI IN ONORE DI CRISAFULLI, II, Padova (1985); C. GATTI, *I*

Historically, the formation of parliamentary parties preceded the formation of the popular parties that, initially, were merely the projection of the divisions existing within the Parliament. However, the question of recognizing and regulating the political groups only arose with the extension of universal franchise and the adoption of the proportional electoral system, with a majoritarian correction replacing the previous “first past the post” system.

In Italy, it was the 1919 Electoral Act³⁰ that introduced the new electoral system of competing lists with proportional representation. The Parliamentary Groups entered the Chamber after the 1920 procedural reform.³¹ It was the internal response that adjusted the regulations to the new Italian constitutional system that followed the 1919 elections. The liberal state of government by the nobles became a state based on broad democratic participation. The entry of political parties changed both the scenarios and the personalities in politics, and the parliamentary rules reflected the change and institutionalised the new political dynamics.

While the Chamber under the “*Statuto Albertino*”³² made no reference to party membership, the 1920 Chamber of Deputies deferred to a party-based system in which the groups in the Chamber were the mandatory organizational structure for the elected representatives. The rules at that time were very similar to the

gruppi parlamentari nella Germania Occidentale, 106 (1986); G. NEGRIG & L. CIAURRO, *Gruppi parlamentari*, in ENCICLOPEDIA GIURIDICA 1-9 (1989); T. MARTINEST, C. DE CARO, V. LIPPOLIS & MORETTI *Diritto parlamentare*, RIMINI 94-110 (1992); CARDARELL, *La disciplina dei gruppi parlamentari tra rappresentanza politica, finanziamento dei partiti e funzionalità delle Camere*, DIRITTO E SOCIETÀ 711-19 (1993). Regarding the constitutional status of the parties and their “capacity to act as a nodal point of the relationship between democracy and pluralism,” compare P. RIDOLA, *Diritti di libertà e costituzionalismo* 1 (1997).

30. Legge 16 Novembre n.1985 (It. 1918), Legge 15 Aug. (It. 1919) introduced a reform of the electoral rules for the elections of 1919 and 1921. As compared with the 1912 electoral law, the franchise was extended to all male citizens 21 years of age or who had performed military service. The proportional system—already used from 1882 to 1891—was reintroduced in order to ensure that also minority lists that had gained a significant share of the votes would be represented in Parliament.

31. The 1919 general elections, held soon after the introduction of the new list-based proportional system, which led to the 25th Parliament of the Kingdom of Italy, were a major turning point in parliamentary law and, more importantly, provided an political and institutional answer to the coming to the fore of the popular masses and the development of the new mass-based political parties. As a result, ten new Rules were introduced in parliamentary procedures to regulate Parliamentary Groups and Standing Committees. A new system of parliamentary rules thus began to take shape that—to the exception of the Fascist interruption—would shape until the Republican period the organization of the Chamber of Deputies on the basis of Groups and Committees.

32. The Constitution of The Kingdom of Italy was adopted in 1848 and overruled in 1948, when Italy became a Republic with Constitution.

present rules: (1) it was mandatory to register as a member of a party; (2) there had to be a minimum of twenty Deputies; (3) as an exception smaller groups could be authorized; (4) arrangements were made for a Mixed Group; and (5) the Groups appointed their representatives to parliamentary Committees.

The reasons underlying the 1920 reform of the Rules were set out in the Constitution of the Republic that recognized political parties (article 49) referring to Parliamentary Groups (articles 72 and 82) for the composition of the Committees sitting in an enacting capacity, and Committees of Inquiry, which are required to reflect the proportions of the Parliamentary Groups. These provisions enshrined the principle of the organization of Parliament based on Groups. With the 1971 reform, the Rules of Procedure further specified and broadened many of the powers of the Groups by recognizing that the Chambers were “organized by the Groups and for the Groups” (as stated in the explanatory memorandum on the changes made to the Rules of Procedure).³³

IV. FORMATION OF PARLIAMENTARY GROUPS

The Constitution of the Republic refers to the Groups in two places, albeit only indirectly: in article 72 and article 82. However, there can be no doubt that the parliamentary Groups are not only the natural and necessary projection of the parties in Parliament, but are also the load-bearing structure of parliamentary organization. Membership of a group is mandatory on all parliamentarians: the Rules of Procedure require³⁴ Deputies to declare to which Parliamentary Group they wish to belong within two days of the first session of the House, and Senators within three days. The minimum number required to set up a Parliamentary Group in the Chamber of Deputies is twenty, while the minimum number for senators is ten. But there are possible exceptions for both Chambers.

The Bureau of both the Chamber of Deputies and the Senate may authorize fewer parliamentarians to create a group than the prescribed number, subject to certain conditions. The conditions provided by both sets of rules for the creation of smaller groups (dictated by Rule 14 of the Rules of Procedure of the Chamber and the Senate), are:

33. See Report of the Committee on the Rules of Procedure, *Il nuovo Regolamento della Camera dei Deputati illustrato con I lavori preparatory*, Chamber of Deputies 10 (1971).

34. See R. 14(3).

- a) to be the expression of a political movement that has some recognition in the social and political texture of the Country; and
- b) to have put forward candidates in a minimum number of constituencies, hence garnishing a minimum number of votes.³⁵

These requirements, however, still refer to the old rules of proportional representation. The Rules of Procedure have taken up the provisions of the new electoral law in several places by introducing new procedures and concepts (in terms of scheduling parliamentary business, pre-legislative scrutiny and consultation, and parliamentary oversight). However the statutes have not completed the necessary adjustment of the rules governing the composition of groups waiving the minimum required numerical membership, which are still the ones that existed under the old proportional representation electoral system (prior to the largely “first past the post” system introduced in 1993). In addition, the Parliamentary Rules of Procedure for the past twelve or so years have not been consistent with the new largely “first past the post” electoral legislation. With the adoption of the new proportional representation legislation in 2005, the provisions of the Parliamentary Rules of Procedure have become fully current again because they were drawn up precisely for the proportional representation system, even though some elements of the rules have not been contemplated in the new electoral law.

In the Twelfth and Thirteenth Parliaments, these provisions regarding authorization to waive the minimum number of members required to set up a Parliamentary Group were not applied, and indeed were deemed not to be applicable, even by analogy, to the new semi-first-past-the post electoral system; the Bureaus of both the Chamber of Deputies and the Senate turned down the requests that were made by various political groups for waivers.³⁶

In the Fourteenth Parliament, there was a change in the case law of the Chamber of Deputies.³⁷ Article 14(2) of the Rules of Procedure of the Chamber had since become inapplicable (which, as already mentioned, referred to the previous proportional representation electoral system) and was considered to have been su-

35. See R. 14(2).

36. COZZOLI, *supra* note 6, at 66.

37. See *id.* at 352.

perseded by the Rules of Procedure Committee, which adopted a new interpretation of the rule to adjust it to the new system. The Committee ruled that, apart from the literal wording of that provision, it was designed to make it possible for representatives of the political forces to set up a Parliamentary Group provided that they were permanently organized in the country, had taken part in the elections using their own lists of candidates, and had obtained, nationwide, at least four percent of the valid votes cast³⁸.

The Rules Committee therefore gave permission for the small Communist Party (*Rifondazione Comunista*) to form a Group, which was subsequently authorized by the Bureau. At the same time, the Bureau urged that Rule 14(2) governing this issue should be amended to bring it into line with the legislation governing elections to the Chamber of Deputies. This interpretation was accompanied by yet another guideline adopted by the Committee, ruling out the possibility to invoke this interpretation in the present Parliament for any further political groupings.

The Committee also took note of the fact that the elements characterizing the position of *Rifondazione Comunista* could not be claimed again in the same Fourteenth Parliament for other political groupings. This was a clear way of emphasizing that this new interpretation of the Rules of Procedure of the Chamber could only be used at the beginning of the Fourteenth Parliament to authorize political forces that had individually exceeded the electoral threshold, and therefore could not be used for groups that, for example, had been created by splitting off from existing groups.³⁹

The establishment of Groups under a waiver became very topical in 2006 at the beginning of the Fifteenth Parliament, following a proportional representation-oriented reform adopted at the end of the Fourteenth Parliament.⁴⁰ The electoral system was then changed back to a proportional representation mechanism with a majoritarian correction in 2005; the elections of 2006 returned a Parliament full of small parties that were not formally entitled to be a fraction within the Assembly but demanded to be one nonetheless.

38. See Rules of Procedure Committee, session of June 13th 2001.

39. See, e.g., S. CURRERI, *I gruppi parlamentari autorizzati nella XIV legislatura* in www.forumcostituzionale.it, 12 (2006); *I gruppi parlamentari nella XV legislatura* in *Quaderni costituzionali*, n.3 (2006).

40. See Legge Dicembre 2005, *supra* note 23, at n.270, on the new electoral system voted in 2005.

Indeed, the Bureau of the Chamber received requests in 2006 to set up six parliamentary Groups with less than twenty members. The Rules Committee was then asked at its meeting on May 16, 2006 to consider and provide an interpretation on the scope of the application of Rule 14(2) in view of the new electoral legislation. This provision had never been amended since its coming into force in 1971, despite several changes to electoral legislation. Thus, there was a need for a clarifying interpretation to ensure consistency between the new law, on the one hand, and the requirement for political parties to be organized on a national basis, as well as the electoral result on the other.

With respect to the requirement for political parties to be organized on a national basis, and in view of the need to ensure consistency with the evolution of the political system and the electoral law, the Rules Committee adopted the following stance on the occasion of the above-mentioned meeting: “A Party organized on a national basis” is deemed to mean a “political force” (also including several parties) which, although not strictly corresponding to the letter of the law, is unequivocally identifiable at the time of elections because it has submitted electoral lists with the same emblem, provided it was not established after the elections. Thus, the electoral list was considered as the criterion to identify the political force, which is recognized by the Rules as a relevant entity for the Parliament.

With respect to the electoral result required, the Rules Committee held that, in view of the changed electoral system, electoral lists—which have been registered in at least twenty constituencies—are required to obtain access to the allocation of seats on a national basis. On the possibility of setting a minimum number of members for the establishment of parliamentary Groups to be authorized under Rule 14(2), the Rules Committee stated that a strict interpretation of the Rules does not seem compatible with an interpretation whereby the authorization to establish a Group would require a minimum number of members. In the light of this interpretation adopted by the Rules Committee on May 17, 2006, the Bureau of the House held a lively and, at times, harsh debate, which continued the next day on the Floor of the House. As a result, the Bureau authorized the establishment of four small groups under Rule 14(2): a socialist-leaning group, a neo-communist one, an environmentalist one and a Catholic one.

The Bureau did *not* authorize, however, a Group called ‘Movement for Autonomy,’ as it had not fulfilled the electoral result re-

quirement in compliance with the interpretation rendered by the Rules Committee on the strength of the new electoral legislation. The new parliamentary group, if authorized, would not have represented the entire political force identified by the list which had participated in the elections, as the above-mentioned movement had submitted joint lists with the *Lega Nord*.⁴¹

Concerning the status of groups set up under a waiver, it should be recalled that during the Fifteenth Parliament the principle of equal status among the groups was formally established, with no *deminutio* for groups set up under derogation. In 2008, however, at the outset of the Sixteenth Parliament, no requests to authorize the establishment of groups under a waiver (i.e., below the minimum membership requirement) were submitted. In the Chamber of Deputies, the Bureau's powers were strengthened such that the Bureau could now dissolve a parliamentary group if falling below the minimum number provided for under the Rules. This power is consistent with the sole responsibility of the Bureau to authorize the establishment of groups under a waiver (i.e. below the minimum membership requirement).

V. THE SO-CALLED "MIXED GROUP"

Members who have not declared membership of any other group constitute the "Mixed Group." In the Chamber of Deputies during Thirteenth Parliament, it became particularly necessary to ensure greater visibility and political autonomy for the minority political forces present in each of the two electoral coalitions.

A problem therefore arose concerning the nature and the internal management of the Mixed Group, which had become unprecedentedly and abnormally large because it comprised, not only individual members of Parliament, but whole political movements that had not wished or been able to find a different placing within the electoral coalitions, and had preferred to remain independent. Because of these situations, at the end of the Thirteenth Parliament the Mixed Group was comprised of ninety-two members in the Chamber of Deputies (of whom seventy were members of internal political groupings and twenty were not), which was almost five times larger than the original number (twenty-six deputies), making it numerically the third largest group in the Chamber

41. See COZZOLI & CASTALDI, *supra* note 5, at 355. The Lega Nord is a party fighting for independence of the North Eastern part of Italy.

(approximately fifteen percent of the overall membership of the Chamber of Deputies). In the Senate, the Mixed Group was comprised of forty-three senators or about fourteen percent of the total membership. This was less marked in the Fourteenth Parliament, where the Mixed Group was comprised of sixty-three Deputies and thirty-four senators.

Additionally, during the Fifteenth and Sixteenth Parliaments, the number of MPs who joined the Mixed Group decreased considerably. This was clearly due to the much stronger linkage between MPs and his/her party under in the new electoral legislation. In the Fifteenth Parliament, Deputies belonging to the Mixed Group amounted to thirty-three members, as against thirty-one Senators; in the Sixteenth Parliament, twenty-four Deputies and sixteen Senators joined the Mixed Group.

This group is extremely varied, because it has lost its “last-resort” character and has now become a “super-group” with widely differing types of political forces permanently belonging to it. As a result, its political thinking is very difficult to clearly identify. The organizational and political problems that have made it difficult to govern the Mixed Group were addressed by the 1997 reform of the Rules, which was intended to regulate the conditions for membership of the Mixed Group.⁴² Political groupings could be established within the Group under the following conditions:⁴³

- at least ten Deputies must submit the request (this is a purely numeric requirement; this procedure for creating an internal grouping within the Mixed Group is therefore detached from any relationship to a particular party or political movement);

42. See V. DI CIOLO & L. CIAURRO, *Le recenti modifiche dei regolamenti parlamentari, Appendice di aggiornamento (update)*, 31 March 1998, to the volume *Il diritto parlamentare nella teoria e nella pratica*, 36-37 (1998).

43. Deputies belonging to the Mixed Group may ask the President of the Chamber to form political groupings within it, on the condition that each consists of at least ten Deputies. Smaller groupings may also be formed, as long as they include not less than three Deputies. These Deputies must represent a party or political movement the existence of which can be demonstrated, on the date of the elections to the Chamber of Deputies, by precise and unequivocal features, and which must, alone or jointly with others, have presented lists of candidates or individual candidates in the single-member constituencies. Not less than three Deputies belonging to linguistic minorities protected by the Constitution and referred to in an Act of Parliament may also form a single political grouping within the Mixed Group. These Deputies must have been elected, in areas in which these minorities are protected, from, or in connection with, lists that reflect these minorities. See Rule 14 (5).

- a request made by at least three Deputies, but in this case they would have to represent a party or political movement that had stood for election to the Chamber of Deputies as such (this second type of grouping has a political characterization, even though the numerical condition still applies, and although the number is smaller than in the first case);
- a request can be entered to set up a single political grouping by at least three deputies who were elected to represent linguistic minorities protected by the Constitution and recognised by law (in this case three conditions must be met: (a) a minimum of three deputies must apply; (b) they must be members of a linguistic minority; and (c) they must have been elected within lists representing a linguistic minority).

It was because of this “bloating”⁴⁴ of the Mixed Group that it became necessary to give prerogatives and rights to the political groupings established therein to ensure that they are as broadly involved in parliamentary work as possible by recognizing that they possess their own legitimacy and political visibility, as well as specific powers based on the Rules of Procedure. One only has to think of the organization of the debates taking into account the groupings and the times to be allotted to them, and their participation in the work of the Conference of Parliamentary Group Chairpersons.

It should be noted, however, that the establishment of political groupings within the Mixed Group is only provided for by the Rules of Procedure of the Chamber of Deputies. There is no general provision for this to occur in the Senate, but representatives of the political groupings within the Mixed Group do have the right to submit parliamentary “interpellations” using the shortened procedure, pursuant to article 156-*bis*, para. 1.

44. See N. LUPO, *Le recenti modifiche del regolamento della Camera: una riforma del procedimento legislativo “a Costituzione invariata”*, in *Gazzetta Giuridica Giuffrè*, 2, n. 37 (1997).

VI. THE FUNCTIONS OF PARLIAMENTARY GROUPS: INDIVIDUAL
MEMBER PRIVILEGES AND PREROGATIVES

According to the parliamentary rules, the Groups have two types of functions: (1) in relation to the organization of the two Houses; and (2) in relation to individual members.⁴⁵

First, with regard to the functional organization of the Chambers, the Groups are the yardstick for the composition of the internal bodies, in order to guarantee their representative character and (as far as possible) their proportionality. They are also the instrument which makes it possible to guarantee the particular "political economy," as is emphasized in the literature⁴⁶ of parliamentary business. In this regard, the Group chairpersons enjoy a number of procedural prerogatives which are often (in the Chamber of Deputies, but not in the Senate) linked to the size of their groups. These are known as weighted requests, where the Rules of Procedure require that a particular procedural point be supported by a given quorum of deputies "or by one or more Group Chairpersons which, separately or jointly, account for at least the same number"⁴⁷ Then, there are cases in which the procedural power of the Group Chairpersons is recognized independently of any weighting of the numerical size of the group (which is obviously favorable to groups with smaller numbers of members).

The groups have a number of powers and privileges within the parliamentary system according to the Rules of Procedure of the Chamber of Deputies.

With regard to the agenda setting, the Group Chairpersons have deliberative voting powers at the Conference of the Group Chairpersons for approving the agenda and the timetable of the House; the representatives of the groups also attend the meetings of the Committee Bureaus for the adoption of the program and timetable. Each group is allocated time which is partly equal for all the groups, and partly proportional to the size of the group memberships. A Parliamentary Group may request that for the phases following a general debate on an exceptionally important bill, time quotas are established only following a unanimous decision of the Conference of Group Chairpersons, or when the debate is unable to be concluded and the bill is set down for a later time-

45. See COZZOLI, *supra* note 6, at 28.

46. See MANZELLA, *Il Parlamento*, 95 (1977).

47. Rule 114(1); see also Rules 44(1) and 114(2).

table. For time-restricted debates, it is mostly permitted for one deputy to speak for each group, in addition to the dissenting members.

The relevant committee must initiate consideration of those bills endorsed by a Parliamentary Group within one month. The Chairperson of a Parliamentary Group may request the Bill to be declared urgent; the Conference of Group Chairpersons or the House resolves on the request. Following the reporting committee's examination of a bill, dissenting groups can appoint minority rapporteurs to represent them. In connection with voting on amendments, a Parliamentary Group may table amendments proportionally to the size of the group and a number of the clauses in the bill, which must be put to a vote even if the Speaker orders a summary vote based on selected amendments or by principles.

Furthermore, the chairperson of a Parliamentary Group has a number of procedural powers, provided that the group comprises of at least (a) one-tenth of the total number of Deputies: in this case he/she may seek the referral of a bill to the floor of the House assigned to a Committee acting in an enacting capacity, or request amendments from the Committee in the course of a parliamentary session to be delayed by a maximum of three hours; (b) thirty Deputies: he/she may request a secret ballot, submit sub-amendments to the amendments tabled by the Committee in the course of the session, or submit proposals to debated topics which are not on the order of the day or agenda; or (c) twenty Deputies: he/she may request voting by roll-call, an adjournment of the debate, submit amendments and sub-amendments to motions within deadlines that are shorter than those normally prescribed, or request a debate to be broadened to discuss the general thrust of a particular bill.

Independent of the size of the group, the Parliamentary Group Chairperson may also: (a) invite the Speaker of the House to request information, clarification and documents from the Court of Auditors; (b) table a preliminary question regarding the substance of a decree law or of a Bill enacting a decree law; (c) take up an amendment withdrawn by its sponsor; (d) table motions or request the discussion of motions withdrawn by their movers; (e) propose a different referral for a particular bill; (f) request a debate on a bill by titles or parts; (g) submit proposals for a different transposition of the principles and guiding criteria for re-wording draft amendments to the Rules adopted by the House; (h) request that the

House to meet in closed session; and (i) object to the referral of a bill to a Committee during a period of adjournment.

With reference to participation of groups in the bodies of the Chamber, the groups must be represented at the Bureau and (mostly in proportion to their numbers) on Committees. The group chairperson is also vested with other prerogatives relating to parliamentary oversight, and may submit no more than two interpellations as a matter of urgency for each month of parliamentary business. Each group also has the right to submit a parliamentary question for each session during which specific time for questions is scheduled. Lastly, the groups are entitled to use facilities, equipment and contributions from the Chamber of Deputies' budget, bearing in mind the general basic requirements and the size of each group.

For individual members, affiliation to a group is a necessary condition of their status, for two reasons: (1) primarily in order to ensure a more economical and rational organization of parliamentary business; and (2) the Rules of Procedure establish a very close linkage to the parties which, as provided by the Constitution, are designed to prevent the fragmentation of the parliamentary mandate, which is typical of the liberal nineteenth century systems.

The Parliamentary Groups have their own internal rules of procedure (through their Statutes or Rules). As far as "whipping"—the requirement that parliamentarians toe the Group line—or group discipline is concerned, it should be borne in mind that individual members are not legally obligated to vote according to the indications of their Group. The provisions of article 67 of the Constitution state that an "imperative mandate"⁴⁸ is prohibited. The Constitutional Court, in judgement 14 of March 7, 1964, stated that each parliamentarian "is free to vote according to the indications of his or her party (or Parliamentary Group to which he or she belongs) but they are also free not to; no provision could lawfully require anyone to be subject to any sanctions for voting against the directives of the party." The Council of State, the supreme administrative court, also ruled in judgement 642 of June 13, 1969 that party discipline is an element extraneous to the normal exercise of parliamentary activities and that parliamentarians could refuse to comply with group discipline either by facing

48. "Each Member of Parliament represents the Nation and carries out his/her duties without a binding mandate."

internal sanctions, or resigning from the group while retaining their parliamentary mandate.

With regard to all of these obligations, the Rules of Procedure of both the Chamber and the Senate act as guarantees, protecting the rights of dissenting members and the activities of individual parliamentarians. Indeed, in 1988 the Rules of Procedure of the Senate laid down specific directives for the statutes of the Groups to protect individual senators. This was a momentous turning point. Only a short time before then, there had been a rigid separation between the internal sources of law governing the groups and parliamentary rules.

According to article 53(7)⁴⁹ of the Senate Rules of Procedure following the 1988 reform, the internal rules of individual Parliamentary Groups are required to provide for procedures and forms of participation that enable individual senators to express their opinions and submit proposals on items on the parliamentary agenda. With this provision, the Senate Rules of Procedure refer to the Statutes of the Groups as a source of law with including guiding principles to protect the freedom of action of each individual member.

Meanwhile, with the introduction of article 15-bis, the Rules of Procedure of the Chamber of Deputies have also dealt with the question of the internal democracy of the parliamentary groups, particularly within the Mixed Group. This rule, which develops the contents of the final sentence of article 15(2), is more appropriately positioned in the new article 15-bis. It requires that the steering bodies of the Mixed Group be set up in such a way that reflects the size of the various political groupings. It specifies that the members of the steering bodies of the Group represent their respective groupings in relations with the other organs of the Chamber of Deputies. They therefore exercise all powers and rights conferred on their grouping and act on its behalf and in its name in all internal official bodies.

Notwithstanding their independence with regard to the adoption of the statutes of the Group, the steering bodies of the Mixed Group of the Chamber of Deputies must resolve any measure in which the interests of the various groupings are involved. The steering bodies must ensure the balance between the groupings

49. "7. The Rules of Procedure of individual parliamentary groups shall lay down the procedures and manner whereby individual Senators may express their positions and submit proposals regarding the matters included in the programme of business or the agenda."

proportionally to their numbers. Whenever any of the groupings believes that any of its fundamental political rights have been violated in this respect, it may appeal the decision to the Speaker of the Chamber of Deputies. The Speaker shall make a decision personally, or place the matter before the Bureau. To date, this provision has not been applied.⁵⁰

Apart from this exceptional power conferred on the Speaker of the Chamber of Deputies by Rule 15-bis(2), the Rules of Procedure of the Chamber of Deputies make no other provision authorizing the Speaker or the Bureau to adopt measures on their own authority, or to rule on or modify resolutions adopted by the Parliamentary Groups. The exclusion of this power is a means for protecting the autonomy of the parliamentary groups' freedom in performing their political/parliamentary role.

In contrast, Rule 12(2) is quite different. This Rule vests the Bureau with the task of ruling on appeals concerning the establishment or first meeting of groups. The rationale of this provision is obviously to regulate the moment in which the parliamentary groups are formed. For in this phase they have not yet acquired their full and autonomous subjectivity within the Chamber of Deputies system. They do not have their own rules adopted by their own members, or organs with the powers to apply these rules, accountable for their conduct towards the members of the group. For this reason, the Rules of Procedure empower the Bureau to decide on appeals concerning the establishment of groups, precisely to guarantee the lawfulness of the procedures required to give the group legal existence. Once this is complete, the group has the power to take its own decisions, with the sphere of competence reserved to its own organs, and hence not subject to oversight by any outside bodies. In any event, provisions protecting the right of individual parliamentarians to dissent from their Group already define the status of individual parliamentarians under the parliamentary rules.

The process of "verticalizing" the parliamentary debate, at the level of Parliamentary Groups and then of opposing coalitions within Parliament, can be problematic. A balance must be sought between offering adequate guarantees for individual parliamen-

50. See M. LUCIANI, Presentation at the Seminar on the revision of the Constitution at LUISS on 20 March 1998 on *La riforma del regolamento della Camera dei deputati*, in *I costituzionalisti e le riforme. Una discussione sul progetto della Commissione bicamerale per le riforme costituzionali*, 247 (S.P. Panunzio ed. 1998).

tarians to take political initiatives, particularly when they dissent, and avoiding placing restrictions on individual parliamentarians that cannot be mechanically linked to the bipolar rationale underlying the new rules for the operation of the parliamentary institution. Concern has emerged that the new Rules of Procedure, which are strongly influenced by the bipolar dialectic between the political forces, could lead to excessive restrictions being placed on the rights of parliamentarians who do not accept that rationale. Parliamentarians stand the risk of being excessively penalized by a misunderstood interpretation of the “first past the post” democratic system. Adapting the Rules of Procedure to the principle of bipolarism has therefore not limited the freedom of the parliamentarian or diminished the role of the Parliamentary Groups and individual members.

The emphasis on bipolarism has led to procedural timing being redistributed between the various phases of the legislative process, in order to encourage debate between the majority and the opposition, without excluding any dissenting deputies or groups from the debate. The attempted goal is to reconcile the legitimate need to streamline parliamentary work while, at the same time, encouraging the ability of individual parliamentarians to have their say.

Specific deadlines were set for a more rigorous scheduling of work: a minimum period was set to thoroughly scrutinize bills in Committee; the status of opposition groups was defined, vesting them with significant rights both to include their own items on the agenda, and to have alternative text put to a vote in the House with priority over other amendments. Opposition groups were also empowered to promote the fact-finding and scrutiny procedures of the Government. Groups are required to respond to requests for information and data, even if the requests are made by minorities, promoting interaction between the Government and the Parliament and between the majority and the opposition. Organs and procedures have been instituted to improve the quality of legislation and to simplify the legislative process. Further, the “Prime Minister’s Question Time” has been introduced; ministers are summoned to give evidence before Committees twice a month following the same procedure used for the House. Even though the new Rules intended to give the majority and opposition groups

an “enhanced” role, they also grant adequate room for the individual positions of individual deputies.⁵¹

If parliamentarians cannot be subjected to “positive” constraints by virtue of the freedom, they have to exercise their mandate; the gradual rewriting of parliamentary rules has nevertheless laid down a series of “negative” constraints on parliamentarians. The new Rules have enhanced the role of the groups and their representatives, to the detriment of individual parliamentarians.⁵² For example, as far as scheduling parliamentary business is concerned, the proposed initiatives of individual deputies outside the mediation of the Parliamentary Groups are not guaranteed any follow-up. Or once again, only *groups*, acting through their chairperson, may submit urgent interpellations or questions for imme-

51. The reform of the Rules, without changing the rights and prerogatives conferred individually on each parliamentarian by the Constitution and the Parliamentary Rules of Procedure (such as the possibility of tabling bills, amendments, motions, resolutions, interpellations and parliamentary questions, and taking part in the work of the Committees and the House), also shows particular attention to the right of individual parliamentarians to dissent. For example Rule 24(7) provides that one-fifth of the time devoted overall for the discussion of the items set down on the timetable of the House should be set aside for Deputies who wish to speak in a personal capacity. Furthermore, specific guarantees are set down for the general discussion and for the discussion of individual clauses, and amendments or additional clauses, and the Speaker may give the floor to deputies wishing to express a dissenting vote from the group to which they belong, setting out the procedures and the times for so doing (article 83 (1) and article 85 (7)). Individual deputies also have a similar right to express their dissent when voting on a motion of confidence (article 16 (3)), and when voting on a proposal to update the government's economic/financial planning document, if required by contingent events (article 118-bis). Furthermore, individual deputies are also given further guarantees to protect their positions when voting on amendments submitted by groups, when implementing the regulations regarding summary votes on selected amendments or by principles (article 85 (8)). In this connection, article 85-bis (3) provides that the Speaker may also put separate clauses and amendments to the vote, where they are considered relevant, that have been submitted by deputies dissenting from the groups to which they belong. However, under the reform, the need to provide guarantees for individual parliamentarians is not limited to the internal organizational phase in the work of the Chamber of Deputies, but is also projected outwards, seeking to encourage the MP to become more firmly established in his or her constituency. For the obligation has been reaffirmed—which existed under the repealed article 25-bis of the Chamber of Deputies Rules of Procedure, which was rarely complied with—that the work of the Chamber of Deputies should be adjourned for one week so that parliamentarians can also perform other activities relating to their constituents.

52. Regarding the principle of the so called “imperative mandate,” see P. RIDOLA, *Diritti di libertà* 119-20 (stating that this principle “acts not only as a protection of the individual status of MPs . . . but it carries a further connotation, within democratic systems and with respect to relations among actors of pluralism, in that it guarantees the mobility of the political system. It enables MPs to keep up communication channels with public opinion, limiting the risk of a political system overly constrained by party discipline and, on the other hand, it offers political parties – via the independence of their MPs – the possibility to participate in a system of mediation vis-à-vis societal complexity.”)

ciate answer, whether on the Floor or in Committee.⁵³ In principle, individual parliamentarians are entitled to express their opinion when they dissent from their group, but nevertheless this guarantee can also depend on the discretion of the Speaker, who has the responsibility of deciding “the modalities and the time limits on any statement,” or evaluating “the relevance” of the amendments submitted by individual deputies.⁵⁴

VII. THE PHENOMENON OF PARLIAMENTARY “MOBILITY”

A further indication of the freedom that individual members nevertheless enjoy, bearing witness to the present settling-down phase through which Italy’s political and institutional system is passing, can be seen from the way in which parliamentarians change groups.⁵⁵ The electoral system in force between 1993 and 2005, based on the “first past the post” system and not fully completed at the institutional level, by no means simplified the political system – one only has to look at the number of Parliamentary Groups. Neither has it curbed the fragmentation between and within political forces, because of the prevalence of the positions of individual parliamentarians and the weakening of group discipline.⁵⁶

The large number of transfers from one group to another that was typical of the Thirteenth Parliament could represent the permanent feature of nervousness in the political system. Member mobility might have serious repercussions both on Parliament and on the fate of governments, by disrupting the existing political balances. However, one should avoid facile simplifications in an attempt to explain the reasons for this, by simply attributing

53. It should also be noted that individual deputies may not activate these new instruments for oversight and scrutiny as such, because these instruments are always tabled through the Parliamentary Group to which they belong. For as far as parliamentary questions to be answered orally and immediately are concerned, whether in the House or in Committee, a deputy for each Group can submit questions, but it has to be done through their own Group Chairperson, which means that individual parliamentarians cannot scrutinize the work of the Government without the “blessing” of the Group to which they belong. The same applies to an even greater extent to urgent interpellations, which can only be tabled through the Parliamentary Group Chairpersons or by at least thirty deputies for each question, and then there are limits on the numbers that may be presented (two per month for each group, and one for each deputy).

54. See Rules 83 (1), 85 (7), 116 (3), 118-bis (4).

55. See C. DE CARO BONELLA, *I gruppi parlamentari nella XII legislatura*, in *Rassegna parlamentare*, 2, 360 (1996).

56. S. CURRERI, *I gruppi parlamentari nella XIII legislatura*, in *Rassegna parlamentare*, 2, 264 (1999).

transformism or political convenience. The collapse of political ideologies and the crisis of the traditional party system, hastened by the changes in the electoral system, could fail to have immediate effects on the conduct of the political classes and on the way of viewing political activism within the party.

It is no coincidence that, in previous parliaments, there were not many cases of parliamentarians changing groups. A gradual increase in migration was present, however, which often resulted in collective movements of dissident factions within one party to another. Across the years it was exceptional for an individual to change groups, considering the powerful group and party discipline, and the profound sense of ideological militancy. In any event, migration was confined to limited political areas.

Instances of migration occurred in the Tenth Parliament (1987-1992) when eighty-six MPs changed groups: sixty-six in the Chamber of Deputies and twenty in the Senate. In the short-lived Eleventh Parliament (1992-1994), forty-three MPs changed groups (forty-one in the Chamber of Deputies and two in the Senate). In the Twelfth Parliament (1994-1996), despite early dissolution, 165 MPs (117 in the Chamber of Deputies and forty-eight in the Senate) changed groups.

Group-changing in the Thirteenth Parliament (1996-2001) was much higher than in the recent past. In the Chamber of Deputies, 139 MPs changed groups (twenty-three per cent of the total membership of the Chamber), while eighty-two senators (one quarter of the membership of the Senate) did so. This phenomenon also reached extreme peaks when some MPs changed groups several times: fifty-nine deputies changed groups only once; thirty-seven deputies changed twice; thirty-two deputies three times; seven deputies four times; one deputy five times; two deputies six times; and one deputy as many as eight times. This phenomenon did not reoccur on the same scale in the Fourteenth Parliament (2001-2006), when only thirty-nine members of the House and twenty-one Senators changed groups.

However, confirming the powerful influence of the electoral system on this phenomenon, it was the Deputies elected in "first past the post" constituencies that changed group most frequently. This indicates a weaker attachment to party membership by those elected under the "first past the post" system (ninety-eight deputies in the Thirteenth Parliament), in comparison with those elected in the proportional representation constituencies (forty-one deputies in the Thirteenth Parliament). Even the latter propor-

tional representation constituencies were strongly affected by this phenomenon: contrary to what one might believe, considering the direct and privileged relationship that MPs elected in “first past the post” constituencies might claim to have with their electorate, parliamentary mobility also affected MPs elected with the proportional representation system (which was quite sizable considering the different proportion of parliamentarians elected with each of these two systems). Despite the greater “gratitude” that the latter ought to have towards the political movements that put their names on the lists, proportional representation constituencies still experienced group migration.⁵⁷

The most typical cases of group changes can be brought under three headings: (a) the transfer of MPs from one group to another while remaining in the same electoral coalition; (b) group changes across coalitions, despite a less than fully bipolar system; and (c) collective migrations resulting from splits and re-groupings affecting a number of political parties. Against this background, the Mixed Group served as a stop-over group, a refuge for parliamentarians who did not move directly due to concerns about their image, in moving one political force to another. But these temporary shuffles in and out of the Mixed Group gave rise to the problem of identifying and managing the political groupings within the Mixed Group.

Problems with the Mixed Group demonstrate that parliamentary mobility must be considered worthy of close attention because of the political and institutional implications that it has. There is no doubt that the electoral system that existed until 2005 contributed considerably to focusing on the “member” element, to the detriment of the “party” element. This is particularly true considering parliamentarians’ view on party discipline, and hence group discipline, as increasingly less binding and imperative. The gradual loss of ideological ties and the constant rapprochement between the stances adopted by the political forces also participated in the development of member mobility.

Yet the very organization of political forces in Parliament actually contributes to fostering mobility. For while the electoral contest is based on coalitions of parties, the political forces, immediately after an election, once again split in Parliament to set up their own parliamentary groups. This makes it possible for MPs to have a certain freedom of movement within their coalition, weak-

57. COZZOLI, *supra* note 6, at 100.

ening the linkage between parliamentarians and the political forces to which they originally belonged.

Furthermore, the tendency of parliamentarians to demand greater political autonomy as a result of the obligations arising from their own constituency is also being driven by current legislation. For example, the legislation on the refunding of election expenses, or the subsidies available for publishing, which allow even the tiniest political formations to qualify for these grants, encourage the splits within Parliamentary Groups. A risk arises from the absence of appropriate forms of coordination and discipline. Often, parliamentarians' right to act independently of the mandate given to them by the electorate and the political parties is used to pursue an excessively individualistic and laissez-faire concept of parliamentary representation.⁵⁸

The freedom of parliamentarians, a fundamental safeguard upheld by the Constitutional Court to defend every MP from pressures exerted by their own political group, cannot and should not be used as a tool to jeopardize the functionality and democratic nature of the system. At the present time, the only way that Deputies and Senators can be penalized under the Parliamentary Rules for switching groups is found in the provisions governing the composition of the Bureaus of the Chamber of Deputies and the Senate. The provisions state that parliamentarians who have been appointed Secretaries lose office as soon as they join another Parliamentary Group.⁵⁹ Any further penalty likely to affect the status of the parliamentarians, however, should be considered infringement of article 67 of the Constitution.⁶⁰

Any interpretation that would place such a privileged emphasis on the exercise of freedom by parliamentarians would destructively lead to individualistic parliamentary representation, detached from any rationale of party membership. There is no basis for laissez-faire style representation in other provisions of the Constitu-

58. See CURRERI, *supra* note 56, at 277.

59. In the Chamber of Deputies (Rule 5(7)) the Secretary loses their "office if the Group they belonged to at the time of their election ceases to exist, or if they join another Group that is already represented in the Bureau;" in the Senate (Rule 5(9-bis)) a penalty is imposed for any group change. But in both Houses, it is only the additional Secretaries who lose office, that is to say, the ones that have been elected to guarantee representation of the smallest groups, but not for those who are elected initially as a result of the agreements concluded between the originally constituted groups.

60. Article 67 states that each Member of Parliament represents the Nation and carries out his/her duties without a binding mandate. A penalty towards a parliamentarian could limit his freedom guaranteed by the Constitution during the mandate.

tion, which provide that political parties are the instruments through which the people exercise popular sovereignty (art. 1 Const.) and use the democratic method to establish national policy (art. 49 Const). The parliamentary groups – mentioned in articles 72 and 82 of the Constitution by reference, respectively, to the composition of the Standing Committees and the Investigation Committees – are the natural parliamentary projection of the political parties.

As indicated above, the phenomenon of parliamentary “mobility” did not occur in the Fourteenth Parliament because crossing over from one group to another has been fairly limited. In the Fifteenth Parliament, which only lasted two years due to the fall of the Prodi Government, group-changing was a limited phenomenon: in the Chamber, sixty-five Deputies changed their group in contrast to fifty-five Senators. Similarly, in the Sixteenth Parliament, only twenty-four Deputies and sixteen Senators have switched groups. The Mixed Group has been a stop-over for parliamentarians that have not changed groups directly, but have moved from one political force to another, by way of the Mixed Group. All this shows that parliamentary mobility must be considered as deserving of attention, because of the political and institutional implications it entails.

VIII. COMPARATIVE REMARKS: THE U.S. HOUSE OF REPRESENTATIVES AND SENATE

In the light of what precedes, a comparison may be drawn with the system in place at the United States Congress. Such a comparison, however, must move from the premise that the basic political circumstances are different. Apart from the obvious difference in area and in population (the United States has more than 300 million inhabitants, whereas Italy has about one-fifth as much in the last census), in the U.S. House and Senate, the two-party system is solid and has been so for two centuries. Nonetheless, the Italian Houses are larger; the House counts 630 members and the Senate 315 (whereas the U.S. House has 435 members, with 100 senators). In the United States, the system springs from the “first past the post” electoral mechanism of British origin, and none of the politicians wish to change it. Members who are not elected as members of the Republican or of the Democratic Party (the Independents) are very few.

Italy has used three electoral methods in sixty-five years: (1) from 1948 to 1992, a strictly proportional system; (2) from 1994 to

2001, a mixed system, in which “first past the post” districts gave three-quarters of the seats in both Houses, while the other quarter was elected in a proportional manner; and (3) from 2006 to present, a new system based on proportional representation, but with an added premium for the party or coalition of parties that wins the most votes. Therefore, the first evident difference between the two nations’ systems is that party discipline is stronger in Italy, when compared to the U.S. Senate at least.

Fractions – more commonly known as called “conferences” or “caucuses” in the United States – have a different, stronger position in regard to the members, due to the fact that members are elected directly in their constituencies. In this respect, another couple of considerations must be added.

First, in the United States, the term in the House is two years. In Italy, both Houses last for a five-year term. As a result, in Italy campaigning is not as frequent and close. Second, based on the constant campaigning, the issue of fundraising in the United States is always of the essence. It is widely known, as reflected in the 1976 United States Supreme Court decision, *Buckley v. Valeo*,⁶¹ that members of the United States House and Senate spend a lot of their time in fundraising activities.⁶² A successful fundraiser is likely to be rather independent from his leader in either House.

In Italy, statutes bar television political ads and the publication of opinion polls within thirty days of Election Day. The need for campaign money is thus slightly less felt. Furthermore, once the electoral system shifted back to proportional representation in 2006, members of Parliament (and therefore members of Parliamentary Fractions) are mainly a self-appointed élite that does not campaign in any specific district.

In the United States, the legislative branch works on a majoritarian base, particularly in the House of Representatives: the Speaker of the House is by all means the leader of the ruling party, while the majority leader is the secondary leader. The Vice-

61. 424 U.S. 1, 21 (1976).

62. After the famous (or infamous, according to a different view) *Buckley* decision, the Court had accepted some legislative limits on campaign spending in the 2003 decision *McConnell v. FEC*, but then in 2010, in *Citizens United v. FEC*, it struck down almost all money caps. *McConnell v. Fed. Election Commn.*, 540 U.S. 93, 223-34 (2003); *Citizens United v. Fed. Election Commn.*, 558 U.S. 310, 372 (2010). The literature on the subject matter is vast. See, e.g., E. J. ROSENKRANZ, *If Buckley Fell* (Century Foundation Press 1999); and for a stark criticism of the system in place, see C. LEWIS, *The Buying of the Congress* (Avon Books 1998).

President of the United States presides over the Senate.⁶³ Only if the President is a lame duck does the Senate have a Senator of the opposite party as a majority leader. The opposition party elects within its caucus a minority leader in the House and Senate.

Thus, there are no fractions in the European sense in the United States. The two parties hold caucuses (the Democrats) and conferences (the Republicans) to decide their strategy in legislative procedures. The few Independents caucus either with one or with the other party (there is no notion of “Mixed caucuses”). For instance, presently, Independent Senators Joe Lieberman of Connecticut and Bernie Sanders of Vermont caucus with the Democrats.

At the committee level, the majority caucus gets to elect all of the chairmen, and the minority designates its ranking member. Staff usually is accountable either to the chair of the committee or to the ranking member, according to party affiliation.

The Rules Committee in the House is in charge of setting the agenda and shaping the debate, allowing time and amendments to each bill to be discussed. The Rules Committee is chaired by a person with the trust of the Speaker and is composed of nine members of the ruling party and only four of the minority party. This means that the majority has a direct grip on the congressional agenda and usually allows the so-called ‘closed rule’ and not a full and open debate on the floor of the House on any given bill.⁶⁴

On the contrary, in Italy the majority’s control over the agenda is only indirect. The ruling party must give up some space to the opposition groups (something similar happens in the British Parliament with opposition days and Private members’ bill days). As stated above, the Speaker of the House is the leader of the ruling party of the House. The Speaker is in charge of promoting his party to achieve the maximum advantage point. In the Italian Houses, the Chief presiding officer – the Speaker of the House and the President of the Senate – should instead ensure fairness of proceedings and fidelity to the Constitution and precedents.

On the other hand, individual senators in the United States are much more relevant and powerful than in Italy. A United States senator represents his State and will not bow down easily to the whip, or even to the leader of his own conference or caucus, if he does not deem the party’s agenda fit for the interests of his State.

63. MCKAY & JOHNSON, *supra* note 1, at 188.

64. See M. Doran, *The closed Rule*, 59 EMORY L. J., 1387 (2010).

This is particularly obvious in two cases, confirmation procedures and filibuster.

When the President appoints a federal official and then sends for confirmation in the Senate, according to the “Advice and Consent” rule laid down in Article II, Section 2, Clause 2 of the Constitution,⁶⁵ the senators from the State that prospective official is from have great influence. An informal ‘senatorial courtesy’ procedure is in place, by which the two senators from that State must be given the opportunity to express their opinion about the appointee, even before formal procedures of confirmation start at committee level. The senators must be given time to fill in a “blue slip,” a sheet of paper on which they might write their position on that person⁶⁶.

It is often understood that if one or both senators from the State do not return a favorable ‘blue slip’ (or do to not return it at all), the appointment will go no further. The position that Senators take in confirmation procedures are usually not compelled by the conference to which they belong. If a Senator does not wish to return the blue slip or vote for the appointee, his own Senate leader will have a hard time persuading him to do otherwise.

None of this occurs in the Italian Senate. Advice and consent (i.e. ‘confirmation’) does not exist in Italy, as it is understood in the United States. Some statutes call for parliamentary approval of Executive branch appointments. But on these issues, Committees usually vote along party lines—that is, the individual member does not have much of a say.

Regarding the filibuster, it is well known that at least forty-one Senators can virtually paralyze the United States Senate, preventing the whole from coming to a vote on any given matter. To break the filibuster in the Senate, sixty Senators are needed. The decision to filibuster is usually a matter settled by the leadership of the party in the minority. However, decisions in this field are delicate, and individual senators can decide differently and go against their own leadership.

All this does not happen in the Italian Senate. No filibuster is permitted in Italy. The Senate in Italy is much more similar, in its political workings, to the United States House.

65. U.S. CONST. art. II, § 2, cl. 2.

66. See R.C. Black, A.J. Madonna, R.J. Owens, *Obstructing Agenda-Setting: Examining Blue Slip Behavior in the Senate, The Forum, Governing Through the Senate, Vol. 9, No. 4, Art. 9, 4 (2011)*.

IX. CONCLUSIONS

The trends in the new ways that parliamentary work is organized are very promising for the changes that are coming to the Italian institutional system. To initially assess the way the reforms of the Thirteenth Parliament's Rules of Procedure of the Chamber of Deputies are working, one has to ask whether the innovations that have been introduced are a major signal of the Italian system joining the stable majoritarian democracies,⁶⁷ or whether it is still a marker that the system is still in a transitional phase.

There is no single answer to this question. All of the amendments that have been introduced attempt to give both Houses of Parliament efficient decision-making rules that expedite political processes and adjust them to the pace of processes of civil society. However, there are nevertheless a number of contradictions in the modification of parliamentary rules⁶⁸ because, on the one hand, they try to anticipate the institutional innovations being debated in Parliament, while at the same time, they reflect the painfully slow process of restructuring the party system.⁶⁹

The reforms of the Rules following the new electoral system introduced in 1993 anticipated the constitutional reforms that have taken place at three different levels:⁷⁰ the first level, the interaction between government, majority and opposition; the second level, in which the parliamentary groups are the main players, as well as the political forces that do not have enough members to form a Group, and which set themselves up as political groupings within the Mixed Group; and the third level, the individual deputies who are given adequate scope for political initiative within the group or majority or opposition coalition to which they belong. Thus, the Italian political-parliamentary system has in a slow and convoluted way oriented itself towards new rules which have made it very different from the past, even though it has not

67. G. ROLLA, *Riforma dei regolamenti parlamentari ed evoluzione della forma di Governo in Italia*, in *Rivista trimestrale di diritto pubblico*, 603, n. 3 (2000).

68. F. LANCHESTER, Presentation at the Seminar on the revision of the Constitution at LUISS on 20 March 1998 on "La riforma del regolamento della Camera dei deputati", in PANUNZIO S.P., *I costituzionalisti e le riforme. Una discussione sul progetto della Commissione bicamerale per le riforme costituzionali*, Milano, 1998, 244.

69. COZZOLI, *supra* note 6, at 129.

70. V. Cozzoli, *L'evoluzione del ruolo dei gruppi parlamentari nel Regolamento della Camera dei deputati*, (The development of the role of the Parliamentary Groups in the Rules of the Chamber of Deputies) in *Studi polacco-italiani dell'Università di Torun* (Polonia), IV, 157 (2005).

achieved a full coherence due to the ostensible and incomplete bipolarization of the political-parliamentary system produced by the electoral system. To compound the picture, this system has changed again following Law no. 270 of 2005,⁷¹ while the political system remains fragmented.

Ten years since their adoption, the reforms of the Rules of Procedure of the Chamber of Deputies, which are a major piece of the mosaic in the process of reforming representative institutions and the Italian form of government, emphasize the linkage between the government and its parliamentary majority within the framework of a system that guarantees enhanced rights for political minorities. Relatedly, the decrease in the number of parliamentary groups following the new electoral legislation in 2005 is a crucial factor for the streamlining of the political system and a more efficient Parliament.⁷² From this point of view, parliamentary groups tend to supersede the established model of parliamentary practice of an opposition working through the method of disorganized and fragmented obstructionism, while placing emphasis on the role of the opposition as a rival force, standing as an alternative to the political majority in government.⁷³

71. See Legge Dicembre 2005, *supra* note 23.

72. Regarding the effects of the recent electoral law in terms of political fragmentation see L. GIANNITI, in *Gruppi e componenti politiche tra un sistema elettorale e l'altro, relazione al seminario di studio "le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione"* Roma 17 marzo 2006, now in E. Gianfrancesco, *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione* 31 (N. Lupo ed. 2007).

73. See V. DI PORTO & E. ROSSI, *Ostruzionismo*, in *Digesto-Discipline pubblicistiche*, X 546-47, 572 (2005).

Breaking the Law to be Within the Law

*Anya Lernatovych**

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I. INTRODUCTION

For many, marrying an American citizen is the “simplest and quickest way of immigrating to this country.”¹ Of the various immigration policies and procedures subject to continuous debate, perhaps the most intriguing is that of “sham” marriages. A sham or fraudulent marriage is a marriage contracted for the sole purpose of obtaining legal status in the United States.² Under the federal statutes forbidding sham marriages, it appears that the crime is not the marriage itself, but rather the conspiracy to violate immigration laws.³ For example, 18 U.S.C. § 371 makes it a crime to “conspire either to commit any offense against the United States, or to defraud the United States”⁴ Section 1325(c) of Title 8 of the United States Code goes a step further, providing that “[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than \$250,000, or both.”⁵

* J.D. Candidate 2014, Duquesne University School of Law. The author would like to thank Dean Emeritus Nicholas Cafardi for his invaluable guidance throughout the writing process.

1. 2 H.R. REP. NO. 906, at 6, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5978.
2. 8 U.S.C. § 1325(c) (2009).
3. *Id.*
4. 18 U.S.C. § 371 (2009).
5. 8 U.S.C. § 1325(c) (2009).

The problem of sham marriages is important to address, mainly because the increasing number of fraudulent marriages undermines the integrity of the United States immigration system. Congress has made several attempts to improve the immigration system, namely by implementing the Immigration and Control Act of 1986⁶ (“IRCA”) and the Marriage Fraud Amendments of 1986 (“IMFA” or “Amendments”).⁷ While both Acts have affected some positive change, neither has been as successful as predicted, leaving several loose ends without creating a viable solution to the problem.

This Article will offer an alternative approach. First, the Article will trace the history of sham marriages in the United States. Second, it will analyze congressional attempts to limit sham marriages. Finally, this Article will argue for the adoption of a new law specifically targeting a well-defined group that will incorporate several provisions from the IRCA and IMFA Acts and will create an alternative route for immigrants to obtain legal status in the United States without breaking the law.

II. HISTORY

A. *The Problem of Sham Marriages*

According to the latest United States Census Bureau data, the estimated number of immigrants (legal and illegal persons living in the United States who were not American citizens at birth) in the country reached a new record of forty million in 2010, representing nearly thirteen per cent of the total population (5.6% naturalized citizens and 7.3% noncitizens).⁸ New immigration, both legal and illegal, plus births by immigrants, added 22 million residents to the country over the last decade, equal to eighty percent of total population growth.⁹ Immigrants represent one-sixth of the United States’ total population.¹⁰ In 2010, the immigrant population was double that of 1990, nearly triple that of 1980, and quad-

6. *Id.* § 1255.

7. *Id.* § 1186(a); 8 C.F.R. § 216 (2009).

8. Elizabeth M. Grieco et al., *The Foreign-Born Population in the United States: 2010*, U.S. CENSUS BUREAU (May 2012), <http://www.census.gov/prod/2012pubs/acs-19.pdf>.

9. Steven A. Camarota, *Immigrants in the United States, 2010: A Profile of America's Foreign-Born Population*, CTR. FOR IMMIGRATION STUDIES 5 (Aug. 2012), <http://cis.org/articles/2012/immigrants-in-the-united-states-2012.pdf>.

10. *Id.*

rule that of 1970, when it was at 9.6 million.¹¹ In addition, estimates suggest that “between twelve and fifteen million new immigrants will likely settle in the United States in the next decade.”¹²

Among the different categories of immigrants who are eligible to gain legal status in the United States, the family-sponsored category is one of the most popular.¹³ In order “to promote family unity, immigration laws allow United States citizens to petition for certain qualified relatives to come and live permanently in the United States.”¹⁴ Specifically, the Immigration and Nationality Act (“INA”) provides that “aliens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence [include] . . . family-sponsored immigrants”¹⁵ Additionally, the INA gives immediate relatives special immigration priority by providing them with an unlimited number of visas, which allows them to circumvent the typical visa waiting period.¹⁶ The term “immediate relatives” means the unmarried children under the age of twenty-one, spouses, and parents of a United States citizen.¹⁷ While there are other categories of family-sponsored immigrants, they are limited.¹⁸

Nonetheless, marriage to an American citizen is still considered to be the easiest and the fastest path toward becoming a lawful permanent American resident. In fact, between 1998 and 2007, more than 2.3 million foreign nationals gained lawful permanent resident (“LPR”) status through marriage to an American citizen, accounting for more than a quarter of all green cards issued in

11. *Id.* at 9.

12. *Id.* at 5.

13. See 8 U.S.C. § 1151(c) (2009). Other categories of immigrants eligible to gain legal status include “employment-based” immigrants and diversity lottery winners, who are also known as green card holders. *Id.* § 1151(a).

14. *Id.*

15. *Id.* § 1151(c).

16. *Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=9c8aa6c515083210VgnVCM10000082ca60aRCRD&vgnextchannel=9c8aa6c515083210VgnVCM10000082ca60aRCRD> (last updated March 30, 2011).

17. 8 U.S.C. § 1151 (b)(2)(A)(i).

18. *Id.* § 1151(c)(1)(A). The worldwide level of family-sponsored immigrants under this subsection for a fiscal year is, subject to subparagraph (B), equal to (i) 480,000. *Id.*

2007.¹⁹ That number has increased dramatically since 1985, and has quintupled since 1970.²⁰ In 2006 and 2007, nearly twice as many green cards were issued to spouses of American citizens than for all employment-based immigration categories combined.²¹

The process of obtaining legal status in the United States through marriage to an American citizen is complicated. First, the United States citizen or her immediate relative must file a Form I-130 with the U.S. Citizenship and Immigration Service (“USCIS”) if the person lives in the United States or, if she lives abroad, at an American embassy or consulate.²² The Form I-130 must either be pending approval or approved by USCIS.²³ Second, after an alien receives a Form I-797, Notice of Action, showing that the Form I-130 has either been received by USCIS or approved, then he/she must file a Form I-485.²⁴ When filing an I-485 application package, they must include a copy of the Form I-130 receipt or approval notice (the Form I-797).²⁵ The alien’s spouse must then apply for “adjustment of status” to have the “alien lawfully admitted for permanent residence.”²⁶ A couple typically files the petition and the application for adjustment simultaneously.²⁷

Unfortunately, this way of obtaining a legal status in the United States has opened a door to many immigrants who are willing to enter into a sham marriage for the sole purpose of obtaining legal status. Marriage fraud in immigration has been an issue for years.²⁸ As one commentator has explained, “[m]ore than 20 years ago the United States Senate held hearings on the topic and concluded that it was a significant and growing problem, but only a few of the recommendations proposed ever went anywhere.”²⁹

19. David Seminara, *Hello, I Love You, Won't You Tell Me Your Name: Inside the Green Card Marriage Phenomenon*, CTR. FOR IMMIGRATION STUDIES 1 (Nov. 2008), <http://www.cis.org/sites/cis.org/files/articles/2008/back1408.pdf>.

20. *Id.*

21. *Id.* at 2. The employment-based preferences category amounts to 14% of all foreign citizens gaining LPR status by preference category, the parents and children of American citizens category amounts to 20%, the diversity lottery winners category amounts to 4%, refugees equal to 7%, compared to 27% of spouses of American Citizens. *Id.* at 4.

22. *Green Card for an Immediate Relative of a U.S. Citizen*, *supra* note 16.

23. *Id.*

24. *Id.*

25. *Id.*

26. See Immigration and Nationality Act (INA) § 245, 8 U.S.C § 1255(a) (2009).

27. *Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/green-card/green-card-processes-and-procedures/concurrent-filing> (last updated April 22, 2011).

28. Seminara, *supra* note 19, at 2.

29. *Id.*

While there is no way of determining the real number of sham marriages, according to one USCIS officer, the number could be as high as thirty percent of all immigrant marriages: “from almost 30 interviews conducted by one officer a week, at least five couples have fraudulent relationships.”³⁰ Another commentator similarly noted that “[t]here is no way of knowing what percentage of the 300,000-plus spouses who gain green cards each year through marriage to American citizens or LPRs do so based on a fraudulent relationship, but consular officers interviewed for this Backgrounder offered estimates ranging from 5 to 30 percent.”³¹

Accordingly, sham marriage is one of the main problems facing the immigration system. As the USCIS officer interviewed for this Article explained:

[T]he biggest problem is that the way the law is written now it promotes marriage fraud. There are no alternative routes, besides marrying an American citizen, for obtaining legal status for aliens who originally came to the United States with a valid visa but for one reason or another overstayed it and automatically became disqualified from any other immigration program.³²

In addition, the increasing number of sham marriages undermines the integrity of the legal immigration system in the United States. For example, “legitimate international couples can face longer wait times due to the huge number of bogus marriage petitions that bog down an already slow and cumbersome visa bureaucracy.”³³ Also, the issue is important to address for national security reasons. Terrorists can easily exploit the current system to obtain entry to the United States.³⁴ It is important to make changes in the immigration law in order to prevent terrorists from taking advantage of the system and obtaining legal status through fraud.

Recognizing the true intent with which the parties entered the marriage is the biggest difficulty that USCIS officers face in determining whether a marriage is a legitimate one.³⁵ The court in

30. Interview with USCIS officer, U.S. Citizenship & Immigration Serv., in Pittsburgh, Pa. (Sept. 26, 2012).

31. Seminara, *supra* note 19, at 12.

32. Interview with USCIS officer, *supra* note 30.

33. Seminara, *supra* note 19, at 2.

34. *Id.* at 1.

35. Interview with USCIS officer, *supra* note 30.

Marblex Design International, Inc. v. Stevens pointed out that “[t]he federal statutes do not address the question of the validity of a marriage; they only address the intent with which the parties entered the marriage, as a portion of a conspiracy. In short, no federal statute says the marriage, itself, is ‘illegal.’”³⁶ The only documents that immigration officers have to work with on the first stage of the process, in order to determine the true intent with which the parties entered the marriage, are the petition itself, marriage and birth certificates, passports, supporting documents and photographs of the couple that are meant to prove the validity of the relationship.³⁷ Therefore, the immigration officers “essentially are flying blind in approving marriage and fiancé-based petitions.”³⁸ The officers must try to identify potential fraud at the first stage of reviewing the file and petition.³⁹ Different income levels (such as when one partner is on disability/welfare and the second one has a doctoral degree), different addresses, lack of proof of marriage, and large age differences give an officer a red flag, and the petition is forwarded to the second stage of further investigation.⁴⁰

The United States Attorney General has delegated broad investigatory powers to officers of the INS; among them are the powers to take evidence and to conduct searches.⁴¹ Accordingly, an officer has the authority to conduct a “Stokes interview” in all suspected marriage fraud cases.⁴² During such an interview, the officer has an opportunity to meet with the couple in person for the first time. First the officer conducts an interview with the American citizen and asks questions about the couple's relationship. Questions can vary from the basic ones, such as where the couple met, how long they have been together, and where they got married, to more spe-

36. *Marblex Design Int'l, Inc. v. Stevens*, 678 S.E.2d 276, 304 (Va. Ct. App. 2009).

37. *Seminara*, *supra* note 19, at 3.

38. *Id.*

39. *See id.*

40. Interview with USCIS officer, *supra* note 30.

41. *See* 8 U.S.C. §§ 1154, 1357 (2009).

42. The name “Stokes interview” is derived from the case *Stokes v. INS*, 393 F. Supp. 24 (S.D.N.Y. 1975), in which the Federal District Court for the Southern District of New York ruled that every I-130 spouse petition filed in the New York District Office in which a question of the bona fides of the marriage is at issue must be adjudicated using the specific guidelines. The officer may consider interviewing the petitioner and beneficiary separately when there is suspicion regarding the documentation that was submitted, the beneficiary and petitioner have given inconsistent testimony, or other factors that may indicate fraud. *Id.* It is at the officer's discretion when determining if parties should be interviewed separately. *Id.*

cific questions that require more detailed answers. For example, a hearing officer might ask one of the parties to describe the couple's house, her significant other's morning routine or recent activities during the weekend. Then the officer asks the alien the same questions without a partner present. Finally, he brings them into the room together and gives the couple a chance to explain any discrepancies in their answers.⁴³

Observing the couple's demeanor and body language is especially important for the officer conducting the interview.⁴⁴ According to the USCIS officer:

'Legitimate' couples act more normal—they look at each other during the conversation, interrupt each other, sometimes even argue—where the potential fraud couple does not have the same behavior and in most instances the alien, since he or she is the one who has the most to lose, is the one who answers a majority of the questions even if they were not addressed to him or her.⁴⁵

If, after the initial interview, the USCIS officer still believes that the couple's marriage is potentially fraudulent their file is sent to a Fraud Detection and National Security ("FDNS") officer.⁴⁶ USCIS created FDNS in 2004 in order to "strengthen USCIS's efforts to ensure immigration benefits are not granted to individuals who pose a threat to national security or public safety, or who seek to defraud our immigration system."⁴⁷ FDNS officers resolve background check information, "engage in fraud assessments to determine the types and volumes of fraud in certain immigration benefits programs," and systematically perform reviews "of certain types of applications or petitions to ensure the integrity of the immigration benefits system."⁴⁸ The FDNS officer will visit the couple and will try to determine if they are living together and if they are in a real relationship.⁴⁹ To make that determination,

43. Interview with USCIS officer, *supra* note 30.

44. *Id.*

45. *Id.*

46. *Fraud Detection and National Security Directorate, U.S. CITIZENSHIP AND IMMIGRATION SERVS.*, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=66965ddca7977210VgnVCM100000082ca60aRCRD&vgnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD> (last updated Nov. 18, 2011).

47. *Id.*

48. *Id.*

49. *See id.*

the FDNS officer engages in a number of investigatory tactics, such as staking out the couple's home, talking with neighbors, visiting their offices or even contacting the citizen's parents.⁵⁰

B. Congressional Attempts to Limit Sham Marriages

Congress has implemented some changes to the immigration law and procedures in order to limit immigration fraud. For example, the Legalization Act (the "Act"), also known as the Immigration Reform and Control Act of 1986,⁵¹ was an attempt to improve the immigration system. The Act provided a means for certain aliens who have maintained an unlawful residence in the United States since before January 1, 1982, and who were physically present in the United States from November 6, 1986 until the date of filing of the application, to become temporary residents.⁵² Upon application and fulfillment of continuous residence and other conditions, the alien may file for permanent residence.⁵³ In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that her period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the government as of such date.⁵⁴ The Act also required that the applicant be admissible to the U.S. as an immigrant, registered under the Military Selective Service Act, not have been convicted of a felony or three or more misdemeanors, and not have persecuted others.⁵⁵ Applicants also need to meet the requirements for English language proficiency and knowledge and understanding of United States history and government.⁵⁶ In addition, IRCA created civil and criminal penalties for the United States employers who knowingly hired undocumented immigrants.⁵⁷ Nearly 1.6 million persons received LPR status under IRCA's general legalization program.⁵⁸

50. *Id.*

51. *See* Immigration and Nationality Act (INA) § 245, 8 U.S.C. § 1255 (2009).

52. *Id.*

53. *Id.*

54. *Id.* § 1255(a)(2)(B).

55. *Id.* § 1255(a)(4).

56. *Id.*

57. *Id.*

58. Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2009*, U.S. DEPARTMENT OF HOMELAND SECURITY (Aug. 2010), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

Unfortunately, the IRCA was not as successful as predicted. One of reasons was the ambiguous language of the Act itself. For example, in *Farzad v. Chandler*, the court discussed the ambiguous nature of the Act, especially the phrase “known to Government” within the meaning of the provision.⁵⁹ Farzad was a native and citizen of Iran who entered the United States on September 19, 1976 as a nonimmigrant student under the provisions of 8 U.S.C. § 1101(a)(15)(F).⁶⁰ He was ultimately authorized to remain in this country until June 1, 1982 but overstayed his visa and engaged in unauthorized employment in violation of Section 241(a)(9) of the INA.⁶¹ Farzad applied for a stay of deportation and satisfied all the requirements of IRCA but was denied by the INS because the agency did not know of his unlawful status (i.e., his unauthorized employment).⁶² INS relied on its proposed regulations, interpreting the phrase “known to the Government” to mean “known to INS” and as excluding “other government agents such as Internal Revenue Service.”⁶³ In addition, “INS maintain[ed] that ‘known’ means that, before January 1, 1982, INS: (1) received factual information constituting a violation of the alien's non-immigrant status which was recorded in the official INS alien file, or (2) had already made an affirmative determination of deportability.”⁶⁴ The court concluded that “this interpretation appeared implausible because it collapsed the two bases for legalization.”⁶⁵ First,

the vast majority of nonimmigrants do not have an official file with the INS unless and until they are somehow determined to have been in violation of their status. . . . INS does not record how or when it initially learned of violation of status. Without such record-keeping, INS would make it impossible, through its own practices, for an applicant to meet the burden required by its interpretation of the Act.⁶⁶

59. *Farzad v. Chandler*, 670 F. Supp. 690, 690-91 (N.D. Tex. 1987).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 692.

64. *Id.* at 693.

65. *Id.* at 694.

66. *Id.*

Second, “INS’s position that ‘the Government’ means only the INS is not supported by the language of the Reform Act.”⁶⁷ Therefore, the court concluded that “Congress intended the phrase ‘the Government’ to be broader than merely the INS, and at least broad enough to include the Internal Revenue Service and the Social Security Administration.”⁶⁸ Unfortunately, the Act has not been successful in its attempt to limit illegal immigration; in fact, it has attracted more illegal immigrants who have wanted to take advantage of the new changes.⁶⁹

Congress has also enacted legislation directed at immigration marriage law, the most important of which is the Immigration Marriage Fraud Amendments of 1986 (“IMFA”).⁷⁰ The IMFA were enacted in response to a growing concern about aliens seeking permanent residence in the United States on the basis of marriage to a citizen or resident when either the alien acting alone, or the alien and his or her reputed spouse acting in concert, married for the sole purpose of obtaining permanent residence.⁷¹ Section 216 created a conditional residence status for aliens who acquire permanent residence based on recent marriages.⁷² To do so, persons subject to the provisions of IMFA are required to petition the USCIS two years after obtaining residence for removal of the conditional basis of the residence. After a petition for removal is properly filed, the INS interviews the couple to determine if the marriage is bona fide.⁷³ In the petition, the spouses must state that: (1) the marriage is valid under the laws of the jurisdictions where celebrated, (2) the marriage has not been judicially annulled or terminated, (3) the marriage was not entered into solely to obtain an immigration benefit, and (4) no fee or other consideration was given, excepting attorney’s fees, in filing the petition.⁷⁴

67. *Id.* at 693.

68. *Id.*

69. Interview with USCIS officer, *supra* note 30.

70. 8 U.S.C. § 1186(a) (2009); *see also* 8 C.F.R. § 216 (2009).

71. 8 C.F.R. § 216 (2009). Congress was particularly moved by the testimony of numerous citizens whose alien spouses had left them shortly after obtaining residence, as well as the testimony of Service representatives concerned with “marriage for hire” schemes. *Id.*

72. *Id.*

73. *See* 8 U.S.C. § 1186(a)(c)(1)(B); *see also* 8 C.F.R. § 216.4(b)(1) (1997) (requiring the regional service center director “to determine whether to waive the interview required by the Act. If satisfied that the marriage was not for the purpose of evading the immigration laws, the regional service center director may waive the interview and approve the petition.”).

74. 8 C.F.R. § 216.4(a)(5). The petition “shall be accompanied by evidence that the marriage was not entered into for purposes of evading the immigration laws” and may

Failure to properly file a petition for removal, or denial of the petition, will result in the alien losing residence status and being removed from the United States as a deportable alien.⁷⁵

It is important to note that the Act itself does not contain a statutory definition of “marriage” that would aid the INS in evaluating a marriage under immigration law.⁷⁶ However, the Supreme Court first formulated a definition of “marriage” in *Lutwak v. United States*, stating, “[t]he common understanding of a marriage, which Congress must have had in mind when it made provision for ‘alien spouses’ in the War Brides Act, is that two parties have undertaken to establish a life together and assume certain duties and obligations.”⁷⁷ The Court also noted that “Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship.”⁷⁸

Historically, the INS tried to implement its own interpretation of the Act by including a “viability” standard when judging whether to grant the permanent resident status for the alien spouse.⁷⁹ The *Chan v. Bell* case stated that there is no reference in the Act to marriage viability or solidity.⁸⁰ The court in *Chan* criticized the INS's proposed drafting of the Act because it would have included a “viability” standard: “The construction proposed by the Service is inherently incompatible with due process, as it would vest in that agency an unreasonably wide, and essentially unreviewable discretion to determine which marriages are or are not viable.”⁸¹

include documents showing joint ownership of property, joint tenancy, children's birth certificates, financial resources, affidavits of third parties. *Id.*

75. *Id.* § 216.4(a)(6).

76. Domestic relations matters are reserved to the states under the Tenth Amendment. U.S. CONST. amend. X (“The power not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people.”). See also *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.”).

77. *Lutwak v. United States*, 344 U.S. 604, 611 (1953).

78. *Id.*

79. Vonnell C. Tingle, *Immigration Marriage Fraud Amendments of 1986: Locking in by Locking Out?*, 27 J. FAM. L. 741 (1989).

80. *Chan v. Bell*, 464 F. Supp. 125, 129 (D.D.C. 1978). “We find no requirement in the statute that . . . a marriage, once lawfully performed according to state law, is to be deemed insufficient proof of ‘a valid marriage’ merely because at some later time the marriage is either terminated, or the parties separate.” *Id.*

81. *Id.* at 129. See also *Johl v. United States*, 370 F.2d 174, 176 (9th Cir. 1966) (“Serious problems of vagueness may well be presented by the fact that the ‘normal’ marriage is nowhere defined and that differing views as to this standard may be entertained by differ-

Similarly, in *Menezes v. INS*,⁸² the Ninth Circuit Court of Appeals held that “if the marriage had been entered into in good faith, the INS could not consider its continuing viability in passing upon an application for permanent resident status submitted under the fiancé statute ...except insofar as it was relevant to the parties’ intent at the time of the marriage.”⁸³ In reaching that decision, the court relied upon *Bark v. INS*, in which the INS denied adjustment of status to an alien spouse whose marriage, it asserted, was a sham.⁸⁴ The court in *Bark* held that evidence of separation of the parties is insufficient by itself to prove that a marriage was not bona fide when it was celebrated.⁸⁵ The court concluded that “[a]llies cannot be required to have more conventional or more successful marriages than citizens” and emphasized that “conduct of the parties after marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married.”⁸⁶ After receiving similar rulings in other cases, the Board of Immigration Appeals (“BIA”) accepted the courts’ mandate that if the spouses were living apart and if “there was no evidence of lack of intent to make a life together at the beginning of the marriage, the INS cannot deny the benefit solely because the parties do not live together.”⁸⁷

III. ANALYSIS

A. *The Failures of IMFA and IRCA*

Both the IMFA and the IRCA were Congress’ attempt to try to fix the immigration problem and limit the number of illegal immigrants entering this country. By implementing both of those Acts, Congress was pursuing the objective of better serving the integration and public safety goals of legalization programs. Unfortunately, neither Act has been as successful as predicted, leaving many loopholes that have created more problems than solutions.

ent immigration officials or jurors, based no doubt to some extent on their own marital experiences.”)

82. *Menezes v. Immigration & Naturalization Serv.*, 601 F.2d 1028, 1033 (9th Cir. 1979).

83. *Id.* at 1033 n.6.

84. 511 F.2d 1200 (9th Cir. 1975).

85. *Id.* at 1202.

86. *Id.* at 1201-02 (citing *Lutwak v. United States*, 344 U.S. 604, 610 (1953)).

87. *Matter of Mckee*, 17 I. & N. Dec. 332 (B.I.A. 1980).

Before addressing the negative factors of the IMFA, it is important to note some positive effects the Act has had on immigration policy and procedures. First, and probably most importantly, the two year conditional status of an alien who married an American citizen gives USCIS officers a longer time frame in which to judge and determine whether a true and real marital relationship exists. Additionally, the two-year requirement acts as an effective deterrent to an alien who wants to enter into a sham marriage solely for obtaining a legal status. The alien understands that for the next two years, she will need to live in a constant lie by pretending to have a real marriage relationship. She will also need to be ready for the possibility of being checked on by the USCIS officers at any time. Not all immigrants are willing to sacrifice their real relationships and their time and undergo all of the stress and expenditures for that two year period in order to keep up appearances of a marriage. Second, IMFA moved in the right direction by shifting the burden of proving that the marriage is bona fide to the citizen and alien spouses.⁸⁸ Third, IMFA places the burden on petitioning spouses to make a timely petition during the ninety-day period before the two years expire; noncompliance with the filing deadlines can result in somewhat harsh penalties such as termination of permanent status and ultimately deportation of the alien spouse.⁸⁹ Finally, the IMFA Act is trying to positively serve the traditional goal of saving family unity.

Putting the benefits of the IMFA aside, the Amendments leave multiple loopholes that negatively impact the immigration system. One of the biggest downfalls is the lack of clarifying language as to the definition of “marriage” and the lack of a “viability of marriage” standard. The USCIS recognized those two requirements as being important and appealed to Congress for amendments in the Act, claiming that those changes would make it more effective at deterring and detecting marriages entered into solely to evade the immigration laws.⁹⁰ The Amendments, however, do not contain a specific definition or a list of “bona fide” marriage characteristics for immigration purposes; nor does it define or require a “viable marriage” standard.⁹¹ One commentator has explained that

88. 8 U.S.C. § 1186a(d)(1)(B) (2009). Under these provisions, the petitioning spouses must make the requisite allegations and provide the addresses of residences and employers. *Id.*

89. *Id.* § 1186a(a)(2).

90. Tingle, *supra* note 79, at 741.

91. 8 U.S.C. § 1186(a).

the omission of the definition was intentional: "Congress's purpose in not providing this definition can be interpreted as recognition of the validity of the courts' criticism of the Service's viability standard."⁹² Based on the cases discussed previously,⁹³ the parties to a sham marriage can live apart and simply refrain from divorce and that alone does not disqualify them from the benefit.⁹⁴ Although the USCIS does require a higher level of proof that marriages were not fraudulently entered into with couples that are living apart,⁹⁵ it does not discourage aliens from entering into a sham marriage since there is no "official" requirement of cohabitation. Requiring the couple to live together is an important issue that needs to be addressed. This change in the law will not be a burden on legitimate couples, who presumably are living together. However, for the fraudulent couples, it will become an obstacle in their actions to defraud the system and will act as a possible deterrent from entering into a sham marriage.

Another negative aspect of IMFA is that it increases the workload for an already understaffed USCIS office. The lack of manpower and resources existed even before the agency took on the role of enforcing the Amendments. The additional procedures and paperwork caused by the IMFA have created a significant burden on the office.⁹⁶ For example, the officers need to interview up to six couples a day.⁹⁷ This daily workload is excessive, and it is unrealistic to believe that each file will be explored and investigated in depth. The process is better described as a "screening," during which the officer merely looks for something unusual and suspicious, rather than an in-depth, thorough investigation.⁹⁸ Because IMFA creates a larger workload for USCIS officers, Congress should have provided officials with the appropriate funding that would compensate for the new changes in the system. Congress also should have created more formal training programs to inform officers of the existing and new techniques of preventing sham marriages.

92. Tingle, *supra* note 79, at 752.

93. Chan v. Bell, 464 F. Supp. 125, 129 (D.D.C. 1978).

94. Matter of Mckee, 17 I. & N. Dec. 332 (B.I.A. 1980).

95. Interview with USCIS officer, *supra* note 30.

96. *Id.*

97. *Id.*

98. *Id.*

Without so intending, the Amendments created a less favored status for alien/citizen marriages.⁹⁹ By promoting family unity, it undermined the existence of honest, “legitimate” marriages and infringed upon the rights of law-abiding spouses, something IMFA’s drafters had feared.¹⁰⁰ Legitimate couples need to undergo the same process as a suspected fraudulent one, which requires them to spend their time and resources and undergo emotional stress during the interview process. Some questions often explore more intimate aspects of the couple’s marriage,¹⁰¹ bordering on an invasion of privacy.

Moreover, IMFA aggravated already harmful domestic situations for immigrant women who are forced by necessity to live apart due to abuse by their citizen spouse. Based on the provisions of the Amendments, battered immigrant spouses have the choice of either remaining in the abusive relationship for at least two years in order for their conditional resident status to be removed or leaving the abusive partner and risking deportation or withdrawal of the petition by the abusive, sponsoring spouse.¹⁰² As one group explained during the Congressional hearings on the Amendments, “[t]he already considerable barriers to escaping an abusive spouse become seemingly insurmountable to a woman who is waiting for the lapse of the two year period in order to complete the process of immigrating legally.”¹⁰³

Congress did attempt to respond to this problem by enacting the Immigration Act of 1990,¹⁰⁴ which allowed a battered spouse to file

99. “Specific objections to the Service’s proposed two year conditional increased workload for an already understaffed Service, creating less-favored status for alien/citizen marriages, and ‘locking in’ parties to what could become an intolerable relationship.” Tingle, *supra* note 79, at 742.

100. “A provision that deterred sham marriages but simultaneously crippled honest marriages would not be in keeping with the overall purpose of family reunification.” Tingle, *supra* note 79, at 742; *id.* at 752 (quoting statement of Rep. Frank: “[A] bill that does both protect the innocent and give the authorities the tools to go after the guilty.”).

101. Interview with USCIS officer, *supra* note 30.

102. James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 685 (1997).

103. *Id.* at 679 (quoting statement of Rep. Louise M. Slaughter who stated that the vagueness of the IMFA places a battered immigrant woman in dilemma of facing an abusive husband or risking deportation to a country that has ceased to be her home).

104. 8 U.S.C. § 1186a(c)(4)(C) (2009). An immigrant spouse must demonstrate that she entered into the qualifying marriage in good faith, either she or her child was battered or subjected to extreme cruelty during the marriage, and she was not at fault in failing to file the joint petition and scheduling personal interview. *Id.*

[T]he phrase ‘was battered by or was the subject of extreme cruelty’ includes, but is not limited to any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, moles-

for a hardship waiver that would remove the conditional basis of the permanent residency status if certain conditions are met. However, the Immigration Act did not solve the problem. The power to grant a hardship waiver or battered spouse waiver is completely discretionary to the USCIS officer; thus there are no guarantees that a waiver will be granted even if all requirements are met.¹⁰⁵ The standard is too subjective and lacks any uniformity: what one officer considers as an abusive relationship, another may not. Further, the IMFA can result in locking parties into an intolerable relationship.

IRCA has had less of an impact on immigration policies involving the family-based category of immigrants than the Marriage Fraud Amendments, but has nonetheless affected immigrants from that category. For example, the “IRCA did not provide derivative benefits to family members; therefore, IRCA beneficiaries had to wait to become LPRs and then petition for family members, which led to substantial backlogs in family-based immigration categories.”¹⁰⁶ As a result of these backlogs, “millions of persons with approved petitions (i.e., who had established a qualifying relationship to a US citizen or LPR) languished for years in unauthorized status.”¹⁰⁷ In some way IRCA contributed to a dramatic growth of the immigration population in the 1990s and the first half of the 2000s: “[t]his growth can be attributed in part to the failure of US legal immigration policies—which IRCA left almost entirely intact—to meet US labor market needs during these years.”¹⁰⁸ Despite all of the negative aspects, some provisions of IRCA can provide a good starting point for the recommendation discussed *infra*.

B. *An Alternative Approach*

In order to make the proper recommendations to solve the marriage fraud problem, one needs to delve deeper into the issue and

tation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence.

8 C.F.R. § 216.

105. *Id.*

106. Donald M. Kerwin, *More than IRCA: US Legalization Programs and the Current Policy Debate*, MIGRATION POLICY INST. 8 (Dec. 2010), <http://www.migrationpolicy.org/pubs/legalization-historical.pdf>.

107. *Id.*

108. *Id.* “It can also be attributed to inconsistent enforcement of the employer verification laws and flaws in the employer verification regime that make it difficult to detect when unauthorized workers present the legitimate documents of others.” *Id.*

understand why aliens choose this avenue of obtaining legal status in the United States. The majority of people who obtain legal status from marriages to an American citizen are younger or are middle-aged people, ages 18-40.¹⁰⁹ The majority of the young immigrants come to the United States on a student visa or travel visa.¹¹⁰ Thus, at the beginning of their stay they do have a legal status; the problem arises when they overstay their visas.¹¹¹ Many aliens who come to the United States on a student visa settle down in the United States, build their lives here and consider this country their second home.¹¹² The majority of immigrants come from countries that do not have economic stability, efficient government, or democratic liberties and offer no or very limited future career possibilities for the young population.¹¹³ It is no wonder that after a brief stay in this country, with unlimited opportunities and possibilities, a majority of immigrants decide to stay, even if it means breaking immigration law by overstaying their visas. As previously stated, aliens who overstay their visas for one reason or another “automatically become disqualified from any other immigration program besides marrying an American citizen.”¹¹⁴ In short, this category of immigrants has no other alternatives to become a lawful resident of this country except by breaking the law and entering into a sham marriage. The irony is that essentially they are breaking the law in order to be within the law, allowing them to become legal in this country and become a productive member of society.

There are two main types of marriage fraud: “cash-for-vows” weddings, in which Americans are paid to wed, and “heartbreakers,” in which foreigners trick Americans into believing their intentions are true, when they actually just want a green card.¹¹⁵ The typical fee for “cash-for vows” ranges between \$5,000 and \$10,000.¹¹⁶ Usually, the immigrants try to attract Americans that

109. Interview with USCIS officer, *supra* note 30.

110. *Id.*

111. *Id.*

112. In the author’s own experience, a lot of students who come to the United States on student visas build their lives here, secure employment, build relationships, and consider this country their “home.”

113. Camarota, *supra* note 9, at 15.

114. Interview with USCIS officer, *supra* note 30.

115. Seminara, *supra* note 19, at 2.

116. *Id.* at 7. An officer with experience in an Andean country in South Africa explained that “the going rate for bogus marriage there is \$5,000,” while officers with experience in the Pacific Rim noted that “many intending immigrants will pay up to \$20,000 to marry an American.” *Id.*

are on the lower end of the socioeconomic spectrum to marry them. For such people, \$10,000 is pretty appealing, considering all they need to do is lie to the government.¹¹⁷ In addition, “most fraud perpetrators know that marriage fraud is extremely difficult to prove and few are ever punished.”¹¹⁸ The other kind of fake marriage, “heartbreakers,” is harder to prevent because it involves personal feelings and emotions: the American believes that the marriage is based on mutual affection and love, while the immigrant only wants to obtain a legal status. The most common victims are middle-aged American men who are desperate for companionship and affection and are willing to do anything for the exotic international bride, including marrying her.¹¹⁹ According to the USCIS officer, the problem is that American victims genuinely believe that their relationships are real and that their foreign partners love them, even if the evidence shows otherwise.¹²⁰ They are literally “blindly in love.”

One possible and viable solution to the problem of sham marriages is creating an alternative route for immigrants to obtain legal status in the United States. One option is creating a statute that specifically addresses those who have overstayed their student or travel visas. Such a statute should not open the door for all foreigners who have overstayed their visas, but only to those who have proven to be productive members of society and intend to stay in this country. The basic conditions for obtaining the status for a qualified immigrant can be borrowed from the IRCA. For example, the applicant should not have been convicted of a felony or three or more misdemeanors. Moreover, the applicant should have registered under the Military Selective Service Act and satisfied the requirements for English language proficiency and knowledge and understanding of United States history and government.¹²¹ In addition, it is proposed that other, new requirements should be added, including the following: the applicant should have lived in the United States continuously for at least six

117. Interview with USCIS officer, *supra* note 30.

118. Seminara, *supra* note 19, at 8. “An immigrant’s workplace in the United States is often an ideal place for [immigrants] to find someone desperate or greedy enough to marry foreigners for cash.” *Id.*

119. *Id.* at 11.

120. Interview with USCIS officer *supra* note 30. *See also* Seminara, *supra* note 19, at 11. “Sometimes consular officers interview wide-eyed, love-stricken Americans who have no idea that the person they have just married or are about to marry has a track record of visa denials, fraud, or immigration violations . . .” *Id.*

121. INA § 245(A)(b)(1), 8 U.S.C. § 1255 (2009).

years, the applicant should have records of paying taxes for each year employed in the United States, and the applicant should pay a fee of \$10,000 to the government of the United States.

The proposed statute reads as follows:

The status of an alien has been inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien:

(1) makes an application for such adjustment and on the date of filing an application for adjustment of status, is present in the United States;

(2) (a) has been physically present in the United States for a continuous period of at least six years since the date of admission as a nonimmigrant; and

(b) throughout such period, has been a person of good moral character, as demonstrated by the following:

i. the applicant should have not been convicted of a felony or three or more misdemeanors;

ii. the applicant should have registered under the Military Selective Act;

iii. the applicant should have satisfied the requirements for English language proficiency and for knowledge and understanding of U.S. history and government; and

iv. the applicant should have filed a taxed return and paid taxes for all years employed in the United States.

(3) has, in the opinion of the Secretary of Homeland Security, justified that his or her continued presence in the United States (even if the applicant has overstayed his/her visa) is allowable on humanitarian grounds, to ensure family unity, or is otherwise in the public interest; and

(4) has paid a fee of \$10,000 to the Attorney General of the United States.

This proposed statute will not only improve immigration policies, but it will also limit sham marriages. The first and most important benefit is that entering into a sham marriage will no longer be *the only way* of obtaining legal status for those immigrants who have overstayed their visas. The second advantage is that foreigners will no longer need to break the law in order to obtain legal status. Third, the conditions of obtaining legal status will encourage foreigners to be productive members of society, finish higher education, secure employment, timely file tax returns, and refrain from violating laws. Moreover, the USCIS will still have discretionary power in determining when the adjustment of the legal status is justified, taking into account all of the circumstances and evidence from the alien's application.

The \$10,000 fee is also important for several reasons. First, instead of paying the American citizen the fee to get married and defraud the immigration system of the United States, the fee goes toward obtaining *legal* resident status. If aliens were willing to pay this amount of money in order to break the law, there is little doubt that they would prefer to pay it to the government in order to obtain legal status without violating the law. Second, the fee will be contributed to the USCIS office, which will help to decrease the problems of understaffing and limited resources. Most importantly, the statute will not open the door to *all* foreigners who have overstayed their visas, but only to those who can prove that while remaining in the United States for over six years, they did not only build their lives in this country, but were productive members of society and benefited the country.

Like any other statute, this proposal has flaws and will no doubt draw criticism. For example, the possibility of obtaining legal status this way will encourage foreigners to intentionally overstay their visas. Second, by remaining in the United States after the expiration date of their legitimate visas, aliens will have violated the terms and conditions of the existing admission, which required indication of no intention of staying in this county illegally. Third, one could argue that the fee of obtaining the legal status is unconstitutional because one is basically "buying" his/her own legal status.¹²² Even though the proposed statute has some negative aspects, the benefits outweigh them. The proposed statute will not only assist in decreasing sham marriages in the United States, but will also help to improve the immigration system in general.

122. Interview with USCIS officer, *supra* note 30.

IV. CONCLUSION

With the increased number of sham marriages undermining the integrity of the immigration system in the United States, Congress should legislate proactively in order to eliminate, or at least to limit, negative consequences of illegal immigration. The only viable and logical solution to the problem of fraudulent marriages is enacting legislation that simultaneously creates an alternative route for those illegal persons with strong equitable ties and long tenure in the United States, while also screening out those applicants who are clearly abusing matrimonial immigration policy. Therefore, any future immigration legislation should recognize the causal roots of sham marriages, and as a result, be tailored to reduce the incentives that leave immigrants no option but to break the law in order to be within the law.

Bad Boys, Whatcha Gonna Do When They Come for You: An Examination of the United States’ Denial of Asylum to Young Central American Males Who Refuse Membership in Transnational Criminal Gangs

*Lauren E. Sullivan**

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* Ms. Sullivan holds a B.A. from Villanova University. She is a 2014 J.D. Candidate at Duquesne University School of Law. The author would like to thank Martha W. Jordan, Associate Professor of Law, for her thoughtful guidance.

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I. INTRODUCTION¹

Manuel, a native Honduran, began to have encounters with MS-13, a dangerous gang active throughout Central America and parts of the United States, in January of 2004, when Manuel was fourteen years old. During his first encounter, members of the gang approached Manuel and his friend, Julio, outside the former's home in the coastal town of Puerto Cortés and told them that it was time to join the gang. The recruiter had the marks of the gang: devil horns tattooed on his forehead, the letters "M" and "S" across his chin, and teardrops around his eyes. One of the teardrops was still not filled in, indicating that the recruiter had yet to avenge someone's death. The gang recruiter took out a gun and tried to hand it to the teenage boys, ordering the boys to follow him to commit a few robberies. When Manuel and Julio re-

1. The following story, which exemplifies the hardships of unwilling gang recruits and their families, is fictional but contains facts from various cases, including: *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012); *Aquino-Rivas v. Attorney Gen. of the U.S.*, 431 Fed. Appx. 200 (3d Cir. 2011); *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009), *abrogation recognized by Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 2008 WL 2927590 (B.I.A. 2008), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

fused to follow, the recruiter warned, "If you want to live, I will be waiting."

A few weeks later, another recruiter from the same gang approached Manuel and Julio, again telling them that it was time to join. Manuel and Julio knew that he was from the same gang because he had the same tattoos: devil horns on his forehead, "M" and "S" on his face, and teardrops around his eyes. The recruiter flashed his gun, a shiny black handgun shoved into his baggy blue jean shorts which sat far below the waistband of his boxer shorts. He told Manuel and Julio that they could either join the gang or be killed.

Manuel and Julio continued to have encounters with recruiters from the gang. Gang members stole from the boys. On one occasion, the gang members demanded that Manuel empty his pockets and hand over all of his money. When Manuel refused, they sliced his neck with a dirty pocketknife. The perpetrators told Manuel that it was a premonition of what would happen to him if he continued to refuse membership in the gang. They also warned that if Manuel told the police, "something would happen to him or his family." Manuel told his family and a teacher about the threats and showed them the cut on his neck, red and infected from lack of medical attention, but they also failed to tell the police because they were afraid of retaliation. When the gang discovered that Manuel told his family and a teacher about the threats, they broke a beer bottle against his face and threatened to kill his family. Manuel, nonetheless, remained steadfast in refusing membership.

In order to show that they meant what they said, the gang began to take action against Manuel's family. Every few days, the first person to leave the family home in the morning found a dead animal on the front step with "MS" written in blood on the front door. Members of the gang followed Manuel's sister home from her friend's house one night, dragged her into an alley, and took turns raping her. She knew that her rapists belonged to the same gang that had been threatening Manuel because she recognized the symbols tattooed all over their faces and bodies. A week later, members of MS-13 harassed Manuel's mother on her way home from the market. They called her derogatory names and knocked her bag of produce to the ground, stomping on it as they yelled profanities at her. They flashed gang symbols and showed her their weapons before running away. The food was inedible, but Manuel's mother did not have enough money to buy more. The

family went without until Manuel's father brought home his next paycheck, barely enough to provide for his family.

Gang recruiters continued to approach Manuel and ask him if he had made up his mind. They again gave him the ultimatum: join or die. Manuel decided that neither choice suited him and fled to Mexico in January of 2005. During Manuel's absence, the gang continued to threaten his family, asking them about Manuel's whereabouts. The gang harassed Manuel's mother and sister and left dead animals with threatening notes on the doorstep of the family home. Shortly after Manuel arrived in Mexico, Mexican authorities detained him and returned him to Honduras. As soon as the gang heard about Manuel's return, they threatened to kill him and his family if Manuel tried to escape again. They gave Manuel one last chance to join the gang or be killed. When Manuel refused to join, the recruiters told him that they would be looking for him and that they would take him by surprise. Everywhere Manuel went, he saw gang members watching him, sometimes casually showing a gun or a switchblade.

Manuel fled Honduras again a few days later and made it to the United States. Upon his arrival, Customs and Border Patrol agents detained him for questioning. During his credible fear interview,² Manuel explained to the interrogating officer why he had come to the U.S. without inspection.³ The officer decided that Manuel had credible fear of returning to Honduras and served Manuel with a Notice to Appear, charging him with removability

2. Section 235(b)(1)(A) of the Immigration and Nationality Act authorizes the Department of Homeland Security to subject aliens who fall into any of five specified categories to expedited removal. Immigration and Nationality Act § 235(b)(1)(A), 8 U.S.C. §1225(b)(1)(A) (West 2013); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVICES, CREDIBLE FEAR SCREENINGS, *available at* <http://www.uscis.gov/uscis-tags/unassigned/credible-fear-screenings> (last updated Sept. 26, 2008). These five categories are irrelevant to this article and, therefore, will not be discussed. Aliens who qualify for expedited removal may be eligible for an exception to such removal if they are seeking asylum. *Id.* Aliens seeking asylum must be referred to an asylum officer to determine whether the individual has a credible fear of persecution or torture in his or her country of origin. *Id.* This interview is called a credible fear interview. If the asylum officer deems the alien to have credible fear of persecution or torture, the officer refers the alien to an immigration judge for the opportunity to seek asylum. *Id.* If the asylum officer determines that the alien does not have credible fear of persecution or torture, then the alien may request that an immigration judge review the alien's application. *Id.* Failure to request review by an immigration judge or a determination by the judge that the alien does not have credible fear may result in the alien's removal. *Id.*

3. "Entering without inspection" is the term used for persons who enter without being issued a visa or without being paroled. Practitioners refer to such an entrance as "entering EWI." Further discussion regarding entering EWI and its consequences is not necessary for the purposes of this article.

for being an alien present in the United States of America without being admitted or paroled.⁴ At Manuel's final hearing in Immigration Court, the immigration judge denied him asylum and ordered him removed to Honduras.

This story is an example of what recalcitrant recruits of transnational criminal gangs in Central America face on a daily basis. These boys, some of them barely even men, come to the United States seeking refuge from the threats of death and serious bodily injury to themselves and their families. The U.S. immigration system, backlogged with requests for immigration relief, sweeps up these boys and tells them that they cannot remain in U.S. To the boys who have experienced death and harm at the hands of gangs in Central America, the immigration judge's determination that the boy does not meet the requirements of asylum is mind-boggling. They do not understand the law, and they do not understand how a judge can look them in the eye and tell them that such circumstances are not so desperate as to qualify for a grant of legal status based on persecution.⁵ To an applicant fleeing from a gang that has repeatedly threatened and harmed him, an order of removal can be a death sentence.

In order that the reader may understand what it means to be a recruit and a member of a transnational criminal gang and how

4. Form I-862, more commonly known as a Notice to Appear or "NTA," is a form that the Department of Homeland Security serves on an alien to begin removal proceedings. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 55 (2008), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final_compressed_PDF.pdf. The NTA includes, inter alia, "the nature of the proceedings, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, and the charge(s) against the alien and the statutory provision(s) alleged to have been violated." *Id.*

5. See, e.g., *Rivera-Barrientos* 666 F.3d 641, 647, 653-54 (denying a female recruit's asylum claim for failure to establish that the gang persecuted her on account of her political opinion or for membership in a particular social group); *Aquino-Rivas*, 431 Fed. Appx. 200 (denying asylum based on failure to establish that treatment based on political opinion, religious beliefs, or membership in a particular social group, as well as failure to establish that treatment of applicant amounted to persecution); *Larios v. Holder*, 608 F.3d 105, 109, 110 (1st Cir. 2010) (denying applicant's claim based on failure to establish that he belonged to a particular social group); *Ramos-Lopez*, 563 F.3d 855 (denying applicant's asylum claim for failure to establish that persecution was on account of membership in a particular social group or political opinion), *abrogation recognized by* *Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec 579, 2008 WL 2927590 (B.I.A. 2008) (denying Salvadoran youths asylum for failure to establish that their personal, moral, and religious opposition to gang's activities made them a particular social group), *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

the gangs affect the culture of Central America, this Comment begins with a primer on some of the major transnational criminal gangs. An explanation of the law of asylum in the United States, including its origins in United Nations Declarations to which the U.S. is a signatory; a discussion of the pertinent subsections of the Immigration and Nationality Act (“the Act”); how courts have interpreted and applied the Act; and the barriers that applicants have faced in obtaining grants of asylum under the current law follow. The author will then explain how these applicants and their representatives can pursue successful asylum claims in U.S. immigration courts and federal courts by defining the particular social group as males between the ages of eleven and twenty-one years who have been targeted for gang recruitment but have refused membership.

II. OVERVIEW OF THE PROBLEMS CAUSED BY TRANSNATIONAL CRIMINAL GANGS AND OF ASYLUM LAW IN THE UNITED STATES AND UNITED NATIONS

A. *A Primer on Transnational Criminal Gangs*

1. *Mara Salvatrucha – MS-13*

Mara Salvatrucha, more commonly known as MS-13, began in Los Angeles, California in the early 1980s.⁶ Many Salvadorans fled to southern California to escape the civil war in El Salvador.⁷ Upon arrival in Los Angeles, the Salvadoran youths, for their own protection from other Hispanic gangs and from racially-motivated police misconduct, formed a gang and utilized the skills they had learned fighting in the Salvadoran civil war.⁸ As a result, many founding members had experience with firearms and explosives.⁹ The group called itself the Mara Salvatrucha.¹⁰ Since its for-

6. Robert Walker, *Mara Salvatrucha – MS-13*, GANGS OR US (Mar. 2, 2004), available at http://www.gangsor.us.com/ms_13.html.

7. *Id.*

8. *Id.*; Mandalit del Barco, *The International Reach of the Mara Salvatrucha*, NPR (Mar. 17, 2005), available at <http://www.npr.org/templates/story/story.php> (quoting Ernesto “Smokey” Miranda, one of the co-founders of MS-13, as saying, “In this country, we were taught to kill our own people, no matter if they were from your own blood. If your father was the enemy, you had to kill him. So the training we got during the war in our country served to make us one of the most violent gangs in the United States.”).

9. Walker, *supra* note 6.

10. *Id.* *Mara* is a Salvadoran slang term for “gang,” with the Spanish word being *pan-dilla*. Ana Arana, *How the Street Gangs Took Central America*, 84 FOREIGN AFF., no. 3,

mation in the 1980s, the gang has added the number thirteen to its name, representing (ironically) good luck and the gang's alliance with the Mexican gang La EME.¹¹

Over the last thirty years, MS-13 has become more than simply a criminal gang; it is a transnational criminal organization, much like La Cosa Nostra.¹² Among the major reasons for the explosion of MS-13 membership and activity are the inability of law enforcement to control the gang and the patterns of relocation that the gang has adopted.¹³ At its inception, MS-13 remained concentrated mainly in urban areas.¹⁴ In recent years, however, members of MS-13 have been following the migratory patterns of other undocumented immigrants into labor jobs in suburban and rural areas.¹⁵ The gang also uses money collected from lucrative criminal activity and membership dues to send select members to universities and community colleges so that they can enroll in business management courses.¹⁶ The educated members of the gang then take on new responsibilities, handling the local cliques' finances and advising the gang's local leaders about business decisions.¹⁷

May-June 2005, at 98, 100. A gang name beginning with the word *mara* indicates that the founding members were probably Salvadoran, *id.*, although this is not always true, as with the Mexican gang Mara 18. *Salvatrucha* is a Salvadoran slang term for a shrewd Salvadoran man. *Id.* at 100.

11. Walker, *supra* note 6. "M" is the thirteenth letter of the alphabet and the first letter of the Spanish name for La EME, or the Mexican Mafia. "La EME" is the phonetic spelling often utilized by the gang. La EME is not discussed in this article because it does not have substantial territory in Central America. La EME began in the correctional institutions of California in the 1950s and remains predominantly in the southern and southwestern U.S. Robert Walker, *The Mexican Mafia Prison Gang: Profile, Background & History: A Security Threat Group - STG*, GANGS OR US (Oct. 23, 2012), available at http://www.gangsorus.com/mexican_mafia.htm.

12. Fed. Bureau of Investigation, *Italian Organized Crime*, ORGANIZED CRIME, http://www.fbi.gov/about-us/investigate/organizedcrime/italian_mafia (last visited Dec. 29, 2013). La Cosa Nostra, also known as the American Mafia, has its roots in organized crime syndicates from Italy. *Id.* It consists of different crime "families" organized throughout metropolitan areas of the United States, Canada, and South America. *Id.*

13. Jeffrey D. Corsetti, *Marked for Death: The Maras of Central American and Those who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 409 (2006).

14. SAM LOGAN & ASHLEY MORSE, MS-13 ORGANIZATION & U.S. RESPONSE, 3 (2007).

15. *Id.*

16. *Id.* at 13.

17. *Id.* For an analogy familiar to most, think of the character of Tom Hagen in *The Godfather*. Vito Corleone takes the orphaned Hagen under his wing. THE GODFATHER (Paramount Pictures 1972). When Hagen completes law school, he remains loyal to the Corleones, offering the skills he acquired throughout his education to benefit the family who gave Hagen the opportunity. *Id.*

Because the majority of MS-13 members are between the ages of eleven and twenty-one, they are also adept at using technology.¹⁸ Law enforcement agencies have been slow to adapt to the gang's new ways of organizing criminal activity and establishing new cliques. With cliques taking root in suburbs and rural areas all across the United States and in parts of Canada¹⁹ where police departments might not have any officers who speak Spanish,²⁰ MS-13 faces few obstacles in executing its goals—or its rivals. Law enforcement agencies cannot adequately handle the problem; their answer is to deport arrested gang members who are in violation of immigration laws.²¹ The unforeseen and unintended result of deporting gang members has been that they have established cliques in their countries of origin²² and continued to spread through Latin America, the United States, and Canada.²³

In Central America, where MS-13 reigns with a fist as strong as the totalitarian governments that once ruled, MS-13 members often assassinate their enemies in broad daylight, aboard public transportation or in the streets, and walk away from the scene untouched.²⁴ Law enforcement agencies are threatened and intimidated by gang members,²⁵ lack the ability to control the gang,²⁶

18. Walker, *supra* note 6. Walker states that MS-13 has an extensive internet presence in which members boast of their crimes, taunt rivals, and communicate with one another. *Id.* “[Drug and arms d]ealers, car jackers and lookouts carry wireless phones, pagers, radios and police scanners.” *Id.*

19. *Id.*

20. LOGAN & MORSE, *supra* note 14, at 13.

21. Shelly Feuer Domash, *Taking Gangs to Task*, POLICE, Feb. 1, 2006, at 2. In an interview with Det. Ricky Smith of the Hempstead Village Police Department in Nassau County, New York, Det. Smith said, “We eventually locked up two people, and deported them, and after that the threat pretty much went away.” *Id.*

22. Robert J. Lopez, Rich Connell & Chris Kraul, *MS-13: An International Franchise: Gang Uses Deportation to Its Advantage to Flourish in U.S.*, L.A. TIMES (Oct. 30, 2005), available at <http://www.latimes.com/news/local/la-me-gang30oct30,0,6717943.story>.

23. Walker, *supra* note 6.

24. *Id.*

25. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: Guatemala (2012), available at <http://www.state.gov/documents/organization/204664.pdf>.

26. Walker, *supra* note 6. A police officer for Fairfax County, Virginia said of MS-13, “We know it is a losing battle. When we run them out of here, we just move them to another location. We just contain what we have. We know we can't get rid of them.” *Id.* The police officer's quote reflects a criminological theory known as displacement. According to displacement theory, removing the opportunity for a crime does not actually prevent future crime but merely moves it to another location. See generally MARCUS FELSON & RONALD V. CLARKE, OPPORTUNITY MAKES THE THIEF: PRACTICAL THEORY FOR CRIME PREVENTION (Barry Webb ed., 1998). Felson and Clarke identify five types of displacement: (1) geographical, in which crime moves from one location to another; (2) temporal, in which crimes are moved from one time to another; (3) target, in which perpetrators change the object of

are on the gang's payroll,²⁷ or collaborate with gang members to commit crimes.²⁸ For these reasons, law enforcement agencies in Central America should fulfill one of the requirements that an asylum applicant must establish—that the persecution is done by a group that the government is either unable or unwilling to control.²⁹

2. *Mara 18 – Eighteenth Street Gang*

Mara 18, like MS-13, has its beginnings in Los Angeles, California, although the year of its inception is difficult to pinpoint.³⁰ Mara 18, whose original name in the United States was Eighteenth Street Gang, began as a collection of Mexican youths who arrived in the U.S. with their parents, hoping to escape the rampant poverty, political oppression, and military conflicts in Mexico.³¹ The gang spread to Mexico and throughout the rest of Central America when the U.S. tightened its reins on undocumented

the crime; (4) tactical, in which perpetrators substitute a different method of committing a crime; and (5) crime type, in which perpetrators substitute one type of crime for another. *Id.* at 25. What the Fairfax County police officer identifies as a problem is an example of geographical displacement. When this occurs, the overall rate of crime does not decrease. A commonly-used example is that of two motels located on opposite sides of a township line. Prostitutes and johns frequent one motel in Township A to carry out their “transactions.” The other motel in Township B does not have such a problem. When citizens of Township A, the one containing the motel often used for prostitution, complain to their mayor and police commissioner, the local police department increases surveillance at the motel, and the criminal justice system pursues more convictions and stiffer sentences for prostitution. After some time, the prostitutes and johns simply move their activities to the motel across the township line, in another jurisdiction. On paper, it appears that the incidence of prostitution has significantly decreased in Township A. However, there is no change in the quality of life of the township because it is no more difficult for perpetrators to commit the crime. Having to cross a township line has no deterrent effect.

27. Corsetti, *supra* note 13, at 415. Like *The Godfather* in *supra* note 17, another Al Pacino film serves as an example of this situation. Recall in the 1973 film *Serpico* how NYPD cops regularly accept a portion of the proceeds from illegal gambling operations in exchange for allowing the operations to continue. *SERPICO* (Paramount Pictures 1973).

28. Corsetti, *supra* note 13, at 415.

29. *See, e.g.,* Castro-Martinez v. Holder, 674 F.3d 1073 (9th Cir. 2011) (denying asylum because petitioner failed to show that Mexican Government was unable or unwilling to control his attackers).

30. Wim Savenije, *Las pandillas transnacionales o “maras”: violencia urbana en Centroamérica*, 47 FORO INTERNACIONAL 637, 640-41 (2007). Savenije suggests that since Mexican immigrants began to trickle into the neighborhoods of Los Angeles in the early part of the nineteenth century, the youths, like many other ethnic groups new to the United States, banded together and developed their own unique style. *Id.* For example, the youths wore zoot suits throughout the 1930s and 1940s and adopted the style of heavy metal rock musicians during the 1980s and 1990s. *Id.* It is impossible to determine when exactly the group ceased to be merely a collection of individuals of the same ethnic background, some of whom engaged in criminal activity, and became a criminal gang. *Id.*

31. *Id.*

immigrants.³² As the INS executed its policy of removing immigrants with criminal histories, the gang took root in Central America, recruited new members, and returned to the U.S.³³ Today, Mara 18's territory stretches from Canada³⁴ to parts of Nicaragua.³⁵

Mara 18 has been diversifying ethnically as well as geographically. Since its birth on the streets of Los Angeles, Mara 18 has opened membership to youths from other Latin American countries, multi-ethnic persons, blacks, whites, Asians, and Native Americans.³⁶ Mara 18 recruits elementary and middle-school aged children³⁷ to begin early indoctrination into the culture and strict rules of the gang. It preys on children who are poor, marginalized, and lack any prospect of future employment and economic stability.³⁸ Children in such situations are easier to manipulate and see the gang as an opportunity to belong, to be cared for, and to make ends meet.

In order to maintain power and control over its territory, the gang will threaten, extort, beat, or kill their opposition. When persons in the community take action against the gang, such as by refusing to cooperate with the gang or reporting gang activity to the police, the gang retaliates with violence.³⁹ Like other violent criminal gangs, Mara 18 follows the doctrine of "blood in, blood out."⁴⁰ One of the ways in which a new recruit can join the gang officially is by killing another person—"blood in."⁴¹ Virtually the only way to leave the gang is by dying—"blood out." Members who elect to leave the gang are often killed.⁴²

32. *Id.* at 642, 646.

33. *Id.*

34. Al Valdez, Orange Cnty. Dist. Attorney's Office, *California's Most Violent Export* (2000), available at <http://www.streetgangs.com/news/013002-californias-most>.

35. See generally Savenije, *supra* note 30.

36. Valdez, *supra* note 34.

37. *Id.* For this reason, Orange County (California) law enforcement officers call the gang the "Children's Army." *Id.*

38. Savenije, *supra* note 30, at 646.

39. *Id.* at 650.

40. Robert Walker, *Background on Gang Initiations*, GANGS OR US (Dec. 13, 2011), available at <http://www.gangsorus.com/initiations.html>.

41. *Id.*

42. *Id.* In some instances, the departing member will not be outright murdered but will have to endure a "beat out" in which fellow members beat the departing member. *Id.* Often, however, the beating is so severe that the departing member dies as a result. Valdez, *supra* note 34. Valdez reproduces what a young boy belonging to Mara 18 told to his probation officer: "I cannot avoid associations with other 18th Street gang members because they call me all the time, and if I don't go with them, they will say I am a ranker There is only one way out, and that's in a body bag." *Id.* A ranker is someone who associates with a

Departing members, law enforcement, and members of rival gangs are not the only persons in danger. Mara 18 members are sophisticated tax collectors. The gang collects taxes from any business, legitimate or illegal, that operates within Mara 18 territory.⁴³ If a business owner fails to pay the tax, he or she receives death threats.⁴⁴ Gang members rarely face prosecution or incarceration for their crimes because law enforcement and the judiciary lack sufficient resources to adequately perform their duties and often play a role in the lucrative activities of the gang.⁴⁵

B. *Asylum Law in the United States and Its Origins*

Article 14 of the Universal Declaration of Human Rights, adopted in 1948, provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”⁴⁶ In 1951, the United Nations adopted the Convention Relating to the Status of Refugees (“the Convention”), which recommended that governments should continue to receive persons fleeing their home countries because of persecution so that these persons may find “asylum and the possibility of resettlement.”⁴⁷ However, the United Nations limited the scope of the 1951 Convention to persons fleeing events that occurred in Europe prior to January 1, 1951.⁴⁸ Clearly, the intention of the drafters was to assist persons who were the targets of extermination by the totalitarian regimes of Europe shortly before and during the Second World War. In 1967, however, the United Nations expanded the scope of the Convention by removing the location and time limitations,⁴⁹ indicating that the drafters intended member States to give a broad con-

gang but is too afraid to engage in the gang’s dangerous or criminal activities. See URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=ranker> (last visited Oct. 25, 2012). As described above, the consequences of being labeled a ranker can be severe. Valdez, *supra* note 34.

43. Valdez, *supra* note 34.

44. *Id.*

45. Corsetti, *supra* note 13, at 409, 416.

46. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml#a14>.

47. Office of the U.N. High Comm’r for Refugees, Convention and Protocol Relating to the Status of Refugees, 11 (Dec. 2010), available at <http://www.unhcr.org/3b66c2aa10.html> (UNHCR, Convention and Protocol).

48. *Id.* at 2.

49. *Id.* The United States of America was not originally a signatory of the Universal Declaration of Human Rights or of the 1951 Protocol; however, the United States adopted the 1967 Protocol. The United States has reservations to some of the provisions but none that fall within the scope of this article.

struction to their respective domestic legislation⁵⁰ regarding the grant of asylum. Yet the United States' statutory definition of "refugee" is rather narrow,⁵¹ and courts often deny asylum if the applicant reaches safety in the U.S. without having suffered physical harm.⁵²

The problem with this approach is that persecution does not just encompass physical harm; it can include, inter alia, threats, intimidation, harm to family members, and destruction of property (if it is severe enough to destroy the victim's livelihood). Gangs in Central America maintain power by instilling fear in others. They intimidate witnesses and government officials who vow to target street gangs and who attempt to institute new laws and policies aimed at extinguishing the power of criminal gangs.⁵³ For persons who refuse membership in a gang after the gang expresses a desire for their allegiance, the penalty can be death.⁵⁴ The consequences of refusing gang membership also include threats and violence to the recalcitrant recruit's family.⁵⁵ With such pressure on young men to join a gang, it is no wonder that these young men flee their home countries and seek refuge in the United States.

50. International laws that do not require domestic legislation to become effective domestic law are called self-executing treaties. See, e.g., *Medellín v. Tex.*, 552 U.S. 491, 491 (2008) ("While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be 'self-executing' and is ratified on that basis."). It is the responsibility of signatory States to enact their own legislation in accordance with the principles of the Convention. Without domestic laws that make the Convention effective, the Convention offers little protection for refugees.

51. Wendy B. Davis & Angela D. Atchue, *No Physical Harm, No Asylum: Denying a Safe Haven for Refugees*, 5 TEX. F. ON C.L. & C.R. 81, 81 (2000) (referencing 8 U.S.C. § 1101(a)(42)(A) (1994) and 8 C.F.R. § 208.13(b)(1) (1999)).

52. Davis & Atchue, *supra* note 51, at 82.

53. Walker, *supra* note 6. A common way of intimidating witnesses and government officials is to send them the dismembered body of a male accompanied by a threatening or intimidating note. *Id.* In 2004, just two weeks after his inauguration, Guatemalan President Óscar Berger received such a delivery. *Id.* The following month, Honduran President Ricardo Maduro received a similar delivery with a note that said, "[M]ore people will die. This is another challenge—the next victims will be police and journalists." *Id.*

54. Corsetti, *supra* note 13, at 428 (citing Telephone Interview with Leonel Dubon, Program Dir., Casa Alianza (Mar. & Apr. 2005); Written Correspondence with Leonel Dubon, Program Dir., Casa Alianza, to Jeffrey D. Corsetti, Georgetown Immigration Law Journal (Mar. & Apr. 2005)).

55. Corsetti, *supra* note 13, at 422, 434 (citing Telephone Interview with Emilio Goubaud, Exec. Dir., Ass'n for Crime Prevention (Mar. & Apr. 2005); Written Correspondence with Emilio Goubaud, Exec. Dir., Ass'n for Crime Prevention (Mar. & Apr. 2005)).

A grant of asylum in the United States requires that the applicant prove that he or she meets the status of a refugee under the Immigration and Nationality Act.⁵⁶ The INA defines a refugee as:

any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .⁵⁷

The applicant must prove (1) a well-founded fear of persecution that is (2) on account of one of the five enumerated grounds and (3) by an organization that the government is unable or unwilling to control.⁵⁸ The first element, demonstrating a well-founded fear of persecution, is two-fold, having a subjective and an objective element.⁵⁹ First, the applicant must show that he or she genuinely has fear.⁶⁰ Next, the applicant must demonstrate that a reasonable person in like circumstances would fear persecution.⁶¹

Of the five grounds upon which to base an asylum claim, membership in a particular social group and political opinion are the most nebulous and discretionary bases for granting asylum. For this reason, attorneys often use these categories when their clients have a strong case for persecution but not on the other three grounds—race, religion, and nationality—which are generally easier to prove but have less flexible parameters. Seeking asylum based on the more nebulous bases, however, can pose substantial difficulties when arguing that a client fits into a social group or has a political opinion that the Executive Office of Immigration Review has yet to define and to determine to be a basis for asylum. Judges are reluctant to grant asylum based on a flexible category

56. 8 U.S.C.A. § 1158(b)(1) (2006); INA § 208(b)(1) (2010), available at <http://www.uscis.gov>.

57. 8 U.S.C.A. § 1101(a)(42)(A) (2006); INA § 101(a)(42)(A) (2010), available at <http://www.uscis.gov>.

58. Corsetti, *supra* note 13, at 417 (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)).

59. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

60. See *Yong Hao Chen v. INS*, 195 F.3d 198, 201-02 (4th Cir. 1999); see also *Matter of Mogharabbi*, 19 I. & N. Dec. 439, 444-45 (B.I.A. 1987).

61. *Yong Hao Chen*, 195 F.3d at 201-02; *Matter of Mogharabbi*, 19 I. & N. Dec. at 444-45.

for fear of opening up the floodgates.⁶² Therefore, attorneys and accredited representatives must define the social group to which their clients belong narrowly enough to eradicate the judges' concerns but broadly enough to reasonably constitute a social group that includes more people than just the client or the client's family.

Perhaps the most difficult part of defining this social group is that the attorney faces the danger of creating a tautology. The social group cannot be defined by the persecution.⁶³ Additionally, the common characteristic that defines the social group must be an immutable characteristic, "one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."⁶⁴

The applicant must also demonstrate that there is a nexus between the type of persecution and one of the five enumerated grounds.⁶⁵ In other words, the persecution must be a direct result of the applicant's race, religion, nationality, membership in a particular social group, or political opinion.⁶⁶ The burden is on the applicant to provide some evidence that one of the five enumerated grounds was a motive for the persecutor's actions.⁶⁷ In denying an applicant's asylum petition, courts often rely on an insufficient nexus between one of the five grounds and the persecutor's actions.⁶⁸

62. Corsetti, *supra* note 13, at 408 (citing *Romero-Rodriguez v. U.S. Attorney Gen.*, 131 Fed. Appx. 203, 204 (11th Cir. 2005)).

63. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); see also *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). For example, women seeking asylum from West African nations that practice female genital mutilation (commonly known as "FGM") and who have undergone the procedure themselves cannot define their particular social group as women who are victims of FGM. This reasoning results in a tautology: the form of persecution is FGM, and the social group is women who have undergone FGM. The social group or political opinion must be in existence prior to the persecution, and the persecution must be a result of membership in the social group before the persecution occurred.

64. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987) (requiring an immutable characteristic or presence of a characteristic that the applicant should not be required to change). The *Acosta* court's construction of member of a particular social group was to preserve refuge for "individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution." *Id.* at 234.

65. 8 U.S.C.A. § 1101(a)(42)(A) (2006); INA § 101(a)(42)(A) (2010), available at <http://www.uscis.gov>; Davis & Atchue, *supra* note 51, at 89.

66. 8 U.S.C.A. § 1101(a)(42)(A); INA § 101(a)(42)(A), available at <http://www.uscis.gov>.

67. *Lukwago*, 329 F.3d at 170 (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

68. Davis & Atchue, *supra* note 51, at 89. For example, it is not enough for a Coptic Christian who has fled from Egypt to prove that a group of men beat him up as he was passing through a market in Cairo. The event could have been the result of a random act of

The purpose of the asylum statute was to give “statutory meaning to our national commitment to human rights and humanitarian concerns;”⁶⁹ however, courts are hesitant to grant asylum to persons who are persecuted for refusing membership in a Central American criminal gang. One of the reasons why courts are hesitant is that many asylum applicants have not suffered physical harm.⁷⁰ Another reason that courts are hesitant to grant asylum is that they do not fully understand that law enforcement in Central America largely either cannot or will not take adequate measures to combat gang violence.⁷¹

C. Common Hindrances to Recalcitrant Recruits’ Petitions for Asylum

1. Denial of Applicant’s Claim for Asylum for Failure to Establish Membership in a Particular Social Group

Persons attempting to qualify for asylum on account of membership in a particular social group must meet three requirements: the applicant must (1) “identify a group that constitutes a ‘particular social group’ within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.”⁷² Establishing a particular social group appears to be the most difficult prong to prove for young men who refuse gang recruitment. Courts often hold that the proposed particular social group—young males who refuse membership in Central American gangs—lacks particularity⁷³ and

violence. Rather, the Coptic Christian must prove that the group beat him up *because* he is a Coptic Christian, which is the second enumerated ground for granting asylum (i.e. religion). The applicant also must prove additional facts which will be discussed later in this article.

69. *Id.* at 81 (citing *Selgeka v. Carroll*, 184 F.3d 337, 343 (4th Cir. 1999)).

70. *Id.* at 82.

71. *See, e.g.*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Guatemala (2011); *see also* U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Mexico (2011); U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: El Salvador (2011); U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Honduras (2011).

72. *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993).

73. *See Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (holding that the purported definition of particular social group lacked particularity because the term “young” is amorphous); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563

social visibility,⁷⁴ and thus will not grant the applicant's asylum petition.

a. Particularity

Particularity requires that the proposed group be accurately described in a manner sufficiently distinct that the group would be recognized in the applicant's society as a discrete class of persons.⁷⁵ In other words, the applicant's definition of a particular social group will be denied if the court determines that the definition is too broad or lacks a unifying characteristic. It is understandable that courts try to balance their responsibility to avoid opening the floodgates to an unmanageable number of immigrants with the United States' commitment to defend human rights and address humanitarian concerns. However, the particularity requirement places an excessive burden on applicants who have bona fide claims of human rights violations in that it forces persecuted individuals to acquire and maintain records of their persecution and to prove that others would recognize the persecution. Many times, applicants do not report the persecution to law enforcement because of fear of retaliation by the gang⁷⁶ or because the police fail to do anything about the persecution.⁷⁷ An applicant brave enough to seek medical treatment for severe injuries resulting from the persecution will most likely keep the cause of the injuries to himself, so there will be no medical records to prove

F.3d 855, 861 (9th Cir. 2009), *abrogation recognized by* *Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585, 2008 WL 2927590, **6 (B.I.A. 2008) (holding that young males who refuse gang membership lacks particularity because what constitutes "young" is relative and is not particular), *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

74. See *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Matter of S-E-G-*, 24 I. & N. Dec. at 588, 2008 WL 2927590, at **8, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

75. See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. at 584, 2008 WL 2927590, at **5, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

76. Savenije, *supra* note 30, at 650.

77. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Guatemala (2011); see also U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Mexico (2011); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: El Salvador (2011); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Honduras (2011).

that any physical injuries were the result of persecution. Therefore, there will be no record of the persecution other than the applicant's sworn affidavit or the testimony of any witnesses who, for whatever reason, are not afraid to testify to the circumstances of the persecution.⁷⁸

Additionally, the U.N. High Commissioner for Refugees has stated that the size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2) of the 1951 Convention and its 1967 Protocol.⁷⁹ The policy behind the Commissioner's guideline is that where a group or organization violates another person's human rights, the size of the persecuted group should not be a basis for denying asylum. Basic human rights of life and freedom should be of primary concern to U.N. member States. To abate member States' concerns about handling a sudden and significant influx of migrants claiming refugee status based on persecution, the Commissioner adds that the claimant still must "demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria."⁸⁰ Nevertheless, United States Courts of Appeals have repeatedly rejected applicants' claims for asylum based on persecution for refusing recruitment into a transnational criminal gang.⁸¹

78. Reasons that witnesses do not fear giving their testimony may include their presence in the U.S., out of the reach of the persecutors, or their ability to mail written testimony to the court without the knowledge of the persecutors.

79. Office of the U.N. High Comm'r for Refugees, Guideline on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶ 18, U.N. Doc. HCR/GIP/02/02 (2002) (UNHCR, Guideline).

80. *Id.* These "other relevant criteria" include, for example, proving that the persecution is on account of a group that the government in the applicant's country of origin are either unable or unwilling to control. *See, e.g.,* *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011).

81. *See, e.g.,* *Garcia-Callejas v. Holder*, 666 F.3d 828, 829 (1st Cir. 2012); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653-54 (10th Cir. 2012); *Aquino-Rivas v. Attorney Gen. of the U.S.*, 431 Fed. Appx. 200, 203 (3d Cir. 2011); *Larios v. Holder*, 608 F.3d 105, 108-09 (1st Cir. 2010); *Barrios v. Holder*, 581 F.3d 849, 852 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009), *abrogation recognized by* *Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 2008 WL 2927590 (B.I.A. 2008), *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

b. Social Visibility

In determining whether the applicant's purported social group meets the second requirement, social visibility, the court must consider the shared characteristic in the context of the country of concern and the persecution feared.⁸² The United States Court of Appeals for the Tenth Circuit concluded in *Rivera-Barrientos v. Holder*⁸³ that, in order to demonstrate social visibility, an asylum applicant must meet two conditions: (1) the citizens of the applicant's country would consider individuals with the pertinent trait to constitute a distinct social group and (2) the applicant's community is capable of identifying an individual as belonging to the group.⁸⁴ Social visibility, according to the *Larios v. Holder*⁸⁵ court, requires that the applicant demonstrate that the purported group is "generally recognized in the community as a cohesive group."⁸⁶ However, the High Commissioner for Refugees has specifically stated that there is no requirement of cohesiveness.⁸⁷ The overarching problem is the dissidence between the High Commissioner for Refugees' intention that persecuted persons can find a safe haven in U.N. member States and the narrowly construed asylum laws promulgated by the United States. The United States' attempt to circumvent the Articles and Protocol which it signed and to which it expressed no reservations⁸⁸ by failing to enact legislation in line with the policy of the Articles and Protocol⁸⁹ gives persecuted persons abroad false hope.

2. *Proving that the Persecution is by an Organization that Law Enforcement and Governments are Unable or Unwilling to Control*

Recall the third overarching requirement: that applicants prove the persecution was committed by an organization that the gov-

82. *Matter of S-E-G*, 24 I. & N. Dec. at 586-87, 2008 WL 2927590, at **7, *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

83. 666 F.3d 641 (10th Cir. 2012).

84. *Id.* at 650-51.

85. 608 F.3d 105 (1st Cir. 2010).

86. *Id.* at 109 (citing *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010)).

87. UNHCR, Guideline, *supra* note 79, at ¶ 15.

88. As stated above in note 46, the United States has submitted reservations to the 1967 Protocol; however, these reservations are not pertinent to the topic of this article or the laws for granting asylum in the first place.

89. *Matter of Acosta*, 19 I. & N. Dec. 211, 211 (B.I.A. 1985) (stating that the Protocol and Handbook published by the UNHCR are "neither binding upon the United States nor controlling as to construction of the Refugee Act of 1980").

ernment is unable or unwilling to control.⁹⁰ Law enforcement agencies in Central America fail to address the problems created by transnational criminal gangs because many officers cooperate with the gangs.⁹¹ Many politicians and members of the judiciary also benefit from corruption. In Guatemala especially, widespread corruption afflicts the police and the judiciary.⁹² In theory, the judiciary is an independent branch of government. In practice, however, there are reports of ineffectiveness and manipulation, such as granting frivolous motions for continuances to delay cases and prolonging the trial and appellate processes.⁹³ Various agencies of the Guatemalan government, although having the responsibility of overseeing reports of judicial and police misconduct, lack the necessary resources to adequately address the problem⁹⁴ and themselves are not free from the crippling effects of corruption. For example, General Francisco Ortega Menaldo, the former Guatemalan Chief of Intelligence, once led one of the five key mafias in Guatemala.⁹⁵

Police officers and judges who attempt to legitimize the legal system from the inside out face opposition from their peers and continual threats, intimidation, and scrutiny.⁹⁶ In 2010, the Special Prosecutor for Crimes against Judicial Workers received 154 complaints of threats or aggression;⁹⁷ this number jumped to 243 in 2011.⁹⁸ Arrests rarely result in prosecution because investigators, judges, and witnesses are intimidated and threatened.⁹⁹ The United States Department of State reports the same issues in

90. *See, e.g.*, *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011); *see also*, Corsetti, *supra* note 13, at 417. To return to our example of the Coptic Christian from Egypt in note 68, what if the men who beat up the applicant on account of his religion were caught by the police, convicted, and incarcerated for their crime? In this instance, the persecution would be committed by a group that law enforcement is able and willing to control. The Coptic Christian applicant need not continue to fear living in Egypt on account of his religion because the threat has ceased. He does not have a reasonable fear of future persecution, and courts will deny his asylum claim.

91. *Id.* at 415.

92. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Guatemala (2011).

93. *Id.*

94. *Id.*

95. Tim Johnson, *Guatemalan Seeks Global Help to Lower Crime in Weary Land*, THE COLOMBIAN POST, (Feb. 10, 2003), available at <http://www.thecolombianpost.com/index.php>.

96. U.S. DEP'T OF STATE, *supra* note 92.

97. *Id.*

98. *Id.*

99. *Id.*

Mexico,¹⁰⁰ El Salvador,¹⁰¹ Honduras,¹⁰² and Nicaragua.¹⁰³ For this reason, citizens rarely seek help from the police or go through the courts to resolve their problems. They either take the law into their own hands or continue to allow themselves to be victimized.

The only alternative for recalcitrant gang recruits is to leave their homeland and settle in what they have been told all their lives is the “promised land”; the “land of opportunity”; a country that has jobs, prosperity, a stable government, police forces with integrity and training, and laws specifically pertaining to the protection of persecuted individuals—the United States of America. For many people throughout the world, the U.S. is still the beacon of hope that it was for countless Western and Northern Europeans in the mid-1800s¹⁰⁴ and numerous Southern and Eastern Europeans from 1880 to 1920.¹⁰⁵ Unfortunately for these more recent immigrants who seek a safe haven from persecution at home, the beacon is snuffed out by the bureaucratic red tape of United States immigration policy and a narrow interpretation of the asylum statute.

100. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Mexico (2011) (reporting that corruption, inefficiency, and lack of transparency continue to be problems within the judiciary and that corruption plagues law enforcement and prison officials).

101. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: El Salvador (2011). The report stated that among the principal human rights violations in El Salvador are widespread corruption in the judicial system and weaknesses in the judiciary and security forces that lead to a high level of impunity. Because there is rampant corruption among political parties and the government, corrupt officials and judges rarely receive any sanctions for their behavior.

102. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Honduras (2011). According to the U.S. Department of State, the most serious human rights violations in Honduras are corruption in the national police force and institutional weakness of the judiciary. There is insufficient funding for witness protection programs, as well. As a result, the public lacks trust in the legal system.

103. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Nicaragua (2011). Although the previously discussed transnational criminal gangs do not have a strong presence in Nicaragua, the country experiences the same issues at the hands of smaller local gangs. In recent years, though, MS-13 and Mara 18 have been making alliances with Nicaraguan gangs.

104. Philip Martin & Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, 58 POPULATION BULLETIN, no. 2, Jun. 2003, at 1, 12, available at <http://www.prb.org/Source/58.2ImmigrShapingAmerica.pdf>.

105. *Id.*

III. ANALYSIS: PAVING THE PATHWAY TO ASYLUM

Gang recruits who apply for asylum in the United States face numerous obstacles. Courts often deny their claims for failure to define the applicant's purported social group with sufficient particularity¹⁰⁶ or social visibility.¹⁰⁷ Applicants also have difficulty proving that the treatment they suffered at the hands of gang members rises to the level of persecution.¹⁰⁸ Applicants and their attorneys or accredited representatives will have a greater likelihood of obtaining a grant of asylum if they define the social group as men between the ages of eleven and twenty-one years who have been recruited by violent criminal gangs but have refused membership and if they provide some proof of physical harm.

A. *Defining a Particular Social Group with Sufficient Particularity and Social Visibility*

As stated above, courts generally deny asylum to applicants who have fled their home countries after being persecuted for refusing gang membership because the proposed social group lacks particu-

106. See *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (holding that the purported definition of particular social group lacked particularity because the term “young” is amorphous); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009), *abrogation recognized by Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585, 2008 WL 2927590, **6 (B.I.A. 2008) (holding that young males who refuse gang membership lacks particularity because what constitutes “young” is relative and is not particular), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

107. See *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Matter of S-E-G-*, 24 I. & N. Dec. at 588, 2008 WL 2927590, at **8, *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

108. See *Davis & Atchue*, *supra* note 51, at 85 (citing *Asani v. I.N.S.*, 154 F.3d 719, 723 (7th Cir. 1998) (defining persecution as “punishment or the infliction of harm which is administered on account of” one of the five enumerated grounds)); see also *Mikhailevitch v. I.N.S.*, 146 F.3d 384, 390 (6th Cir. 1998) (holding that persecution “requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty”); *Mroz v. Reno*, No. 96-1252, 1997 WL 139762, at *2 (10th Cir. 1997). The Courts of Appeals for the First and Ninth Circuits recognize that this trend leads to the “absurd result of denying asylum to those who have actually experienced persecution and were fortunate enough to survive.” *Davis & Atchue*, *supra* note 51, at 86 (citing *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 489 (1st Cir. 1994) and *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985)). The inconsistencies among the jurisdictions puts a substantial burden on refugees seeking asylum status in the United States; refugees do not have the resources to research where they should resettle in order to be recognized as having been persecuted on one of the five enumerated grounds.

larity¹⁰⁹ and social visibility.¹¹⁰ In order to rectify this problem, applicants and their representatives can begin by defining the purported social group as eleven- to twenty-one-year-old males who are sought by transnational criminal gangs for membership but refuse. This definition meets all of the requirements established by the Board of Immigration Appeals (“BIA”) and United States Courts of Appeals in that it is particular¹¹¹ and socially visible.

1. *Satisfying the Particularity Requirement*

The first requirement that the applicant must meet is that the purported social group is “particular,”¹¹² meaning that in the applicant’s society, others will recognize the group as a discrete class of persons.¹¹³ Although the U.N. High Commissioner for Refugees has already promulgated guidelines stating that signatory States to the 1967 Protocol Relating to the Status of Refugees (including the United States of America) should not consider the size of the group when determining a definition for the group,¹¹⁴ guidelines do not seem to have had any persuasive effect on the United States’ immigration policy regarding asylum. Therefore, it might be more practical to call for slow, moderate change rather than suggesting that courts completely overturn their precedent.

109. See *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Ramos-Lopez*, 563 F.3d at 861, *abrogation recognized by* *Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. at 585, 2008 WL 2927590, at **5-7, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

110. See *Rivera-Barrientos*, 666 F.3d at 653; *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Matter of S-E-G-*, 24 I. & N. Dec. at 588, 2008 WL 2927590, at **8, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

111. In *Rivera-Barrientos*, the Court of Appeals for the Tenth Circuit held that a particular social group of Salvadoran women between the ages of twelve and twenty-five years who have resisted gang recruitment meets the requirement of particularity. 666 F.3d 641, 650 (10th Cir. 2012).

112. See *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Ramos-Lopez*, 563 F.3d at 861, *abrogation recognized by* *Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. at 585, 2008 WL 2927590, at **6, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

113. *Matter of S-E-G-*, 24 I. & N. Dec. at 584, 2008 WL 2927590, at **5, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

114. UNHCR, Guideline, *supra* note 79, at ¶ 18.

a. *Age Limitation*

For this particular issue, the applicant's society would be the applicant's country of origin which, in this case, would be any Central American country. The first criterion of the author's proposed definition of particular social group—that the applicant is between the ages of eleven and twenty-one years—can be grounds for asylum when the individual faces persecution while that individual's age places him within the group, even though age in itself is not an immutable characteristic.¹¹⁵ Choosing this age range is not arbitrary; MS-13 and Mara 18 typically recruit males between the ages of eleven and twenty-one years.¹¹⁶ Recognizing that gang recruitment occurs during a discrete time in a young man's life narrows the purported social group to recruits who experience persecution as an immediate result of their refusal while they are still within the age of recruitment. Giving a discrete age range rather than defining the applicant as "young" avoids the problem that the applicants in *Larios*¹¹⁷ and *Matter of S-E-G*¹¹⁸ experienced—namely, that defining a group merely as "young" is "amorphous"¹¹⁹ and "relative."¹²⁰ Because most young men flee shortly after they refuse gang recruitment and begin to experience persecution, it is likely that the applicant will still be within the age

115. *Matter of S-E-G*, 24 I. & N. Dec. at 583-84, 2008 WL 2927590, at **4-5, *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009). Age is not an immutable characteristic because one will simply get older, removing him or her from the danger of persecution based on age. *Id.* Persecution based solely on the age of the applicant can suffice to place him or her within a particular social group if the persecuted individual makes the claim for asylum while he or she is still within the age group. *Id.* at 584. The Board of Immigration Appeals also acknowledged that "youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed. However, this does not necessarily mean that the shared past experience suffices to define a particular social group for asylum purposes." *Id.* (citing *Gomez v. INS*, 947 F.2d 660, 663-64 (2d Cir. 1991)). A particular social group cannot be circularly defined by the type of persecution endured. *Id.* (citing *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)).

116. Walker, *supra* note 6.

117. 608 F.3d at 109 (holding that the purported definition of the particular social group lacked particularity because the term "young" is amorphous).

118. 24 I. & N. Dec. at 585, 2008 WL 2927590, at **6 (holding that defining the purported social group as "young males who refuse gang membership" lacks particularity because what constitutes "young" is relative and is, therefore, not particular), *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

119. *Larios*, 608 F.3d at 109.

120. *Matter of S-E-G*, 24 I. & N. Dec. at 585, 2008 WL 2927590, at **6.

range of the purported social group during the adjudication of his asylum claim.¹²¹

b. Gender Limitation

The second criterion, that the applicant is male, is not only immutable but is also sufficiently narrow and particular to satisfy the United States courts.¹²² This principle first arose in the landmark asylum case of *Matter of Acosta*, in which the Board of Immigration Appeals specifically listed sex as a common, immutable characteristic¹²³ which might constitute grounds for asylum if the applicant's sex was the motivation for the persecutor's actions.¹²⁴ Here, transnational criminal gangs like MS-13 and Mara 18 generally recruit males.¹²⁵ Therefore, a male applicant within the age range of recruitment has case law to support his claim based on sex and age where the persecution is a result of these characteristics.

c. Refusal of Membership in the Recruiting Gang

The last characteristic in the author's proposed definition of particular social group is that the applicant must have refused membership in the gang. The Attorney General will not grant asylum to an individual who has participated in the persecution of another person based on any of the five enumerated grounds¹²⁶ or who has "committed a serious nonpolitical crime outside of the United States."¹²⁷ Therefore, if the Attorney General produces

121. Federal law requires that refugees apply for asylum within one year of their arrival in the United States. 8 U.S.C.A. § 1158(a)(2)(B) (2006); INA § 208(a)(2)(B) (2010), available at <http://www.uscis.gov>. Because there is a backlog of immigration cases, applicants who are close to the age cutoff risk aging out of the purported social group. However, neglecting to place an age cap on the group will result in courts denying asylum for failure to define the group with sufficient particularity. See, e.g., *Larios*, 608 F.3d at 109; *Matter of S-E-G*, 24 I. & N. at 585, 2008 WL 2927590, at **6.

122. See *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (citing *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005)) (recognizing that gender is an "innate characteristic" that is "fundamental to [one's] identit[y]"); see also *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993) (recognizing that persecution based on gender may constitute persecution based on membership in a particular social group).

123. 19 I. & N. Dec. 211, 233 (B.I.A. 1985) overruled in part on other grounds by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

124. See 8 U.S.C.A. § 1101(a)(42)(A) (2006); INA § 101(a)(42)(A) (2010), available at <http://www.uscis.gov>; *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

125. Walker, *supra* note 6.

126. 8 U.S.C.A. § 1101(a)(42)(B) (2006); 8 U.S.C.A. § 1158(b)(2)(A)(i) (2006).

127. 8 U.S.C.A. § 1158(b)(2)(A)(iii) (2006).

evidence that the applicant engaged in gang activities in the past, the government will deny asylum if the applicant persecuted persons in his country of origin or committed serious crimes outside of the United States. The applicant must have always remained steadfast in refusing to join a gang and not merely have experienced a change of heart after having been a gang member.

Additionally, the applicant must show that the persecution was on account of his membership in a particular social group.¹²⁸ In order to prove that the gang persecuted the applicant based on his membership in a particular social group (i.e. eleven- to twenty-one-year old males who refused membership), the applicant can present evidence, such as affidavits, news articles, photographs, threatening notes from the gang, et cetera, that the persecution began when he refused membership in the gang and that gang members gave the applicant the ultimatum to join or die. Using this model, the applicant has presented evidence that the social group existed prior to his persecution¹²⁹ and that there is a nexus between the applicant's membership in the social group and the persecution the applicant suffers.¹³⁰ In other words, because the eleven- to twenty-one-year-old male refused membership in a gang, the gang began to persecute him.

2. *Satisfying the Social Visibility Requirement*

Moving on to the second requirement, social visibility,¹³¹ the applicant must prove that his social group—males between the ages of eleven and twenty-one years who refuse gang membership after being recruited—is socially visible. In order to demonstrate social visibility, an asylum applicant must meet two conditions: (1) “the citizens of the applicant's country would consider individuals with the pertinent trait to constitute a distinct social group” and (2) “the applicant's community is capable of identifying an individual as belonging to the group.”¹³²

128. See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

129. *Id.*

130. See 8 U.S.C.A. § 1101(a)(42)(A) (2006); INA § 101(a)(42)(A) (2010), available at <http://www.uscis.gov>; *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

131. See *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586-88, 2008 WL 2927590, **7-9 (B.I.A. 2008), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

132. *Rivera-Barrientos*, 666 F.3d at 650-51.

a. *First Condition of Social Visibility: Do Citizens Consider the Purported Group to be a Distinct Social Group?*

The first condition of social visibility is that the citizens of the applicant's country of origin "would consider individuals with the pertinent trait to constitute a distinct social group."¹³³ An applicant can demonstrate that citizens of his country would consider recalcitrant male recruits between the ages of eleven and twenty-one years to constitute a distinct social group by providing evidence that people use a particular word to describe males of different age groups or by demonstrating that unwilling recruits are identifiable as a group by the recruiting gang. The first suggestion, that the applicant demonstrates that people use different words to describe males of different ages, is a bit weaker than the second proposition. At any rate, it is worth exploring. The Spanish words "niño," "chico," and "muchacho" all translate to mean "boy." However, each word carries its own connotation: "niño" is used to describe very young boys, like toddlers; "chico" usually means a boy slightly older but not yet a teenager; "muchacho" means a boy in his teens to very early twenties.¹³⁴ If the applicant can demonstrate that persons in his country refer to him as a "muchacho," for example, it is likely that the citizens of that country view him as falling within the proposed age range of eleven to twenty-one years. Citizens of the applicant's country also are likely to recognize these young males as refusing gang membership because gangs often make very public their efforts to intimidate¹³⁵ so that it serves as both specific and general deterrence.

The second suggestion for demonstrating that citizens of the applicant's country would consider recalcitrant male recruits between the ages of eleven and twenty-one to be a distinct social group forces the court to adopt a definition of the word "citizens." Absent more specific language, it appears that it is not necessary that *all* citizens recognize this particular social group, but rather that *any* citizens recognize the group. Because the persecutors are gang members, it makes sense to adopt their definition of the par-

133. *Id.*

134. This categorization of the words for "boys" is the general rule as understood by the author. Some regional differences may apply.

135. Walker, *supra* note 6 (describing event in which MS-13 sent dismembered bodies with threatening notes to Honduran President Ricardo Maduro and Guatemalan President Oscar Berger).

ticular social group that they target. It does not matter how the culture as a whole views the members of the purported social group because it is not the entire culture that is persecuting the males; what is important is how the persecutors view the persecuted. If the persecutors target certain people because they see the victims as members of a group, then that is also how courts should define the group. Therefore, once an applicant establishes that others—in this case, the gang members themselves—view people who (1) are between the ages of eleven and twenty-one years, (2) are male, and (3) were approached for membership in a transnational criminal gang but refused, as a distinct group, he satisfies the requirements for particularity¹³⁶ and the first condition of social visibility.¹³⁷

b. Second Condition of Social Visibility: Can the Applicant be Identified as a Member of the Group?

The applicant must also prove that he satisfies the second condition of social visibility, that the applicant's community is capable of identifying the applicant as belonging to the group.¹³⁸ While the first condition focuses on whether there is a distinct social group in the eyes of the applicant's community, the second condition focuses on the community's view of the individual applicant as part of that distinct social group. In order to satisfy this second condition, all that the applicant needs to prove is that he specifically is (1) between the ages of eleven and twenty-one years, (2) male, and (3) was approached for membership in a gang but refused. The applicant can easily prove the first two traits by presenting a birth certificate, school registration, medical records, or some other document that verifies his sex and date of birth. By presenting evidence that others in his community refer to him using words like "muchacho," the applicant can prove that people in his community identify him as a male between the ages of eleven and twenty-one.

136. See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. at 584, 2008 WL 2927590, at **5, *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

137. See *Rivera-Barrientos*, 666 F.3d at 650-51; see also *Matter of S-E-G-*, 24 I. & N. Dec. at 587, 2008 WL 2927590, at **8, (finding that there is no societal perception of a group where the record did "not suggest that victims of gang recruitment are exposed to more violence or human rights violations than other segments of society"; however, if the applicant can submit evidence that recalcitrant recruits are treated more severely or suffer harm and threats more frequently, it may be possible to persuade the judge that he does, in fact, constitute a member of a distinct group in the eyes of the gang.), *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

138. See *Rivera-Barrientos*, 666 F.3d at 650-51.

Items such as affidavits, threatening notes from the gang, and photographs of injuries or damage to the applicant's property at the hands of the gang can constitute evidence that the applicant was approached by the gang but refused membership. Because gangs often make their threats public,¹³⁹ the applicant's community will be capable of identifying the applicant as having refused membership in the gang. Once the applicant demonstrates that he satisfies the particularity and social visibility requirements, he has overcome the first hurdle to a successful asylum claim.

*B. Denial of Applicant's Claim for Asylum for Failure to Establish Past Persecution*¹⁴⁰

In addition to the particularity and social visibility requirements, the asylum statute also requires that an applicant establish past persecution or a well-founded fear of future persecution.¹⁴¹ Neither the statute nor the regulations requires physical harm in order to prevail on a persecution claim.¹⁴² Courts have held that "[p]ersecution includes threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom,"¹⁴³ but it does not "encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."¹⁴⁴ Although a successful asylum claim does not require that the applicant have suffered persecution in the form of physical harm, courts will nonetheless often deny a grant

139. Walker, *supra* note 6; *see also supra* note 53.

140. The author would like to note that where the applicant has established past persecution based on one of the five ground enumerated in 8 U.S.C.A. § 1101(a)(42)(A), the government can rebut the presumption that the applicant will continue to be persecuted if returned to his country of origin by proving that the conditions in the applicant's country of origin have changed. *See Matter of Chen*, 20 I. & N. Dec. 16, 18, 20-21 (B.I.A. 1989) (concluding that Chinese applicant who suffered religious persecution during the Chinese Revolution in the 1970s no longer had a well-founded fear of religious persecution in 1989 because the Chinese government had become much more lenient toward "mere religious activity"). However, because the conditions of the Central American countries at issue have not changed with respect to the pervasiveness of transnational criminal gangs and the lack of government control over those gangs, establishing a well-founded fear of future persecution will not need to be discussed in this article.

141. *See Davis & Atchue, supra* note 51, at 85 (citing 8 U.S.C. § 1101(a)(42)(A)-(42)(B) (1999) and 8 C.F.R. § 208.13(b)(1) (1999)).

142. *See id.*

143. *Aquino-Rivas v. Attorney Gen. of U.S.*, 431 Fed. Appx. 200, 202 (3d Cir. 2011) (citing *Wong v. Attorney Gen. of the U.S.*, 539 F.3d 225, 232 (3d Cir. 2008)).

144. *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993).

of asylum where the applicant cannot produce evidence of severe physical injury.¹⁴⁵

However, applicants who are fleeing from gang recruiters generally can prove that they have suffered persecution at the hands of the gang that tried to recruit them. Where the recalcitrant recruit has been beaten severely, especially repeatedly, he meets the “physical harm” test followed by the United States Courts of Appeals for the Sixth,¹⁴⁶ Seventh,¹⁴⁷ and Tenth Circuits¹⁴⁸ as well as the more lenient thresholds of the First¹⁴⁹ and Ninth Circuits.¹⁵⁰ Because it is not unusual for gang members to physically harm those who oppose the gang,¹⁵¹ the applicant will likely be able to demonstrate that he suffered persecution by presenting evidence that the gang repeatedly physically harmed the applicant for his refusal to join. This evidence can be in the form of affidavits, newspaper clippings, medical records, and photographs.

It is also not unusual, however, for gangs to refrain from using physical violence as a means of intimidation and to resort to threats instead. Gangs typically respond to refusals to join their ranks by threatening the recruit with death or severe bodily injury or by threatening the recruit’s family.¹⁵² However, “[t]hreats can constitute past persecution only in the most extreme circumstances, such as where they are of a most immediate or menacing na-

145. See Davis & Atchue, *supra* note 51, at 85 (citing *Asani v. I.N.S.*, 154 F.3d 719, 723 (7th Cir. 1998) (defining persecution as “punishment or the infliction of harm which is administered on account of” one of the five enumerated grounds)); see also *Mikhailevitch v. I.N.S.*, 146 F.3d 384, 390 (6th Cir. 1998) (holding that persecution “requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty”); *Mroz v. Reno*, No. 96-1252, 1997 WL 139762, at *2 (10th Cir. 1997). The courts of appeals for the First and Ninth Circuits recognize that this trend leads to the “absurd result of denying asylum to those who have actually experienced persecution and were fortunate enough to survive.” Davis & Atchue, *supra* note 51, at 86 (citing *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 489 (1st Cir. 1994) and *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985)). The inconsistencies among the jurisdictions puts an excessive burden on refugees seeking asylum status in the United States; refugees do not have the resources to research where they should resettle in order to be recognized as having been persecuted on one of the five enumerated grounds.

146. *Mikhailevitch*, 146 F.3d at 390.

147. *Asani*, 154 F.3d at 723 (defining persecution as “punishment or the infliction of harm which is administered on account of” one of the five enumerated grounds).

148. *Mroz*, 1997 WL 139762, at *2.

149. *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 489 (1st Cir. 1994).

150. *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985).

151. *Savenije*, *supra* note 30, at 650.

152. See *Walker*, *supra* note 6; see also *Corsetti*, *supra* note 13, at 428 (citing Telephone Interview with Leonel Dubon, Program Dir., Casa Alianza (Mar. & Apr. 2005)); *Corsetti*, *supra* note 13, at 428 (citing Written Correspondence with Leonel Dubon, Program Dir., Casa Alianza (Mar. & Apr. 2005)).

ture or if the perpetrators attempt to follow through on the threat.”¹⁵³ In order to satisfy the requirement of establishing past persecution by threats alone, the applicant must prove that the gang threatened him personally and that the threats pose a real danger to the applicant’s life or freedom.¹⁵⁴ It is insufficient for the applicant to show merely any treatment that our society regards as unfair or unjust.¹⁵⁵ By providing the court with affidavits of people with personal knowledge of serious, credible threats to the applicant’s life or well-being, newspaper clippings reporting a threat or an attempt to carry out a threat, threatening notes from the gang, and photographs of the aftermath of a threat or an attempt to carry out a threat, the applicant can prove that he has been persecuted because his life and freedom have been jeopardized.¹⁵⁶ Evidence that members of the gang stalked the applicant with increasing frequency after his refusal or that the gang carried out some of the threats and that the actions are increasing in frequency or severity is sufficient to prove past persecution for membership in a social group consisting of eleven- to twenty-one-year-old males who have refused gang recruitment.

IV. CONCLUSION

Teenage boys who have come to the United States to seek refuge from the threats, beatings, and intimidation after refusing to join gangs like MS-13 or Mara 18 almost invariably have their hopes crushed once they find themselves in removal proceedings. In spite of the U.N. drafters’ intention that signatory States enact laws that give the Convention Relating to the Status of Refugees a broad construction,¹⁵⁷ Congress’ asylum statute is rather narrow.¹⁵⁸ Immigration judges have been hesitant to grant asylum to these scared young men because the Board of Immigration Appeals and the United States Courts of Appeals have set a high

153. *Nzeve v. Holder*, 582 F.3d 678, 683 (7th Cir. 2009) (citing *Bejko v. Gonzales*, 468 F.3d 482, 486 (7th Cir. 2006)). While the court examined the totality of Nzeve’s circumstances, where an alleged threat on Nzeve’s life, about which Nzeve had learned from other members of his political party, had never been attempted to be carried out and where Nzeve continued his political affiliation for years after the alleged threat without incident, the threat itself did not contribute to Nzeve’s claim for asylum. *Id.*

154. *See Aquino-Rivas v. Attorney Gen. of U.S.*, 431 Fed. Appx. 200, 232 (3d Cir. 2011)

155. *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir.1993).

156. *See Aquino-Rivas*, 431 Fed. Appx. at 232.

157. UNHCR, Convention and Protocol, *supra* note 47.

158. *Davis & Atchue*, *supra* note 51, at 81 (referencing 8 U.S.C. § 1101(a)(42)(A) (1994) and 8 C.F.R. § 208.13(b)(1) (1999)).

threshold for establishing membership in a particular social group and past persecution in such situations.¹⁵⁹ The courts have denied granting asylum to these teenage males because their proposed definition of “particular social group” lacked either particularity¹⁶⁰ or social visibility¹⁶¹ or because they have failed to demonstrate that they have been persecuted.¹⁶² Because judges do not grant asylum to these young men, thousands upon thousands lose hope in the United States’ willingness and ability to offer refuge to vulnerable persons. As a result, the applicants return to the very countries where their persecutors reside.

Attorneys and accredited representatives can increase the likelihood of obtaining asylum for the teenage men fleeing from gang retaliation by proposing a social group with the following parameters: (1) between the ages of eleven and twenty-one years, (2) male, and (3) refusing gang membership after being approached. Courts will likely consider such a group to be sufficiently particular and socially visible if the attorney supports his or her proposition with case law. Ideally, courts would have considered the policy of the statute to be consistent with the intention of the U.N. Protocol—that States enact legislation providing a way for persecuted persons to obtain safety and resettlement. Unfortunately, courts have interpreted the statute rather narrowly and have issued orders of removal to persons with legitimate claims for asy-

159. See, e.g., *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003); *Asani v. I.N.S.*, 154 F.3d 719, 723 (7th Cir. 1998) (defining persecution as “punishment or the infliction of harm which is administered on account of” one of the five enumerated grounds); *Mikhailevitch v. I.N.S.*, 146 F.3d 384, 390 (6th Cir. 1998) (holding that persecution “requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty”); *Mroz v. Reno*, No. 96-1252, 1997 WL 139762, at *2 (10th Cir. 1997); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585, 2008 WL 2927590, at **6 (B.I.A. 2008) (holding that young males who refuse gang membership lacks particularity because what constitutes “young” is relative and is not particular), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

160. See *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (holding that the purported definition of particular social group lacked particularity because the term “young” is amorphous); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009), *abrogation recognized by Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. at 585, 2008 WL 2927590, at **6 (holding that young males who refuse gang membership lacks particularity because what constitutes “young” is relative and is therefore not particular), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

161. See *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Matter of S-E-G-*, 24 I. & N. Dec. at 588, 2008 WL 2927590, at **8, *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

162. *Davis & Atchue*, *supra* note 51, at 82.

lum. However, now that such precedent has been established, attorneys and their refugee clients have quite an onerous task in proving eligibility for a grant of asylum. Such a task is difficult, and often nearly impossible, for persons who flee in secret. Until Congress promulgates an asylum statute consistent with the broad construction of the U.N. Convention Relating to the Status of Refugees or until courts decide to overturn their precedent by applying a more liberal construction to the asylum statute, applicants will have to provide the court with mountains of credible and convincing evidence and narrowly define the particular social group to which they belong. Requiring these applicants to make such a showing is incompatible with the applicant's circumstances in his country of origin and is inconsistent with the United States' pledged commitment to the human rights of vulnerable peoples.