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## INTRODUCTION

WITH the enactment of the Chinese Civil Code, systems of private law modelled on those of the West will govern nearly the entire world. Western legal systems, moreover, are much alike. Both 'common law' systems such as those of England and the United States and 'civil law' systems such as those of France, Italy and Germany have a similar doctrinal structure based on similar legal concepts. They divide private law into certain large fields such as property, tort, and contract, and analyse these fields in a similar way. Problems of property law are approached by distinguishing ownership from possession. Tort liability is discussed by distinguishing fault from strict liability and by requiring that the defendant's conduct be the proximate or adequate cause of the plaintiff's harm. The formation of a contract is analysed by applying doctrines of mistake, fraud, duress, and offer and acceptance. The obligations of the contracting parties are determined by using general canons of interpretation and by holding the parties to a set of 'implied terms' to be found in the law of sale, lease, or whatever other type of contract they have entered into. The enforceability of a contract is determined, *inter alia*, by a distinction between gift and exchange. The organization of the law and its larger concepts are alike even if particular rules are not. Accordingly, though answers may differ, the problem of whether a boy is liable for injuring a playfellow or a seller is liable for defects in his merchandise is analysed in much the same way in Hamburg, Montpellier, Manchester, and Tucson, or for that matter in New Delhi, Tel Aviv, Tokyo, and Jakarta.

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## *On the value and method of rule-comparison in comparative law*

Michael Bogdan

### *1. Introduction*

In a well-known interview granted in 1997 by John Henry Merryman<sup>1</sup> to Pierre Legrand, Professor Merryman is quoted as having said the following:

It seems so obvious that comparison based on statements of rules of law, which is the dominant mode of comparative legal scholarship, is a relatively trivial kind of enterprise. The literature that has developed from rule-comparison does not, so far as one can tell, engage much of real significance. If you are a practicing lawyer with a foreign law problem, it is, of course, important for you to be able to identify and understand the applicable rules, and in doing so you will necessarily compare the foreign rules with those that are familiar to you in your own system. Thus, there are professional activities for which rule-comparison is directly useful, but scholarship is supposed to have larger concerns. To the extent that one engages in serious scholarship in comparative law, one soon exhausts whatever value there may be in rule-comparison.<sup>2</sup>

Professor Merryman's negative attitude towards rules-oriented comparative work is confirmed by the following statement, taken from the same interview:

Some of the most highly regarded scholars... spend their impressive learning and intellectual brilliance in rule-study. Of course, clever, learned people will always find clever, learned things to say about whatever they study, even if it is only rules. But for all that intellectual horsepower to be spent on such trivial phenomena seems like a waste.<sup>3</sup>

Merryman is not alone in looking with contempt on comparative legal research focusing on comparisons between the substantive contents of legal rules belonging to different legal systems. Thus, Mark Van Hoecke and Mark Warrington wrote in an article published in 1998 that

[b]roader investigation reveals that it is not even rules which are at the core of the comparative endeavour; it is, rather, the legal discourse, the way lawyers work with the law and reason about it.<sup>4</sup>

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<sup>1</sup> Professor Emeritus, Stanford University, USA.

<sup>2</sup> See Pierre Legrand, "John Henry Merryman and Comparative Legal Studies: A Dialogue", 47 *American Journal of Comparative Law* pp. 3-66 (1999), at p. 4.

<sup>3</sup> See Legrand, *op.cit.*, p. 46.

<sup>4</sup> See Mark Van Hoecke & Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", 47 *International and Comparative Law Quarterly* pp. 495-536 (1998), at p. 495.

What is then the alternative offered by those comparative legal scholars who, as Legrand put it, "would like to resist the kind of anti-intellectualism that has plagued comparative legal studies for so long" and who, like Merryman, maintain that law cannot be reduced to a system of rules but rather embraces a "complex of actors, institutions, and processes"?<sup>5</sup> Merryman himself offers a number of categories describing the legal systems to be compared. Among these factors that – in his view – deserve to be studied and compared, one may mention legal extension (the area of social activity to which the legal system attempts or purports to apply), legal penetration (the impact of the legal system on the lives of significant segments of the population), legal culture (the inner logic of the legal system), legal institutions (courts, legislatures, law schools, etc.), legal actors (attorneys, judges, scholars, litigants, etc.), legal processes (judicial and administrative proceedings, legislation, legal education, etc.), secondary rules (rules of jurisdiction and procedure, rules governing the creation of substantive rules, etc.), and legal expense (costs to operate the legal system).<sup>6</sup> Merryman suggests that each of these categories provides an interesting dimension for comparison and that they together describe the legal system. In his own words, substantive rules of law "are prominently absent from this list of legal system components".<sup>7</sup>

For Merryman, the legal system is a "law machine", largely independent of the substantive contents or even the very existence of substantive legal rules.<sup>8</sup> It is possible that this is merely a terminological issue, the relevance of which should not be overestimated, but the concept of legal system is by most jurists probably understood differently, namely as the total of all legal rules in a particular country (or other entity having a legal system of its own), including the substantive rules as well as rules of procedural nature and other "rules about rules". In particular, for most continental lawyers legal rules constitute the very core of a legal system. More important than this terminological issue is that Merryman, and some with him, are of the view that it is only the comparison of components of the law machine as such, *i.e.* of the general features of the legal systems under scrutiny, that constitute "serious scholarship in comparative law".

I respectfully disagree and I shall in this paper make an attempt to show that rules-oriented comparisons are, in fact, far from "a relatively trivial kind or enterprise". On the other hand, I shall not spend much effort on discussing whether rule-oriented comparisons, even if scholarly enough, fall beyond the field of comparative law and should rather be classified as research in their particular field of positive law (contracts, torts, procedure, penal law, etc.).<sup>9</sup> Such territorial border disputes between legal scholars protecting their respective hunting grounds are of very little scientific interest.<sup>10</sup> There is no official or

<sup>5</sup> See Legrand, *op.cit.*, p. 62.

<sup>6</sup> See Legrand, *op.cit.*, p. 63. Other comparatists have suggested similar lists of factors, see for example the "basic elements of a legal culture" enumerated in Van Hoecke & Warrington, *op.cit.*, pp. 513-516.

<sup>7</sup> See Legrand, *op.cit.*, p. 64.

<sup>8</sup> See Legrand, *op.cit.*, p. 65.

<sup>9</sup> See references in Michael Bogdan, *Comparative Law*, Kluwer 1994, pp. 22-25.

<sup>10</sup> The delimitation of comparative law as such may, of course, be of great and legitimate relevance from other points of view than the purely scientific one, for example with regard to creating optimal structure of courses for law students (where pedagogical criteria should be decisive), or when interpreting the will of a donor who had bequeathed some money for research in "comparative law" (where the donor's understanding of the term should be decisive).

other generally accepted definition of comparative law<sup>11</sup> and nobody has the right to monopolize it by excluding others; it is submitted that comparative law is open and borderless in the sense that it encompasses comparative legal research in all traditional legal disciplines (it is thus possible to speak of, *e.g.*, "comparative procedural law"; a scholar doing such research can legitimately call himself both a comparatist and a proceduralist).

In fact, most of the comparative legal research is rules-oriented and it is a relatively very small group of legal scientists who prefer to focus on and compare the general legal and social features of different legal systems or even entire groups of legal systems. There is, of course, nothing wrong with such macro-comparisons,<sup>12</sup> provided they are done well. Both macro-comparisons and rule-oriented comparisons (which often deserve the name micro-comparisons, because they usually focus on a relatively limited legal problem) can be scholarly or trivial depending on their quality, but to generally declare the former to be scientific and the latter to be trivial is nonsensical. The evaluation of the answers provided by each of the two types of comparison must be done in relation to the questions asked at the outset. It is possible that the rule-comparison is treated with contempt by some macro-comparatists because it does not provide an answer to *their* questions, while they fail to grasp and understand the immense value the same rule-comparison may have for other comparatists who are interested in comparing how two or more legal systems deal with a certain particular problem of substantive law.

## II. *The purpose and value of rule-comparison*

This author finds the scientific comparison between legal rules belonging to different legal systems to be of such obvious value and use that it is almost embarrassing having to defend it. It is, furthermore, impossible to make an exhaustive list of all the benefits that can be reaped from such a comparison, so I shall restrain myself to mentioning a mere selection of the most important ones.

The most obvious value of studying foreign legal rules and comparing them with those of the comparatist's own country is that foreign solutions can provide a source of inspiration, whether as models or as warnings, for jurists working *de lege ferenda*, naturally only after a proper critical analysis has been made. A critical rules-oriented comparison between various national solutions is, for example, essential at all scientific or other attempts to bring about a unification or harmonization of law. A scholarly project such as the work of the Lando Commission on European Contract Law could never have been carried out

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<sup>11</sup> According to my humble attempt to define comparative law, it includes three areas. *To begin with*, comparative law encompasses the comparing of different legal systems with the purpose of ascertaining their similarities and differences (whether regarding the treatment of a particular legal problem or on a more general level corresponding to Merryman's list of categories). *Second*, comparative law includes the processing of the similarities and differences that have been ascertained, for example by explaining their origin, evaluating the solutions utilized in the different legal systems, grouping of legal systems into "families" (whether with regard to their general features or in respect of the treatment of a particular legal problem), or searching for the common core of the legal systems under scrutiny (again, the common core may pertain to the general features or to the handling of a particular legal problem). *Third and last*, comparative law comprises the treatment of the methodological problems which arise in connection with these tasks, including methodological problems connected to the study of foreign law. See Bogdan, *op.cit.*, p. 18.

<sup>12</sup> See Bogdan, *op.cit.*, p. 57.

without relatively detailed comparisons between the rules of the various member countries of the European Community (and some other countries as well).<sup>13</sup>

An often overlooked value of a rules-oriented comparison is its contribution to a better understanding of the comparatist's own legal system.<sup>14</sup> The comparison between how a particular legal problem is solved by the comparatist's own law and how it is dealt with in one or more foreign legal systems may demonstrate that the solution he may have taken for granted is far from self-evident, since other countries may solve the same problem in quite a different manner, perhaps better. A legal rule he has previously considered necessary in any civilized legal system may at a closer look turn out to be the result of factors specific for his own country, other countries managing quite well without it. The rule-comparison thus enables the comparatist to see his own law with a certain distance and frees him from the shackles of his national legal training, opening his eyes for other legal solutions to the same or similar legal problems.

A most interesting subject of comparative studies is the functioning of legal transplants, i.e., legal ideas, institutions and rules developed in one legal system and then copied and implanted into another. Has the transplant become assimilated in its new legal and social environment, has it been rejected by it, or does it survive the transplanting but in a substantially amended form? Does it co-exist and co-operate harmoniously with endemic legal ideas, institutions and rules, or has it turned into a constant source of irritation?<sup>15</sup> Such studies are of great practical value for, *inter alia*, international development aid in the legal field, where a foreign expert often consciously or instinctively tries to implant ideas, norms and institutions stemming from his own legal system (often a common-law jurisdiction) into a developing country with totally different legal roots (usually a mixture of inherited French, Portuguese or other civil-law principles, endemic legal traditions and remnants of Soviet or other Marxist influence).

### III. Some methodological problems of rule-comparison

Like any other scholarly work, a rules-oriented comparison must naturally be done properly if it is not to bring comparative legal research into disrepute. Comparing foreign legal rules with one's own is a difficult task and the risk of errors and misunderstandings is obvious. Rule-comparison is, in fact, sometimes criticised from two mutually incompatible viewpoints. Some allege that such comparison is trivial (see Merryman's statement quoted above) while others consider it to be an enterprise so difficult that in practice it is impossible to carry it out in a meaningful manner.

In my opinion, both criticisms are unwarranted.

The criticism asserting that rule-comparison is too difficult starts usually by pointing out the fact that legal rules are not independent of the society surrounding them and that they cannot be understood isolated from the general features characterizing the whole legal system which they belong to. This is, of course, quite true, but it should not be used as grounds for criticism against all rules-oriented comparison in general, but merely against *bad* rules-oriented comparison. To my knowledge, there is no recent example of a rules-

<sup>13</sup> See Ole Lando & Hugh Beale (eds.), *The Principles of European Contract Law*. Parts I and II, Kluwer 2000, pp. xxv-xxvi.

<sup>14</sup> See Bogdan, *op.cit.*, p. 28 with further references.

<sup>15</sup> See, e.g., Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", 61 *Modern Law Review* pp. 11-32 (1998).

oriented comparatist who is of the opinion that legal rules should be studied and compared having regard to their wording alone. On the contrary, most authors stress that such rules must be compared in their proper legal and non-legal setting.<sup>16</sup> In the following, I shall try to identify and describe in a summary fashion the principal role and impact of such setting within comparative legal scholarship, in particular in respect of rules-oriented comparative research.

The basis of any meaningful rules-oriented comparative legal work is, of course, the obtaining of correct information about the rules to be compared. The necessity of using reliable and up-to-date sources of information is obvious. It is equally elementary that the study cannot limit itself to researching the primary sources of law, such as the naked wording of statutes in civil-law countries or of judicial holdings in common-law jurisdictions. Such primary sources have to be subjected to established methods of interpretation, and these may often result in conclusions that differ or are even incompatible with the wording as such. Thus, the Swedish Penal Code still provides for "imprisonment for life" as punishment for certain crimes, although every Swedish lawyer knows that this does not really mean imprisonment for the rest of the prisoner's life. Similarly, many statements made by judges of the highest judicial instances in England have lost their weight by being "distinguished" without ever having been formally overruled. It is evident that a legal rule must not be confused with a mere statutory provision or with a naked judicial statement. The statutory provision or judicial statement which seemingly takes care of the problem at hand is normally a mere part, albeit a central one, of the real legal rule. The complete legal rule is composed not only of the wording of the statute or of the judicial statement but even of the prominent general features of the legal system as a whole, including most of the elements on Professor Merryman's list (see above). Without taking into consideration such general features, the wording is easily misunderstood. To understand the contents and functioning of a foreign provision of law, one must examine both its legal environment (such as the prevailing rules of interpretation) and its non-legal environment, i.e. its social (political, economic, ethical, religious, etc.) context. All this applies, of course, even to the study of the comparatist's own legal system, but that creates usually less difficulties. A comparison between mere legal texts deserves thus to be criticised, but this is, I repeat, a criticism against *bad* rule-comparison rather than against rules-oriented comparative legal work as such. Such legitimate criticism is nothing new. As *Otto Kahn-Freund* wrote some thirty years ago, the use of comparative method requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law.<sup>17</sup>

However, some writers tend to exaggerate on this point, for example when they suggest that a comparison between legal rules is meaningful only if the rules belong to legal systems sharing the same legal and social context:

Comparative law, when viewed in its narrowest sense, appears to be feasible (in terms of the aims and objectives it can pursue) only when limited to an *intra-cultural* comparison,

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<sup>16</sup> See, e.g., *Jaakko Husa*, "Farewell to Functionalism or Methodological Tolerance?", *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 2003, pp. 419-447, at pp. 428-429, with references.

<sup>17</sup> See *Otto Kahn-Freund*, "On Uses and Misuses of Comparative Law", *37 Modern Law Review* pp. 1-27 (1974), at p. 27.

i.e. a comparison of legal systems within one and the same cultural family, sharing a basic common conception of law.<sup>18</sup>

I find it difficult to accept this view. In my opinion, comparisons between legal rules belonging to very different legal cultures are not only possible but even particularly interesting and rewarding. Why should it not be possible or feasible to compare how the law of the People's Republic of China and the law of England or Sweden deal with a particular problem, for example the access rights of a non-custodian parent to his child after a divorce or the protection of minority shareholders in a corporation?

Naturally, I do not mean that everything is comparable. Any meaningful comparison presupposes that the two elements to be compared have a common quality (the *tertium comparationis*), in relation to which the comparison will take place. As put by one writer, orange light has shorter waves than indigo, and sea water is saltier than Perrier, but what would it mean to compare the color orange with the taste of sea water?<sup>19</sup> If a rule-comparison is to be meaningful, the most central and important requirement that must be fulfilled is that the rules to be compared deal with the same problem or situation (the same "segment of life"), which serves as the comparison's *tertium comparationis*.<sup>20</sup> "The same problem or situation" does not in this connection mean total identity in all respects, which can hardly ever be achieved, but rather those fundamental similarities of relevant circumstances that make it reasonable to assume that the two situations must by the legal system be treated in the same way (i.e., that the law cannot reasonably distinguish between them). To decide whether this condition is fulfilled in a particular case is not as simple as one might be tempted to believe. Besides, the question does not normally arise in this form. The comparatist does not normally start with two given legal rules and examine whether they deal with the same problem. He starts rather with a certain situation or legal problem and looks for relevant legal rules regulating it in the legal systems he wishes to compare. His success will depend on, *inter alia*, whether the situation/problem can arise at all in both societies in question. If this is not the case, the comparison between the national legal solutions to the problem in question is not possible. This used to be a hotly debated issue before the collapse of the communist regimes in Central and Eastern Europe.<sup>21</sup> Certain authors argued at that time that "socialist" legal rules could not be compared in a meaningful way with legal rules in the West, the main reason being that "socialist" and "capitalist" societies were so profoundly different from one another (mainly because of their different class nature) that the same situations and problems simply could not arise in both of them. One must not, however, confuse the legal rule's political goals (such as to contribute to the society's transformation in a particular direction) and the same rule's function to regulate, in one way or another, a particular problem or situation. To the extent that the same problems and situations arise and are subject to legal regula-

<sup>18</sup> See Van Hoecke & Warrington, *op.cit.*, p. 509.

<sup>19</sup> See James Gordley, "Is Comparative Law a Distinct Discipline?", 46 *American Journal of Comparative Law* pp. 607-615 (1998), at p. 615.

<sup>20</sup> This does not apply in the rare cases where the comparatist is not interested in comparing the substantive solutions but rather some formal aspects of the rules in question, such as the complexity of the language used or the manner of dividing statutory texts into sections and subsections. In these respects it is possible to compare even legal rules dealing with totally different problems of substantive law.

<sup>21</sup> See Bogdan, *op.cit.*, pp. 61-67 with further references.

tion in two societies, it is possible to compare that regulation in a meaningful way. The issue of the divorced parents' access rights existed in both socialist and capitalist societies and could, it is submitted, be presumed to be the same problem/situation regardless of which of the two types of societies was involved. It was thus suitable for comparative studies. On the other hand, the protection of a corporation's minority shareholders was a problem unknown in the traditional state-planned socialist countries, which made comparisons impossible.

Except in relatively simple cases, the question whether the problem under scrutiny is the same in both societies cannot be answered by legal experts alone, as it requires some knowledge about the non-legal (political, economical, social, etc.) features of the societies in question. A rule-oriented comparison is thus not limited to comparing legal rules in the narrow sense or, to put it in other words, comparing legal rules requires comparing the relevant non-legal aspects of the two societies as well. The amount of effort required by the latter comparison will naturally vary from case to case. A Swedish comparatist comparing his own law with that of one of the other Nordic countries<sup>22</sup> does not normally have to devote much time to studies of the society there, because it can be presumed to be similar to Sweden. The task becomes much more difficult if the comparison involves legal rules in more exotic countries, especially countries with a different socio-economic order. It is, however, submitted that all legal systems are basically comparable provided the *tertium comparationis* is chosen with care and on a sufficiently general level. It would certainly be meaningless to attempt a comparison between legal rules regulating market competition in Sweden and in North Korea, since the problem/situation "competition in the market" simply does not exist in North Korea. On the other hand, both Sweden and North Korea have legal rules regulating the economic life (basically the production and distribution of goods and services); the Swedish rules on economic life include, *inter alia*, the rules on market competition whereas the North Korean rules on economic life include, *inter alia*, detailed rules on state planning. These rules can be compared with one another if one wishes to compare on a more abstract level how the legal systems of Sweden and North Korea steer the economic life in general, but comparison is impossible if the intention is rather to compare how they regulate market competition (which does not exist in one of the two countries). Of course, the more abstract the level of comparison becomes the less it tells us about the alternative ways of solving particular problems on the level of details. This does not make the comparison less interesting in other, more general respects, for example when comparing the use of legal instruments such as orders and prohibitions prevailing in a planned economy with the use of economic stimulants (taxes, custom duties, fees, subsidies, interest rates, etc.) prevailing in a market-oriented economic system.<sup>23</sup>

As can be seen, rule-oriented comparisons are far from trivial. This applies, to at least the same extent, to the scientific processing of the results of the rule-comparison, *i.e.*, of the ascertained similarities and differences. The comparative work is not necessarily over when the comparing as such is done, as the similarities and differences can be subjected to further studies and analyses of great scientific interest.<sup>24</sup> One such interesting task is to

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<sup>22</sup> Denmark, Finland, Iceland and Norway.

<sup>23</sup> See Bogdan, *op.cit.*, p. 66.

<sup>24</sup> A rule-comparison may of course be done for other than scientific purposes, for example in order to enable parties to a particular international commercial contract to choose a legal system best suited for their needs. This paper deals, however, mainly with comparative law as a scientific discipline.

attempt to explain them: why are two legal systems similar or different on a particular point? A question often asked by less-experienced comparatists, such as law students writing comparative essays and papers, is whether the explaining should focus on the similarities or on the differences. This is, in my opinion, a question having very little to do with the substance of the comparative study as such and must be answered on the basis of purely pedagogical considerations, as similarities and differences are two sides of the same coin: a similarity is nothing more or less than lack of differences and a difference is nothing else than lack of similarity. Whether the presentation should concentrate on similarities or differences depends largely on the expectations of the comparatist himself and/or the expected assumptions of his anticipated readers. When presenting the results of a comparison between legal rules of two closely-related legal systems, for instance the legal systems of the Nordic countries, it is normally more interesting to search for explanations for the differences that one has found than to provide the largely obvious explanations for similarities, at least when the addressees (the expected readers) can be expected to be aware of the close historical, geographical, cultural, linguistic, religious, *etc.* ties between the Nordic nations. After comparing Swedish law with, for example, Vietnamese law, it is probably more interesting to find explanations for the rather surprising similarities that can be found despite the profound differences between the two societies in the above-mentioned respects.<sup>15</sup>

After having compared how two (or more) legal systems deal with the same problem, it is natural to ask which of the two (or more) legal solutions is better or the best one. A "good" legal rule is, of course, not an end in itself, but rather only one of the instruments used in order to attain certain desirable effects in the society. What effects upon the society are desirable is a political rather than legal question on which opinions often differ even within the same country. Jurists are not – or in any case should not be – entitled to exercise greater influence than other citizens when it comes to such political issues. The differences of opinion are potentially even greater between persons belonging to different communities. Any comparative evaluation, including a scholarly evaluation by comparative legal scientists, must be carried out on the basis of a given set of values (value judgments), *i.e.*, it must necessarily be subjective to a certain extent. This does not mean that the evaluation is meaningless, but merely that the comparatist must be aware of the fact that the set of values he applies is not necessarily shared by all. Some values, such as those expressed in the universal human rights instruments, may of course be more widely accepted than other values. Before starting to criticise a foreign legal rule from the viewpoint of a legal scholar, the comparatist should take into account the socio-political aims pursued by the foreign legislator. It would not be meaningful and appropriate to criticise, from a legal point of view, foreign legislators for making laws serving their own socio-political goals rather than those of the comparatist himself.

A real comparative legal evaluation of the contents of two rules presupposes not only that they deal with the same problem/situation (which is a fundamental precondition of any meaningful comparison, see above), but even that they have the same aim(s).<sup>16</sup> It is, for example, hardly possible to tell which of two abortion laws is "better" if they have opposite aims, one of them trying to reduce the population explosion and the other desiring to increase the birth rate. A legal scholar is hardly qualified to express an expert opinion on whether the society needs more or less children and his private views on this mat-

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<sup>15</sup> See Bogdan, *op.cit.*, pp. 68-69.

<sup>16</sup> See Bogdan, *op.cit.*, p. 80.

ter are of limited interest in this context. If, on the other hand, both abortion laws are intended to increase the birth rate, the comparatist can compare which of them is a more efficient instrument to achieve that goal (quite regardless of whether he personally sympathises with that aim or not). The use of the comparatist's (or his country's) set of values is, on the other hand, fully legitimate when the purpose of the comparative evaluation is to find a foreign model to be imported to and implemented in the comparatist's own legal system.

Another interesting task of comparative legal research is the grouping of legal systems into "families of law" or other similar groups ("legal cultures", "legal traditions", etc.), characterised by important common features.<sup>27</sup> Most of these divisions have resulted in groups such as the common-law family, the civil-law family, the socialist-law family, the family of Moslem law, and the Far-Eastern family of laws. The purpose of such divisions is usually pedagogical; they serve mainly to facilitate students and others to obtain a quick introduction into and overview over the amazing multitude of legal systems existing in the world today. Such "pre-understanding"<sup>28</sup> of legal systems enables the comparatist to proceed with greater ease to the study of and comparison between more specific legal rules and solutions. Due to its introductory purposes however, the grouping of legal systems is usually grossly oversimplified and the criteria used are usually not consistent; the above-mentioned standard list of legal families may to an orderly mind seem similar to a division of automobiles into cabriolets, German cars and yellow cars. Nevertheless, as long as the division serves its pedagogical purposes it is useful and legitimate. It is, for example, wrong to criticise the prevailing divisions for being "Euro-American-centric",<sup>29</sup> i.e. for dealing in more detail with Western legal systems than with the legal systems of, for example, Africa, as long as most readers and students are, because of commercial and other practical reasons, primarily interested in learning about Western law. Other divisions may be appropriate for other purposes,<sup>30</sup> but as far as pedagogical divisions are concerned it will be difficult to replace René David's classical main criterion, according to which two laws do not belong to the same family if someone educated in the study and practice of one of them is not capable, without much difficulty, of handling the other.<sup>31</sup>

<sup>27</sup> See Bogdan, *op.cit.*, pp. 82-91.

<sup>28</sup> See Jaakko Husa, "Legal Families in Comparative Law - Are They of Any Real Use?", *Retfærd* 2001, no. 4, pp. 15-24, at p. 21.

<sup>29</sup> See, e.g., Ugo Mattei, "Three Patterns of the Law: Taxonomy and Change in the World's Legal Systems", 45 *American Journal of Comparative Law* pp. 5-44 (1997), at pp. 10-12.

<sup>30</sup> See, e.g., Mattei, *op.cit.*, pp. 19-44, who divides legal systems into three main families depending on whether they are dominated by the rule of professional law (mainly Western legal systems), political law (mainly developing and transitional legal systems) or traditional law (mainly Islamic and Far Eastern legal systems). Many other criteria are conceivable as well: for some purposes it might, for example, be useful to classify legal systems depending on the size of their resources, ranging from large-size systems that are more-or-less self-sufficient regarding legislation, case law, legal research and legal education to extremely small-scale systems that due to the small number of inhabitants or severe poverty depend largely on continuous foreign input in various forms.

<sup>31</sup> See René David & John E.C. Brierley, *Major Legal Systems in the World Today*, 3rd ed., London, Stevens & Sons 1985, p. 21. David uses an additional criterion, according to which two legal systems cannot be considered as belonging to the same family, even though they employ the same concepts and techniques, if they are founded on opposed philosophical, political or economic principles.

The grouping of legal systems is usually made on the basis of macro-comparisons between the fundamental general features of legal systems rather than on the basis of rule-comparisons. This is quite natural, since the grouping is used mainly for a general introductory presentation of whole legal systems (or even whole groups of legal systems). There is, however, nothing to prevent the grouping of legal systems with regard to the contents of their respective rules in a particular field of law or even with regard to their respective legal rules on a particular point of law. On the macro-level, English law and the law of the United States are usually placed within the same family (the common-law family) of laws, but a comparison focusing on constitutional law would probably lead to a different result (English law, in contrast to American law, does not even comprise a written constitution); it is also possible to group legal systems depending on whether they practise capital punishment, whether they permit and how they deal with divorces, or whether and how they protect consumers. Such rule-oriented divisions are probably of less pedagogical value than the divisions on the macro-level, but they can be very useful in other respects, for example if one looks for possible co-relations between the occurrence of certain rules of law and factors such as the political and economical system, prevailing religion, geography, demography, etc.

#### *IV. Concluding remarks*

The principal purpose of this paper is merely to show that rule-oriented comparisons of legal systems are neither trivial nor impossible. They are, in fact, a very useful and scientifically rewarding enterprise, requiring the use of sophisticated and advanced research methods. If the readers find this conclusion elementary and self-evident, I shall have to ask them – and Erik Jayme – to forgive me. I shall do so gladly and with relief, because such reaction from the readers would mean that the prejudice against rule-comparison is less widespread than I feared.

constitutional thinking is a reality,<sup>23</sup> and the United States is a major participant—no less so because some of its judges may prefer to export than to import.<sup>24</sup>

The interconnectedness of federal constitutional law to other bodies of law illustrates a broader phenomenon of constitutional adjudication. To expound a constitution—any constitution—is to draw upon and contribute to a body of principle, practice, and precedent that transcends jurisdictional boundaries. Commonalities emerge across jurisdictions because constitutional law develops within a web of reciprocal influences, in response to shared theoretical and practical challenges. These commonalities are at points so thick and prominent that the result may fairly be described as *generic constitutional law*—a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction. The mere fact that courts borrow law from one another is unremarkable. But generic constitutional law exists for more systematic reasons having to do with interlocking relationships of history and sovereignty, adjudicative methodology, the broad normative appeal of various rights, and the tensions underlying judicial review itself. Some have observed, to the contrary, that constitutional law is less likely to be shared than other types of law, for cultural, social, and nationalistic reasons.<sup>25</sup> Such factors are

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23. See, e.g., The Hon. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *TULSA L.J.* 15, 16–27 (1998) (describing the “globalization” of human rights law, driven in part by increased “dialogue” among judges and courts); Anne-Marie Slaughter, *A Global Community of Courts*, 44 *HARV. INT'L L.J.* 191, 192–204 (2003) [hereinafter Slaughter, *Global Community*] (describing a “global community of courts” that engages in “constitutional cross-fertilization”); Anne-Marie Slaughter, *Judicial Globalization*, 40 *VA. J. INT'L L.* 1103, 1109–23 (2000) (describing “substantial and growing judicial cross-fertilization” in the areas of human rights law and constitutional law).

24. See, e.g., Slaughter, *Global Community*, *supra* note 23, at 199 (deeming it historically “unusual” that American courts are “beginning to borrow as well as to lend”); Mark Tushnet, *Returning With Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 *U. PA. J. CONST. L.* 325, 325 (1999).

25. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 8 (2d ed. 1993) (“Societies largely invent their constitutions, their political and administrative systems, even in these days their economics; but their private law is nearly always taken from others.” (quoting S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW*, at ix (1969))); Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in *GOVERNANCE IN A GLOBALIZING WORLD* 253, 256, 260 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000) (finding “reason to suspect that the phenomenon of preferring indigenous law making for its own sake is especially

undoubtedly responsible for much divergence, and the force of sheer nativism should never be underestimated. The fact that profound dissimilarities and prejudices exist, however, only makes the phenomenon of generic constitutional law all the more remarkable.

A search of law journals on Westlaw and LexisNexis reveals very few appearances of the phrase "generic constitutional law," all of them the work of Justice Hans Linde of the Oregon Supreme Court, who has on occasion used the term as a mild epithet to criticize the manner in which state judges adopt federal constitutional formulae in lieu of ascertaining whether an approach specific to state law might be in order.<sup>26</sup> Even by itself, the word "generic" already carries unfavorable connotations: it can imply something undifferentiated, substandard, undistinguished. None of these critical or negative connotations is intended here. As used here, generic constitutional law is a descriptive concept, not a normative or evaluative one. Least of all does it comprise a grand theory of law. The claim that constitutional law across the globe is undergoing a process of teleological convergence is well beyond the scope of the concept. It is not argued that there exists a "universal natural law" of constitutional democracy<sup>27</sup>—that certain constitutional principles are universally true or good, and that it is the task of judges

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true in the making of constitutions," and noting the desire "in some political quarters" to avoid American influence "just because it is American").

26. See Linde, *supra* note 21, at 942–45 ("[M]ost state courts do not free themselves from Supreme Court formulas but treat them as generic constitutional law."); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 175 (1984) ("What should a state court do when faced with a constitutional claim that is phrased in federal terminology and cites only federal cases, though there could be an equivalent claim under the state constitution? . . . Must constitutional claims be identified by brand, or is there such a thing as generic constitutional law?"); see also Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 236 n.15 (1998) (quoting Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 219–21 (1992)); James L. Oakes, *Hans Linde's Constitutionalism*, 74 OR. L. REV. 1413, 1418 (1995) (quoting INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM 99 (Robert F. Nagel ed., 1995)); John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 231 n.16 (1994) (citing Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 219 (1992)).

27. Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July-Aug. 2004, at 40, 42 (opining that the use of foreign law as authority flirts with the "discredited" idea of "universal natural law").

worldwide to ascertain them.<sup>28</sup> Nor is it argued that constitutional principles—or constitutions themselves—inevitably serve certain goals that are conducive to human flourishing,<sup>29</sup> though the existence of generic constitutional law may be construed as inconclusive evidence in support of such arguments.

The goal of this Article is instead to explore why, as Justice Breyer puts it, “[j]udges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances.”<sup>30</sup> Three explanations are suggested here. First, constitutional courts experience a common theoretical need to justify the sometimes countermajoritarian institution of judicial review. This concern, and the stock responses that courts have developed, amount to a body of *generic constitutional theory*. Second, courts employ common problem-solving skills in constitutional cases. The use of these skills constitutes what might be called *generic constitutional analysis*. Third, courts face a tangle of overlapping influences, largely not of their own making, that encourage the adoption of similar legal rules. These similarities make up a body of *generic constitutional doctrine*. Each will be considered in turn. It is the contention of this Article that the combination of theory, methodology, and doctrine amounts to nothing less than generic constitutional law. ~~In closing, this Article discusses why the idea of generic~~

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28. See, e.g., Richard A. Epstein, *The “Necessary” History of Property and Liberty*, 6 CHAP. L. REV. 1, 2, 7–8, 27–28 (2003) (arguing that natural lawyers identified “certain powerful principles” involving the protection of liberty and property “to which any conscientious application of constitutional discourse or doctrine must turn if it is to meet the minimum standards of intellectual coherence and practical common sense”). See generally Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 890 (1999) (describing the “universalist” school of constitutional interpretation and its normative premise that “the presence of a legal principle in many legal systems is evidence of its truth or correctness”).

29. See, e.g., RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM 19 (2003) (“[T]hose principles and practices that endure generally do so because they serve well the communities of which they are a part.”); RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 82–140 (1999) (arguing that constitutions cannot survive unless they coordinate behavior in a way that creates opportunities for mutual gain); Epstein, *supra* note 28, at 7–8, 27–28 (arguing that utility-maximizing legal arrangements that harness “the best in human nature” have been “intuited and acted upon by justices of all political persuasions”). See generally Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1238–69 (1999) (offering examples and critiques of “functionalism” in comparative constitutional analysis).

30. Breyer, *supra* note 4.

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## INTRODUCTION

### Constitutional Cosmology—Convergence, Resistance, and Engagement

A committee of the House of Representatives of the U.S. Congress holds hearings on a bill providing that U.S. courts “may not rely upon” laws, rules, or judicial decisions of foreign countries or international organizations in deciding constitutional cases.<sup>1</sup> The Lord Chief Justice of England and Wales issues a “practice direction” regulating the citation to foreign law in briefs before the courts.<sup>2</sup> The Constitution of South Africa requires judges to consider international law in interpreting that constitution’s Bill of Rights, and specifically authorizes the consideration of foreign law.<sup>3</sup> Argentina’s constitution incorporates several named human rights instruments as of constitutional stature.<sup>4</sup> Colombia’s Constitutional Court interprets its constitution to preclude certain bilateral investment treaties; in partial response, the constitution is amended.<sup>5</sup> France amends its constitution to permit judicial review of laws after they are enacted, moving away from its longstanding constitutional opposition to judges having such power.<sup>6</sup>

These and other events are manifestations of the new universe in which domestic constitutions operate—an increasingly transnational legal environment of international treaties, customary international law, multilateral and bilateral agreements, and supranational infrastructures of trade law and human rights law. This new universe also includes pressures and influences from transnational business firms, human rights groups, and social movements (in the global North and South) that seek to reconstruct and use law at local, national, and global levels. It includes, as well, increased comparative judicial awareness reflected in cross-national references in constitutional court decisions around the world, and some degree of transnational convergence towards judicial enforcement of constitutions. How do these multiple transnational phenomena affect our understanding of the role of constitutions and of courts in deciding constitutional cases? How do constitutions and constitutional courts affect these transnational legal phenomena? Is there an emerging phenomenon of “transnational constitutionalism” and, if so, how should it be conceptualized? How should the U.S. Supreme Court respond? This book will explore these questions.

**Transnationalism and Constitutional Review** Recent U.S. debate over the role of transnational law (that is, both foreign and international law) in constitutional interpretation reflects both the gravitational pull of transnational legal sources and resistance to their influence.<sup>7</sup> It has been clear since the early 1990s that something transnational is reflected in the spread of constitutional review and in the discourse of constitutional courts around the world. Transnational regional

of international rules, include “principles that exist in the national laws of states worldwide.”<sup>114</sup> A strong transnational consensus on a shared value, even if not part of customary international law, may also have a persuasive value that goes beyond that which considering other countries’ practices singly would have, in part because it may foreshadow an emerging customary norm, and also because knowledge that many other reasonable actors have reached a different conclusion on the same normative question, contested within one’s own country, may prompt deeper reflection on the reasons why. International and domestic sources may overlap in other ways, for example, when countries implement international human rights covenants through their constitutions.<sup>115</sup> The vocabulary of distinct forms of law, foreign or international, should not obscure their often interrelated and overlapping content.

#### **Comparability: Normative and Functional Concerns**

Comparability matters more for some purposes than for others and matters particularly in considering *foreign* law and experience.<sup>116</sup> Use of a foreign decision because of the persuasive internal logic of its reasoning may not require any showing of comparability, though a good jurist will consider whether the provenance of even a well-reasoned opinion may elicit negative reactions from her domestic audience. Expressive, value-clarifying, or value-checking uses of foreign law may be designed to show, in an expository or “interlocutory” way, how the United States is similar to or different from another country, or how the United States understands its own values; such usages do not necessarily require similarity, but they do entail the identification of shared or distinct constitutional systems and values.

Considerable controversy has been engendered by this value-clarification, value-checking mode of comparison. The Court’s approach has sometimes been misunderstood as one of adherence to a normative consensus of other nations, or of treating foreign decisions as “precedents” comparable to U.S. decisions. Rather, what is going on in cases such as *Lawrence v. Texas* is the use of other nations’ experiences to interrogate U.S. interpreters about the best understanding of their own Constitution.<sup>117</sup> This “normative” use of foreign law is not as precedent (which in a common law system is generally to be followed absent a good reason not to), but rather as a reflective mirror, helping judges clarify the nature of U.S. constitutional values, by reflecting on what the law is in other countries. For this reason, considering the experiences even of countries that might be regarded as negative models may also help in constitutional value-checking and clarification.

Comparability in the sense of *similarity* is most important when transnational law and experience are being considered as suggesting the answer to a functional question relevant under existing U.S. doctrine (such as whether a statute is the “least restrictive means” in cases involving “strict scrutiny”) or because they may illustrate the likely consequences of alternative interpretive approaches

and thereby help the Court determine what doctrine will best implement an agreed-on U.S. constitutional value. In these cases, to determine what is comparable requires knowledge beyond the immediate question—and even beyond the field of law, if an effort fully to understand the likely effects is entailed; that is, both law and related experience will be important to the inferences that can be drawn.<sup>118</sup> Although such functional uses of foreign experience are in some ways less controversial, they pose empirical challenges and require caution in drawing inferences.<sup>119</sup>

To complicate matters, sometimes functional and “normative” (that is, value-checking or value-clarification) uses of transnational law are blended. For example, in *Lawrence v. Texas*, one of the references to the case law of the ECtHR asserted that “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”<sup>120</sup> The language of “legitimacy” here is the language of values, suggesting that the Court has concluded that the “human freedom” to which the United States and Europe are each committed must be understood to include the liberty of adults to choose to engage in private homosexual conduct; the language of “urgency” might be taken to indicate that a functional case for prohibiting private consensual adult noncommercial sodomy could not be established. Although this reference has been criticized by some scholars for ignoring differences in the relevant “constitutional” texts,<sup>121</sup> neither *Lawrence* (and the line of substantive Due Process cases in the United States) nor the ECtHR’s decision in *Dudgeon* were primarily about close textual analysis, nor could they have been. Rather they were about whether a general principle embodied in the dispositive text—“respect for . . . private . . . life” under Article 8 of the ECHR, and “liberty” in the United States Due Process Clause (a term long understood to embrace some protection of “private” life)—required re-evaluation of a proscribed activity.<sup>122</sup>

Some scholars have taken a position of “hyperparticularity”—that each country is so unique, or the United States is so unique, that no other country is sufficiently comparable; they focus on differences in the wording of similar texts, on different national experiences, and on the “exceptionalism” of the United States’ founding, aspirations, or religiosity. Some see only the exceptional and miss the many commonalities; some acknowledge both, but argue that a scientifically verifiable process for understanding how law works in each society is beyond accomplishment. This view would deny the possibility of learning from history, as much as of learning by comparison, and while historical or comparative knowledge is always and only partial, it can supplement other less informed and even more partial views.<sup>123</sup> While there are obstacles to accurate comparison,<sup>124</sup> hyperparticularity is too pessimistic a view of the possibilities of learning—and one inconsistent with the rationalist, ameliorative perspective of the U.S. Constitution.

Other scholars would address the challenges of comparison by the use of threshold standards. Professor David Fontana has suggested that a “judge should use . . . comparative legal materials only if the contextual differences are relatively minimal.”<sup>125</sup> “Minimal difference” may be too narrow a standard, however. There are important differences between any two nations and this approach would exclude those comparisons that may be aversive precedents or that may help clarify differences. Constitutional approaches from quite different societies, moreover, might well be illuminating in reflecting on one’s own constitutional commitments.

Yet functional comparisons designed to cast light on how to solve common problems or on the consequences of alternative interpretations of the Constitution are most likely to be of value if they come from similarly situated societies. An initial point of comparison is whether countries are committed to democratic forms of government, with respect for liberal rights, under a rule of law system. This requires some degree of political and sociological, as well as legal, knowledge. Even those who might argue for looking primarily at legal texts<sup>126</sup> could not realistically deny the need for some extralegal analysis of the sociological conditions of legality and respect for rights that must play a role in the selection of comparators for functional purposes. Doing so may require resort to independent ratings, like those of Freedom House’s Annual Survey of Political Rights and Civil Liberties.<sup>127</sup> Under these kinds of criteria, the United Kingdom would be among a group of countries that could be a useful comparator as to the substance of some constitutional rules: although it does not have a written constitution that is judicially enforceable as against parliamentary legislation, the British do have a rule of law constitutional system, with a well-functioning democracy that has lasted over a long period of time, and a shared legal system out of which many U.S. constitutional values grew.

Indeed, the United Kingdom might be more comparable to the United States—notwithstanding the absence of a single written constitution or of U.S.-style judicial review of legislation—than, say, Argentina (even though Argentina’s nineteenth century constitution was modeled on that of the United States and Argentina is a large federal nation), or certainly than Russia, an even larger federal nation but one with a poor record for democracy, and political and civil rights.<sup>128</sup> Yet, if parliamentary supremacy survives as part of the British constitution, comparisons will need to confront institutional questions. If the question is, what kind of legislation is justified and necessary in a liberal, rule of law society confronting problems of terrorism, a British statute in effect for some time might be a helpful resource in identifying the consequences of the presence or absence of particular procedures for both security interests and individual due process rights.<sup>129</sup> If the question, however, is, what force has a decision of the highest court in Britain declaring a statute incompatible with the Human Rights Act, the persuasive force of the court’s reasoning is but one factor; the U.S. Court would also need to be mindful that judicial review in Britain is, at least

formally, a “weak form” of review that allows legislative departures from the court’s ruling.<sup>130</sup>

Thus, a second criterion to consider is whether the country has a tradition of entrenched written constitutions, enforced by courts. Such countries are more likely to have confronted not only the substance but also the institutional role questions the U.S. Court faces in resolving constitutional issues. Many constitutional rights provisions are designed to protect similar understandings of rights and values—understandings only partially revealed by their text, because their social meaning and institutional context will also be necessary for accurate comparison. Where it is a court that is authorized to provide the constitutional answer, analysis will be grounded in a more comparable institutional arrangement, though attention to the possibility of legislative override or change through amendment also might be relevant to evaluating institutional comparability.<sup>131</sup>

Third, in determining what is comparable, one should look not only at legal and political systems but also at societal characteristics.<sup>132</sup> Without taking sides in the general debates over whether law necessarily mirrors society,<sup>133</sup> one must surely consider the broader context in which law develops and operates in evaluating the comparability of foreign law for constitutional purposes. Aspects of understanding this broader context include the history and culture of legal traditions and language (as when Justice Frankfurter referred to the Anglo-American tradition, or the “English-speaking world”), the size and heterogeneity/homogeneity of the country (including linguistic, ethnic, and/or religious affiliations),<sup>134</sup> and the material and economic commitments of the state (for example, whether it is a “social state”). Comparisons of social norms of moderation and tolerance, which Karol Soltan argues are essential features of “constitutional patriotism,”<sup>135</sup> might be important in looking at issues, for example, of speech regulation, or religious tolerance or accommodation; and, as Professor Dixon’s work suggests, a history of active social movements around constitutional issues may also be a relevant measure of comparability.<sup>136</sup> But these comparisons must also be linked with the particular constitutional commitments of the polity, for sometimes constitutions are designed to constrain historically dangerous societal tendencies.<sup>137</sup>

On a range of issues involving individual rights as well as structure,<sup>138</sup> countries that are large, federal, and heterogeneous may offer more persuasive analogies than countries that are small and homogeneous, and that do not confront to the same extent the diversity of views and backgrounds that the United States embraces. These three factors may be related. Larger countries are likely to be more heterogeneous; federalism is more prevalent among larger polities,<sup>139</sup> and may be a form particularly likely to be used when strong differences divide national populations. Internal heterogeneity, federalism, and the greater difficulties of securing compliance with legal rules across larger areas, are characteristics that may influence the shape of doctrine. More generally, cultural, social, and economic factors affect how constitutional law can be implemented. “Prophylactic” or bright-line rules of procedure, for example, may be

less necessary to protect underlying constitutional values in societies that either rely heavily on informal resolution of criminal matters or have a homogenous and well-trained national police and prosecution force capable of adhering to legal norms without resort to such prophylaxis. Likewise, the effectiveness of informal norms in producing remedies for government wrongdoing—for example, by resignation in the face of scandal—may bear on other questions of constitutional remedies. Moreover, economic resources may bear on what levels and forms of procedures for legal justice are possible, or indeed on what kinds of questions are treated as legal issues or not.

Fourth, foreign or international law can be considered for functional purposes only if it has addressed the topic at hand. So, for example, countries that have had long histories of dealing with purposeful violence targeted at civilian populations will be more likely to have thought about and addressed the question of whether routine criminal procedure law or more specialized procedures are needed to respond. To the extent that democratic, rights-protecting nations have considered and reached solutions, other countries experiencing similar problems could benefit from considering the solutions accepted, and rejected, in such other nations.<sup>140</sup>

A separate question, perhaps implicit in some strands of American exceptionalism, is whether the *power* of a country in the community of nations is relevant in analyzing comparability. To be sure, all other things being equal, a powerful nation with a normatively attractive body of law is likely to have more influence on other nations' laws—by virtue of familiarity, accessibility, and interest in studying it—than a smaller nation with an equally normatively attractive body of law. This does not imply that the laws of a powerful nation cannot benefit from comparisons with less powerful nations.<sup>141</sup> Considerations of power might, however, play a cautionary role for those pursuing rationales relating to “judicial diplomacy.” Great powers are likely to have a capacity to influence, by what they do and are seen to do and by what they demand of themselves and others; “if global culture matters, the ‘double standards’ employed by some powerful states can have negative effects.”<sup>142</sup> But obvious efforts to influence or instruct other countries may backfire.<sup>143</sup>

One further caveat: Functional comparison is appealing and seductive. But it assumes that comparable functions can be identified across countries and can be so identified from primarily legal materials. As Günter Frankenberg argues, if we look at foreign law only from the perspective of what we already know about our own country, we will miss much. To assume one can tell what “functions” exist and whether they are similar may be to assume the answer; to ask the question only from the U.S. perspective may obscure the very different contexts in which other countries operate. For these reasons, Frankenberg argues that in making legal comparisons, scholars should engage in what he calls “distancing” as well as “differencing,” efforts to shift the perspective from which comparisons are made.<sup>144</sup> Although Frankenberg warns against taking “shortcuts” in

constitutional comparison,<sup>145</sup> adjudicators must ultimately make decisions in real world time. It is for scholars to create the infrastructure of learning on which judges can draw—always with caution, because, as the work of comparativists implies, there will always be more that we do not and cannot know.

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The work of identifying principles of guidance on the relevance or weight of foreign and international law in constitutional interpretation has only begun, but progress has been made. As I and others argue, the nature of the domestic constitutional question is critical, with some more open than others to being informed by transnational sources.<sup>146</sup> Second, the nature of the transnational source matters across several dimensions. As Professor Cleveland suggests with respect to international law, the *universality of a norm in law and practice* goes to its persuasive force;<sup>147</sup> transnational consensus on an issue that is broad, deep, and specific may call for consideration, in ways that the regimes of particular countries do not. Next, as Professor Kumm's work also suggests, the *process* by which an international norm is formed, as well as its *substantive character*, bears on the degree of consideration it should attract.<sup>148</sup> The institutional *provenance* of norms, rules, and decisions also matters, with legal practices and especially constitutional decisions of other courts in rule of law democracies having, for example, a distinctive form of seriousness. Whether and how the U.S. *political branches* have accepted (or rejected) an international legal norm may affect the nature of its persuasive value:<sup>149</sup> their acts may express the judgment of other constitutional actors on the constitutionality of implementing an obligation and might also speak directly to the perceived relationship between treaty norms and substantive constitutional norms.<sup>150</sup> Finally, the *degree of comparability* with respect to democracy, rights-protection and the rule of law, among other factors, matters for the *self-reflective uses, positive and negative, of foreign law and experience*, especially for normative value-checking and clarification or to shed light on empirical questions asked by U.S. doctrine.

While these considerations are not simple "rules of thumb," together they offer a start at identifying how courts should decide to consider transnational sources in constitutional adjudication. Consistent with a posture of engagement, they offer a "graduated" approach:<sup>151</sup> one that does not treat foreign or international law as an undifferentiated mass to be either rejected or embraced, that is open to both positive and "aversive" uses of foreign law or experience,<sup>152</sup> and that is sensitive to the varying normative contexts of both the domestic issue and the foreign or international source.

#### ~~B. FAIR USAGE, FAIR PROCESS, AND RECENT CONTROVERSIES~~

~~It is more challenging to understand a foreign legal system than one's own. The growth of international law and proliferation of interpretive bodies and fora~~

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## NOTES

### INTRODUCTION: CONSTITUTIONAL COSMOLOGY

1. See *Constitution Restoration Act of 2004: Hearing on H.R. 3799 Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (2004); see also *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004).

2. Practice Direction on the Citation of Authorities, (2001) 1 W.L.R. 1001 (Eng.) (issued by the Lord Chief Justice of England and Wales, Apr. 9, 2001), available at <http://www.hmcourts-service.gov.uk/cms/814.htm>.

3. S. AFR. CONST. 1996 § 39.

4. CONST. ARG. § 75(22).

5. See David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism*, in REGULATION 501, 524–26 (Colin Scott ed., 2003).

6. See *Loi constitutionnelle de modernisation des institutions de la V<sup>e</sup> République* (1), arts. 29, 30, Law No. 2008-724 of July 23, 2008, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 24, 2008, p. 11890; 1958 CONST. art. 61-1 (Fr.), *English transl. available at* <http://www.assemblee-nationale.fr/english/8ab.asp#TITLE%20VII>; see also “France Backs Constitution Reform,” BBC News, July 21, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7517505.stm>; The French Political System—Constitutional Reform—2008, <http://about-france.com/constitutional-changes-2008.htm>. At this writing I am unaware whether a statute has gone into effect implementing this constitutional change.

7. The term “transnational” encompasses not only international law as it is traditionally understood (to embrace widely adhered to treaties, conventions, and customary international law), but also regional agreements and bilateral agreements, as well as the domestic law of foreign nations when considered, relied on, or distinguished in another tribunal’s or lawmaking body’s decisions. Transnational law may also include the domestic law of particular countries that seek to regulate transnational phenomena, such as migration, “trafficking,” or citizenship.

8. See, e.g., Rainer Nickel, *The German Federal Constitutional Court: Present State, Future Challenges*, in BUILDING THE UK’S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES 175, 196 n.64 (Andrew Le Sueur ed., 2004); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 337 (2002); see also Roderick A. MacDonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT’L & COMP. L. 69, 76 (1998).

9. See LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003).

113. See *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), 1980 I.C.J. 3 (Judgment of May 24) (finding, on complaint by United States, violations by Iran and obligation to make reparations). *But see* *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), 1984 I.C.J. 169 (Order of May 10, 1984) (granting provisional measures against the United States to cease blocking access to or laying mines in the ports of Nicaragua, notwithstanding the U.S. position that the ICJ lacked jurisdiction).

114. MURPHY, *supra* note 47, at 86; *see id.* at 78; RESTATEMENT, *supra* note 54, § 102(1)(c); *id.* § 102(2); *see also* Statute of the International Court of Justice, *supra* note 46, art. 38.

115. See Chapter 2, above. When the U.S. Senate consents to and the President ratifies a treaty, they may be understood at once to be making international law and domestic law; as noted, their acts may have some interpretive force with respect to the constitutionality of implementing the international obligation.

116. Questions of comparability are more associated with foreign law, but when nonbinding international law sources are invoked, questions of comparability (in the form of claims of exceptionalism or persistent objection) may arise. *See also supra* note 59.

117. *Lawrence v. Texas*, 539 U.S. 558, 573, 576–77 (2003) (referring to a decision of the ECtHR). ECtHR decisions are binding on states that are parties to the case, *see* ECHR art. 46; Europe's post–World War II commitments to the protection of rights through judicial review has much in common with the United States. There are, to be sure, differences between U.S. law and society and that of European nations, but the existence of some difference does not preclude useful reflection on their approaches to human liberty and privacy. Nor have U.S. justices been blind to learning from European nations as *negative* examples. *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650–52 (1952) (Jackson, J., concurring). *But compare* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 755, 804–05 (2005) (questioning references to European law in “problematic” cases like *Reynolds v. United States*, 98 U.S. 145 (1878), described as “closely on par” with *Lawrence*) with Harold Hongju Koh, *International Law As Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004) (treating *Reynolds* as involving references to legal rules “of other nations . . . with similar legal and social traditions”).

118. To the extent that courts need to understand something of the relationships between law (and constitutional decisions) and the society in which that law operates, there are greater disciplinary limitations on the ability of judges to “know” and evaluate social science research than exist for them to evaluate foreign law. *See* Chapter 5, note 49 above. It is difficult enough to determine in one's own society what the effects are, and findings may well be contested; it is all the more so across national lines. More possible with considered effort is to have some knowledge of the similarities and differences in the broader sociolegal context in which another constitutional system operates. And some knowledge is probably better than the “armchair intuitions” that are likely otherwise to be deployed.

119. *See* Chapters 1, 4, 5 above (noting concern for “omitted variables” in functional analysis); *see also* Hirschl, *supra* note 36.

120. *Lawrence v. Texas*, 539 U.S. at 577.

121. *See, e.g.,* Ramsey, *International Materials*, *supra* note 74, at 73–74; *see also infra* notes 122, 160.

122. Ramsey also argues that the European court evaluated the claim in *Dudgeon* under a more stringent standard of review (whether, as provided in ECHR art 8.2, a restriction is

“necessary in a democratic society . . . for the protection of health or morals, or for the protection of the rights and freedoms of others”) than the reasonableness inquiry that presumptively, he says, underlay the *Lawrence* decision. *Id.* at 74. If so, the difference in standard of review would have been worth acknowledging. What standard the Court was applying in *Lawrence*, however, remains somewhat unclear. See text at note 120 (noting *Lawrence*’s reference to the “urgen[cy]” of government interest). Even if the question was addressed under different standards and textual language, both legal texts—the right to privacy under the European Convention and the Due Process Clause of the U.S. Constitution—had been interpreted to protect liberty in a private sphere, and thus were addressing similar topics.

123. Cf. James Q. Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 312, 336–44 (Pierre Legrand & Roderick Munday eds., 2003) (cautioning about risks of the “new romanticism” in comparative law and suggesting the possibility for “sympathetic understanding” of foreign law even from very different cultures).

124. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 10–15 (2d ed 1993) (identifying among the “perils of comparative law” the risks of “superficiality,” of “getting foreign law wrong,” and of “arguing too easily to another system”); William P. Alford, *On the Limits of “Grand Theory” in Comparative Law*, 61 WASH. L. REV. 945, 947 (1986) (“[W]e need to approach foreign subjects with an even greater tentativeness of theoretical construct and with an even greater self-consciousness than we would subjects closer to home.”).

125. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 556 (1999). In contrast to the arguments made here for engagement, Professor Fontana also seems to assume that the goal of comparativism is “importing,” see *id.*, rather than illuminating understandings of one’s own system to find the best answer to a constitutional problem within that system.

126. See the comparative law authorities collected in Fontana, *supra* note 125, at 540 n.4.

127. Cf. Hathaway, *supra* note 77, at 1967 (describing her use of four different sources to measure compliance with human rights treaties: “the Center for International Development and Conflict Management at the University of Maryland, College Park, the United States Department of State Country Reports on Human Rights, Freedom House’s Annual Survey of Political Rights and Civil Liberties, and the Inter-Parliamentary Union”).

128. On Argentina, see Chapter 3, notes 178, 179 above. According to Freedom House’s 2007 and 2008 ratings, Argentina received a “2/2” rating for political rights and civil liberties; Russia received a 6/5 rating. The United States and Britain both received a 1/1 rating in those years, as did Spain; Israel’s rating was 1/2. See Freedom House’s Annual Survey of Political Rights and Civil Liberties, <http://www.freedomhouse.org/template.cfm?page=15&year=2006> (last visited Jan. 24, 2009).

129. Likewise helpful could be statutes in Israel or in a number of European countries that have confronted terrorism but sustained commitments to a liberal, democratic, rule of law state. See *supra* notes 22–23, 128. India is a democratic country with a long history of fighting terrorism; but its success in doing so while maintaining high general levels of political and civil rights is less clear and the particularities of its constitutional provisions on preventive detention also would require great caution in comparison. See *Freedom House’s Annual Survey*, *supra* note 128 (showing India rated a “free” democratic state, but with ratings of 2/3 on political rights and civil liberties from 2002–08). See generally

Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311 (2001) (discussing how article 22 of the Indian Constitution from the outset has explicitly authorized laws providing for relatively lengthy "preventive detention," freed from ordinary procedural constraints); Iyer, *supra* note 20, at 128 n.42. The Indian Constitution's historic background and specificity in authorizing preventive detention stand in contrast to the U.S. Constitution's protections of liberty; Indian approaches, insofar as they have been permissive of executive detentions, would need to be analyzed in this context.

130. Human Rights Act, 1998, c. 42 §§ 4(2), (6) (U.K.) (authorizing courts to issue determinations that a statute is incompatible with the rights set forth but not to invalidate the statute). On the range of "weak" forms of judicial review that permit various types of legislative override or response to judicial determinations that laws conflict with constitutional instruments, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003) (distinguishing "weak" and "strong" forms); see also Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 U. TORONTO L.J. 89 (2003) (suggesting that "weak-form" judicial review is unstable and is likely to become "strong-form" review over time).

131. See *supra* note 130. Whether a court that is subject to being overruled would be more, or less, inclined to uphold existing laws is debatable. Compare Posner, *supra* note 1, at 89–90 (suggesting that constitutional courts whose decisions can be more easily overruled by amendments will be bolder) with Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 46 (Louis Henkin & Albert J. Rosenthal eds., 1990) (referring to a French scholar's observation that when a parliament can easily overrule a court's constitutional decision, the court would hesitate to find a law unconstitutional). So, too, is it debatable whether formal differences in authority will affect the frequency or nature of legislative "over-rulings" of judicial declarations of invalidity.

132. See Dixon, *supra* note 40, at 979–93 (2008) (discussing criteria of "general" constitutional comparability); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 420–33 (2005) (arguing that comparisons should be limited to countries with societal similarities to the United States).

133. For helpful discussion, see BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY, 28–30, 32–40, 107–32 (2001) (describing and arguing against "the Mirror Thesis" of Western legal theory). See also WATSON, *supra* note 124, at 95–101 (arguing that law often results from transplants and includes rules not peculiarly designed for a particular society); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1135–36 (1983) (arguing that law may develop more or less autonomously, without a close "causal relationship" with its own society).

134. Glensy, *supra* note 132, at 421.

135. Karol Edward Soltan, *Constitutional Patriotism and Militant Moderation*, 6 INT'L J. CONST. L. 96, 99–101 (2008); see also Glensy, *supra* note 132, at 413, 421, 447 (discussing the tolerance and diversity of a society as factors to be considered in making comparisons).

136. Dixon, *supra* note 40, at 980–81. Dixon's focus is on comparability for purposes of "co-evolution" of public understandings, but such criteria, indicative of a society's relative freedom and openness, are also relevant to functional or consequentialist analyses.

137. See Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATIONS (András Sajó, ed., 1996), reproduced in JACKSON & TUSHNET, *supra* note 41, at 1739–40. For example, one might view the German concept of unamendable constitutional

provisions, see GRUNDGESETZ (GG) [Basic Law] art. 79(3) (F.R.G.), as a reaction to the damaging positivism of the Nazi era, rather than as a more general precept of constitutionalism applicable to other contexts. Cf. Chapter 9, note 61, below.

138. “Rights” issues may also be “federalism” issues insofar as constitutionalizing a right at the national level establishes a floor below which no constituent member may fall.

139. According to the Forum of Federations, there are 24 federal nations out of 193 countries, but these 24 federal states (listed in Chapter 7, note 32, below), include 40 percent of the world’s population. See Forum of Federations, <http://www.forumfed.org> (click on “federalism by country”); see also CIA World Factbook 2008, Rank Order—Population, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (last visited Jan. 24, 2009) (listing, in order, the twelve largest polities—China, India, the EU (not included in the Forum of Federations list), the United States, Indonesia, Brazil, Pakistan, Bangladesh, Nigeria, Russia, Japan, and Mexico—of which eight are federal (or in the case of the EU, quasi-federal) in character).

140. See, e.g., *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Can.) (looking to alternative procedures available in Canada and the UK to accommodate national security concerns with the procedural due process interests of aliens accused of terrorism to have notice of and be able to contest the evidence against them); cf. *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997) (noting Dutch experience with legal assisted suicide); *id.* at 785–87 (Souter, J., concurring in the judgment) (reviewing evidence on Dutch law and finding factual disputes surrounding it to support upholding the challenged state law, leaving latitude to legislatures).

141. There is an undertone in some of the literature that the United States, as a powerful and leading nation, has little to learn from others. But even with respect to military actions abroad (as to which the United States may see itself as having special or unique responsibilities, see Chapter 5 above), there may be a basis for comparative engagement, for example, on the extraterritorial force of domestic norms. See, e.g., *R. (on application of Al-Skeini et al.) v. Sec’y of State for Defence*, [2007] UKHL 26, [2008] 1 A.C. 153 (U.K.) (opinion of Lord Rodger of Earlsferry) (analyzing limited application of the Human Rights Act (HRA) to claims by family members of Iraqis killed by British troops in Iraq; upholding HRA’s application to the one of six Iraqis who died after assertedly being beaten by British troops while in custody on a British military base). To be sure there are many differences between the United States’ and the UK’s legal contexts, including the UK’s relationship to the ECHR and ECtHR, and the statutory (unentrenched) character of the HRA, which would need to be considered in a full analysis. But it is difficult to see a country’s political and economic power in the world—as contrasted with its particular constitutional system, its rule of law qualities, its size, or even its relationship with other legal systems—as clearly bearing on its aptness for comparative purposes. On extraterritorial application of the Canadian Charter, see *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125 (holding that although ordinarily the Charter does not apply to extraterritorial actions by Canadian officials, the Charter did apply where those actions—interrogating a U.S.-held detainee in Guantánamo—were in breach of Canada’s international human rights obligations).

142. Goodman & Jinks, *Institutional Theory of Sovereignty*, *supra* note 80, at 1784.

143. See Chapter 4, note 133, above.

144. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L. J. 411, 414–15 (1985) (arguing for a “dialectic of learning” based on “distancing”—“an attempt to break away from firmly held beliefs and settled knowledge,” and “to resist the power of prejudice and ignorance”—and “differencing,” developing a “sharp sense for

diversity and heterogeneity,” based on a “conscious effort to establish subjectivity, that is the impact of the self” to take account of the observer’s perspective).

145. Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, 4 INT’L J. CONST. L. 439, 443–47 (2006) (identifying cognitive, functionalist, and hermeneutical fallacies).

146. See, e.g., Cleveland, *supra* note 3, at 108.

147. *Id.* at 113 (also emphasizing clarity of norm).

148. Kumm, *supra* note 44, at 268–74. Kumm argues that substantive concerns should play only a limited role “in assessing the legitimacy” of an international rule, to respect its character as law, but that this should not preclude the possibility of a national state ignoring international rules that are “deeply unjust or extremely costly and inefficient.” *Id.* at 273. In the realm of constitutional interpretation, however, some treaty norms, apart from their substantive justness or efficiency, would be irrelevant, insofar as they address subjects remote from constitutional law. Moreover, very marked divergences between international norms and well-established constitutional meaning would diminish the former’s persuasive force.

Professor Kumm also argues for a principle of jurisdictional subsidiarity, *id.* at 264–68, one that may have more application to determining the appropriate level for regulation than to the persuasive force of existing international law in constitutional interpretation. Indeed, Kumm notes that although human rights treaties do not solve collective action problems (and thus his subsidiarity principle would disfavor their legitimacy as international law), “outcome-related reasons” favor their being “elevated in a way that, say, treaties addressing international postal delivery are not” to “play a central role” in constitutional interpretation. *Id.* at 276–78.

149. See Cleveland, *supra* note 3, at 113, 116–22. The political branches’ actions can affect the binding quality of most international norms, and thus the consequences for the United States of a breach; as noted earlier, however, treaty obligations can ordinarily be satisfied at subconstitutional levels.

150. For complications in interpreting acts of ratification, see Chapter 8, text at notes 115–23 below. Some theories of constitutional interpretation envision interaction between the Court and the political branches. See Chapter 5, above. On these accounts, the views of the political branches reflected in treaty ratification or international agreements could be relevant on constitutional meaning. Consistent with the independent role of the Court, as well as the significance of precedent and of multi-valenced sources in U.S. constitutional practice, they certainly could not be dispositive. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957); cf. Cleveland, *supra* note 3, at 115–16 (suggesting that acceptance of international obligations may give rise to constitutionally cognizable government interests).

151. See Kumm, *supra* note 44, at 292.

152. See Scheppelle, *supra* note 31.

153. Ramsey, *International Materials*, *supra* note 74, at 77–79 (arguing the importance of “Get[ting] the Facts Right”). For discussions of errors in judicial resort to international or foreign law, see Chapter 1 note 41 above; see also Cleveland, *supra* note 3, at 96–97 (describing errors or opportunism by U.S. Court in use of international law).

154. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J. concurring); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

155. 536 U.S. 304 (2002).

156. Ramsey, *International Materials*, *supra* note 74, at 77–78. The brief Ramsey criticizes was filed on behalf of a group of former diplomats, including a former ambassador to China, J. Stapleton Roy. Brief of Diplomats Morton Abramowitz et al. as Amici Curiae Supporting Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727).