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Comparative Public Law Scholarship in the United States

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Comparative Public Law Scholarship in the United States

John C. Reitz

RÉSUMÉS

English

The article addresses the paradoxical nature of comparative public law scholarship in the United States. The globalization of life makes foreign law as inescapable in the United States as in any other modern country. Foreign law models played a substantial role at the founding of the country and for some time thereafter when there was not much American law. But today comparative study of foreign models of public law plays hardly any role at all in the preparation of legislation or constitutional amendments in the United States, and a high-profile debate at the Supreme Court revealed significant antipathy on the Court to the use of comparative law in interpreting domestic law. In those senses, comparative public law scholarship appears to have little impact on U.S. law. There are, moreover, a number of unique features of American law that make it difficult to import legal models from other countries, most notably the especially strong skepticism toward reliance on the state and state regulation that pervades American society and legal thinking about law.

One might conclude that a cosmopolitan world view is not very strong in America, but the article argues for a more nuanced view. The forces of globalism expose lawyers and courts in the United States constantly to foreign and international law, immigration continues to enrich the body of scholars working and teaching in the United States, and there is a rich body of foreign and comparative law scholarship in English that is readily available to students and scholars in the United States and that is produced at least in substantial part by scholars working in the United States. These features attest to a curiosity and openness in the United States to learning about foreign law. The article argues that America is home to strong tendencies in both directions, cosmopolitanism and its opposite, nationalism or chauvinism, and comparative public law scholarship in the United States should be seen as navigating between these opposing impulses.

Français

Cet article traite de la nature paradoxale de la recherche en droit public comparé aux États-Unis. La mondialisation rend le droit étranger aussi incontournable aux États-Unis que dans tout autre pays moderne. Les modèles de droit étranger ont joué un rôle important lors de la fondation du pays et jusqu'à ce que qu'un véritable « droit américain » émerge. Néanmoins, l'étude des modèles étrangers de droit public ne joue désormais

pratiquement plus aucun rôle dans la préparation de la législation ou des amendements constitutionnels aux États-Unis. Un débat très médiatisé à la Cour suprême a même révélé une antipathie significative de la Cour à l'égard de l'utilisation du droit comparé dans l'interprétation du droit national. En ce sens, la recherche en droit public comparé semble n'avoir qu'une très faible influence sur le droit américain. En outre, le droit américain présente un certain nombre de caractéristiques uniques qui rendent difficile l'importation de modèles juridiques d'autres pays. C'est en particulier le cas s'agissant du scepticisme marqué à l'égard de l'État et de sa réglementation, qui imprègne la société et la pensée juridique américaines.
On pourrait en conclure qu'il n'y a pas véritablement de place pour une vision cosmopolite du monde aux États-Unis, mais cet article tente d'adopter une position plus nuancée. Les forces de la mondialisation exposent constamment les avocats et les tribunaux américains au droits étrangers et international, de plus en plus d'universitaires étrangers travaillent et enseignent aux États-Unis, et il existe un riche corpus d'études de droit étranger et comparé en anglais, facilement accessible aux étudiants et aux universitaires américains. Il est pour une large part l'œuvre d'universitaires qui travaillent aux États-Unis. Cela atteste, de l'existence, aux États-Unis, d'une certaine curiosité et d'une certaine ouverture au droit étranger. L'article démontre que les deux tendances opposées que sont le cosmopolitisme et le nationalisme ou le chauvinisme se retrouvent aux États-Unis, et que la recherche en droit public comparé aux États-Unis navigue entre ces deux pôles.

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Mots-clés
doctrine en droit public comparé, droit constitutionnel comparé, droit administratif comparé, Cour suprême des États-Unis, traités internationaux, mondialisation, droit privé comparé

Keywords
comparative public law scholarship, comparative constitutional law, comparative administrative law, Supreme Court, international agreements, globalization, comparative private law

PLAN

TEXTE

I gratefully acknowledge the assistance of Iowa law students, Waleey Fatai, Sahil Kumar, and Wen Qin. Thanks to my wife Sharyn H. Reitz for her support when the writing took so much time.

1 The status of comparative public law scholarship in the United States may seem somewhat paradoxical. Although much foreign law is inescapable in modern life and even though foreign law models played a substantial role at the founding of the country and for some time thereafter when there was not much American law, comparative study of foreign models of public law no longer plays much of a role in the preparation of legislation or constitutional amendments. Moreover, a high-profile debate at the Supreme Court has revealed significant antipathy on the Court to the use of comparative law in interpreting domestic law. In those senses, comparative public law scholarship appears to have little impact on U.S. law. The failure of legislatures to consult comparative law scholarship and the Supreme Court debate suggest a certain lack of cosmopolitanism [1] in America and an actual aversion to modeling U.S. law on foreign law. These impulses are reinforced by structural and ideological aspects of U.S. law. But as elsewhere, the forces of globalism expose lawyers and courts in the United States constantly to foreign and international law. In fact, a strong body of scholarship in the areas of international and comparative law has developed in the United States, a fact which attests to a curiosity and openness to learning about foreign law at least on the part of comparative law scholars. This in turn suggests that cosmopolitanism remains quite strong in the country. America, it seems, is home to strong tendencies in both directions: cosmopolitanism and its opposite, nationalism or chauvinism. This

report describes the development of comparative public law scholarship in the United States between these opposing impulses.

1. Inescapable Foreign Law

2 Foreign and international law is actually impossible to avoid in the United States. We live in a global age, and like a leaky boat that lets the water shoot into the boat from holes in the hull, American legal systems have to admit foreign law in a variety of situations. Each of these ways spawns a need for and ultimately a body of comparative and international law scholarship. The most important ways involve the American rules of private international law (called in the U.S. conflict of laws), and treaty obligations requiring some degree of harmonization of domestic law and foreign law.

3 The operation of the conflicts rules in American jurisdictions regularly exposes American courts and lawyers to foreign law when those rules require courts to apply foreign law to cases pending in U.S. courts. The conflicts rules are part of U.S. law and do not change the content of U.S. law; they just substitute foreign rules in the place of American rules for resolution of certain issues. The exposure to foreign law could influence how U.S. lawyers and courts think about the relevant legal issues and that influence could affect them not only when they have the opportunity to participate in law reform projects involving those issues, but even as they craft arguments about how to interpret their own domestic law. But none of that influence is direct, and any arguments to adopt the foreign law's solutions in interpreting existing U.S. law have to be justified on the basis of the materials within U.S. law. For that reason, the impact on U.S. law itself from the operation of conflicts of law rules appears unlikely to be large. In fact, it is reduced even further by the fact that there are a number of conflicts rules that restrict the reach of foreign public law into U.S. courts, including exceptions for *ordre public* and foreign penal and tax law. [2]

4 Treaty provisions, by contrast, may require changes directly in U.S. law but only if the U.S. agrees to the changes by signing and ratifying the treaty. Such treaty provisions are usually for the purpose, at least in part, of harmonization, and harmonization is an important tool for securing international human rights. The "national treatment" and

"most favored nation" clauses of Friendship, Commerce, and Navigation treaties are old examples of a fairly minimal form of harmonization, but they are also important parts of the General Agreement on Trade and Tariffs (GATT). [3] Harmonization has been expanded to include many examples of substantive standards that have been harmonized. The Convention on the International Sale of Goods (the CISG), for example, seeks to harmonize the rules for international sales of goods. Other harmonization treaties concern such issues as the international trade in endangered species, climate change, or marine pollution.

5 The United States has even entered into a few international agreements that go beyond establishing uniform standards for national law. These so-called "mutual recognition agreements" (MRAs) require U.S. customs officials to forgo their own inspections to see if imported goods and services comply with U.S. standards for the protection of health, safety, consumers, or the environment. Instead, under these agreements, the U.S. officials are required to accept the inspections and certifications by foreign compliance assessment bodies under foreign law standards, something we do only with trusted trading partners. [4]

6 Harmonization treaties may have a significant impact on U.S. public law, but only if we agree to them, and the United States has refused to ratify treaties thought to be inconsistent with U.S. law. [5] Moreover, the process of harmonizing through international treaties is probably not generally perceived to involve the imposition of foreign standards. The United States often supports harmonization efforts because it wants every country's law to change in certain ways, for example, to be more protective of the environment. Harmonization may in fact seem to be the way a dominant country like the United States can extend the content of its law to many other countries. There appear to be some specific circumstances in which a kind of involuntary harmonization may result without our country's agreement, but these possibilities seem to be limited to products liability litigation against companies in international trade and chiefly affect the scope of document disclosure. [6]

2. Anti-Cosmopolitan Refusals to Look to Foreign Law

2.1. Little to No Use of Comparative Law in Preparing Legislation

7 The clearest and most significant impacts of comparative public law scholarship would involve the use of foreign law as a model for law reform in the United States. If foreign law models were being used as part of the process of either legislative reform or litigation to change the domestic law that would also imply a very significant openness to foreign law. However, it is difficult to find any evidence for this kind of impact of foreign public law in the United States. In 1998, George Bermann, one of our leading comparative law scholars and a specialist in comparative public law, made a similar statement about comparative law in general. After giving his opinion that U.S. lawyers were not making sufficient use of the comparative method to identify general principles of law, he contrasted that lack of effort with the activity in Europe to find common principles of private law:

> Recent initiatives in the direction of codifying and synthesizing the law of various nations, particularly in the field of private law, is very largely European- rather than American-driven.

> As for domestic law reform as such, no one has measured the extent to which legislatures actually resort to foreign law and the comparative law method, but the impression nevertheless remains that foreign law and the comparative law method are seriously underutilized in the U.S. in pursuit of these purposes.[7]

8 I am unaware of any significant examples that would show that the situation has changed today, certainly not in the realm of public law. There is in fact very little evidence that legislatures even consider foreign law before adopting new statutes or codes. At least, we do not have a general practice for federal or state legislative bodies to commission or seek out comparative law surveys relating to issues pending before them. I have been unable to uncover any significant

examples in public law, and informal conversations with my colleagues who teach and write in public law areas and my own experiences teaching and writing in the field of administrative law suggest that there are none of any importance. There is one minor example that provides the exception to prove the rule, but it is quite minor. [8] A review of tables of contents and indices of some of the leading treatises in constitutional and administrative law in the United States further support these conclusions because they make no reference to any developments in American law that were based on foreign models. [9]

2.2. The Supreme Court Debate about Citing Foreign Law

9 Any consideration of the status of comparative public law in the United States has to take into account the debate that broke out on the Supreme Court in the 2000s about the propriety of citing foreign and international law on questions of U.S. domestic constitutional law. The debate did not result in a clear rule forbidding the use of comparative law on such domestic law questions, but some justices advocated for such a ban.

10 Probably the fullest and best known statement of the debate was in *Roper v. Simmons* [10] in which Justice Kennedy's majority opinion invalidated a state juvenile death penalty under the Eighth and Fourteenth Amendments. After concluding that there was a basis under U.S. law to so hold, Justice Kennedy said that he found "confirmation" for his interpretation of U.S. law in the fact that all other countries in the world had abolished capital punishment of juveniles or publicly disavowed the practice. [11] In other words, Justice Kennedy made it clear that he was citing foreign law, not as controlling authority, but only as non-binding authority that he thought added to the persuasive power of his opinion. Justice Scalia's opinion for three of the four dissenting justices included a host of objections to the reference to foreign law. [12] As the debate continued in subsequent cases, opponents of citing foreign law were in usually in dissent, but in the last case involving significant debate on the issue, *McDonald v. City of Chicago*, [13] Justice Alito raised the objection in his opinion for the Court.

11 The debate is surprising because the Court has regularly cited foreign law at least since the first Justice Marshall.[14] It may be a little difficult to see what the objections could possibly be to references to non-binding authority, but there is a huge literature analyzing this debate from all points of view.[15] I bring up the debate here because of the one objection that makes the most sense to me, even though I personally reject it. That objection is based on national identity. In a 2006 article, Steven Calabresi argued that the popular view of our national identity includes the self-understanding that we are an exceptional nation, composed in large measure of people who fled or who are descended from people who fled other countries. Our exceptionalism is bound up in the U.S. Constitution so that, at least to the popular mind, it offends our sense of identity to have that document interpreted in light of foreign law.[16] In effect, he argued, cosmopolitanism does not fit the United States, at least it does not fit the popular understanding of our Constitution.

12 It is a bit unclear where we are on this debate. The conservative justices who argued against foreign law succeeded in making that an argument for the Court only in the last of the cases mentioned, *McDonald*, but more conservative justices have joined the Court since that case. The controversy over this debate seems to have quieted down in recent years. In 2022 the Supreme Court issued its controversial decision on abortion in which opinions both for and against constitutional protection cited to foreign law in academic *amicus* briefs.[17] But comparative law appears to have played at most a minor confirmatory role for both sides, and no justice objected to the references to comparative law.

3. A Brief Overview of the Rich and Vigorous Comparative Public Law Literature in the United States

13 Despite these ways in which the use of foreign law models have been rejected, there is in fact a rich comparative public law literature in the United States.

3.1. Increase in the Volume of Comparative Public Law in the Twentieth Century

14 When Clifford Larsen surveyed the field of comparative public law in 1998, he was of the view that comparative law in the United States had concentrated on

> private law and “anatomy of the legal system” subjects such as basic contract and tort principles, litigation methods and procedural law, the structure of the legal system and of the legal profession, Roman law sources of civil law and the spread of private civil law concepts around the world. The same generalization holds true for legal journals: they tend to print primarily private law and "legal structure" articles. [18]

15 Comparative coverage of most aspects of public law, he argued, was seriously deficient. He specifically highlighted the need for comparative scholarship with respect to school systems; pension systems and social security; health care, especially care of the aged; family law issues including parental leave, adoption and foster care; land use regulation; criminal law; governmental structure, including federalism; and environmental regulation. [19]

16 I do not know if he was right that at that time coverage of all of these areas was so deficient, but I am sure he was right that public comparative law was underdeveloped by comparison with private comparative law and that comparative public law was the most promising area for new work in comparative law. My own feeling upon as a new professor in the late-1980s was that comparative public law, especially administrative law, was a relatively underdeveloped area, a kind of new frontier for comparative law.

17 In fact, there were good foundations on which to build. The principal founders of the study of administrative law in the United States at the end of the nineteenth and beginning of the twentieth century were Frank Goodnow, Ernst Freund, and Woodrow Wilson. They all included comparisons with European administrative law in their writings, [20] and Goodnow and Ernst both labelled one of their

books a "comparative" study.[21] But as the study of administrative law matured in the United States, comparative studies fell out of the picture, with just a few exceptions. Bernard Schwartz wrote a comparative work covering French law[22] at mid-century, and two later books on British administrative law[23] but his treatise on U.S. administrative law does not mention any comparative perspectives.[24] Arthur von Mehren and Jim Gordley's introduction to the civil law legal systems included substantial sections on French administrative and constitutional law.[25]

18 The comparative perspective was certainly lacking from my courses in constitutional and administrative law when I was a law student in the early 1970s at the University of Michigan, and comparative public law, except for some constitutional structure connected with the development of the constitutional courts, was also largely missing from my course on comparative law at Michigan. But Eric Stein's course on what was then called the Common Market did expose those of us who took that rather specialized course to a foreign form of public law and one which drew on European sources. By the 1980s and 1990s, when I started teaching, comparative public law had largely disappeared from what I understood to be the main channels of comparative law teaching and scholarship, but it was gaining in importance as the Common Market project in Europe gained in importance. What we now call European Union law may be the main introduction for many U.S. students to European thinking about administrative law.

19 Meanwhile, the tumultuous political events and relentless globalization of life in the second half of the twentieth century had exposed the country and the law schools to strong forces for internationalization. The end of World War II ushered in a wave of constitution-making and marked the beginning in many countries of judicial review of legislation for compliance with the constitution. This development was accelerated by the defeat or collapse in more countries of Communist Party or other authoritarian rule in the 1980s and '90s. Constitutional words were meant to be given legal force in courts of law for the first time in many legal cultures, so issues of constitutional law were suddenly important in many more countries and American lawyers needed to know how to deal with such new legal issues. At the same time, the fall of the Iron Curtain and the

improvement in relations with China unleashed a wave of new students and even some new professors from countries that formerly had highly limited contacts with the U.S. These new students and scholars in U.S. law schools had the interest and the linguistic knowledge to research and write about law in their former countries, many of which were not well represented in the literature up to that time. Students and scholars raised in the United States began expanding their linguistic and comparative law skills.

20 The result by the end of the twentieth century and the beginning of the twenty-first was a flowering of comparative scholarship and teaching, including much work focused on public law. Quite a few law schools started new law journals devoted to international and comparative law. In the first decade or so of the new millennium, at least three casebooks on comparative constitutional law were published in the United States. [26] One prominent American constitutional law treatise cites some foreign law though only as isolated examples to show that the law could be different. [27] To my knowledge no one has published a comparative administrative law casebook, but the 2010 edition of the Koch treatise on administrative law has some short discussions of key features of a few foreign systems of administrative law and citations to some comparative studies of different countries. [28] Consistent with the relative number of casebooks in the two fields, I have the impression that there have been far more courses on comparative constitutional law than comparative administrative law in recent years. [29] But comparative studies of different areas of administrative law and different countries' administrative systems have greatly multiplied. Electronic searches for journal articles and books in the last twenty years show that the areas that Larsen identified in 1998 as in need of comparative law study are no longer ignored by comparative scholarship. The individual works are too numerous to mention here.

3.2. Relative Volumes of Various Types of Comparative Literatures

21 The fact that the volume of comparative public law literature has grown in recent years naturally raises the question about the extent of that volume as compared to comparative private law studies and

the related questions about the relative size of literature on certain subtopics within the field of comparative public law, especially constitutional and administrative law. I have found no studies of these questions and my own attempts to gather empirical data on these questions have foundered on the difficulties of the classification issues that would need to be resolved.

22 The first problem is the line between public and private law. That line may seem clearer in a jurisdiction that strictly separates public law teaching from private law teaching, but we do not do so in the United States. The line between constitutional and administrative law is equally problematic because, at least in the United States, certain core constitutional doctrines like separation of powers and due process are taught in the basic courses in both areas. Scholarship about privacy illustrates the difficulties in all these distinctions. Privacy is in part a constitutional right, but it is also an important consideration in fashioning all manner of regulation concerning the collecting, handling, and transfer of personal data. Privacy is also protected to some extent by tort and contract law and therefore a subject of private law. Scholarship about privacy issues may often concern at least two if not all three of these aspects. Many areas of law raise similar questions about these categories: for example, bankruptcy, involves a settlement of conflicting private claims. In that sense it seems like a form of private law, but it could also be viewed as a type of procedural law that is neither constitutional nor administrative law but, like other forms of procedural law. Employment law looks like private law in its unregulated form in the United States because of at-will employment, but in most other countries large numbers of employment relationships are subject to regulation that severely limits at-will employment; even in the United States, employment law is subject to constitutional and statutory limitations on discrimination on the basis of race and other "suspect categories," not to mention the administrative law that applies to protect the right to unionize.

23 Not fully appreciating these definitional difficulties, I attempted to gather some empirical data using two databases readily available at Iowa. The first comprises the articles published by the *American Journal of Comparative Law* (AJCL). The AJCL is the flagship comparative law journal in the United States and because it is a peer-

reviewed journal, I thought it would more reliably indicate the interests of the teachers and professional comparative law scholars than any other American law journal, most of which are edited by students. With the help of a research assistant, I attempted to survey the last twenty years of articles in the *AJCL*. We classified the articles into five categories: public or private law or neither (works that were about U.S. law without any significant comparison to foreign law), and within the comparative public law category, whether about constitutional law, administrative law, or other (a fairly large category that includes, for example, international law, criminal law, civil and criminal procedure, and arbitration). Based on our efforts to sort the articles, we estimated that there were almost twice as many comparative public law articles published as articles about private law, and about four times as many comparative articles about constitutional law as about administrative law.

24 The second database was the record of purchase of new books by the Iowa Law Library, which has an ambitious program of acquisition of new books on all aspects of law and is one of the leading research law libraries in the country. [30] Don Ford, the Foreign, Comparative, and International Law Librarian (FCIL) at the Iowa Law Library, suggested that he could analyze the Law Library's new book purchases by using the search capabilities of the Iowa Law Library's online public access catalog (OPAC). Based on that study, Ford estimated that there are roughly one third more comparative administrative law books than constitutional books published since 2000.

25 In view of the definitional difficulties I have mentioned, I am not willing to make strong claims of validity for our studies. The most important lesson they taught me is that in order to obtain meaningful results from such a process of classification, it is necessary to have very tight agreement on the criteria to use in coding. My research assistant and I did have a written set of guidelines, but I think they proved to be too loose. We uncovered too many difficult cases that were not resolved by our guidelines. In the end, the criteria ended up being adjusted on an ad hoc basis so that I have no confidence that we could repeat the process with roughly the same results. Although the cataloguing of books for the Law Library's OPAC is done by experienced, professional cataloguers, I was not able to learn enough

about the way they define the differences between categories to compare them to our definitions.

26 So in the end, I am left to depend on my intuitions and I mention my failed attempts at empirical study only to show that their results are not so wildly different from my intuitions that they should shake confidence in my own judgments. We do know that comparative law in the nineteenth and early twentieth centuries had a strong focus on private law. [31] Professor Larsen argued that that focus had persisted to the end of the twentieth century. [32] My own sense was that sometime between mid-century and the beginning of the twenty-first century, the focus was shifting for the geopolitical reasons I have mentioned. The shift undoubtedly reflected the fact that in every country, governmental regulation has come to play an ever-increasing role in modern life. Everywhere there a need for regulatory intervention to counter the massive economic power of huge companies and to deal with looming environmental challenges. The shift no doubt accelerated with the fading of Communist Party power after 1989, as discussed above in Section 3.1. For all those reasons, I have the impression that comparative public law studies probably now exceed comparative private law studies, and based on the importance of constitutional law, especially the expansive nature of constitutional protections for human rights, I expected that comparative constitutional studies probably exceed comparative administrative studies. I see no reason to doubt those impressions, but I do not claim to have proven them empirically.

3.3. Improvements in Quality of Comparative Public Law

27 The increase in the volume of comparative public law does not necessarily shield the field from criticism. Expressions of disappointment with the field seem to be a fixture of comparative law in general. In his 1999 review of comparative law in the United States, George Bermann wondered, “Why has the progress of comparative law in the United States been modest at best, in some respects, and apparently unsatisfactory in others?” [33]It seems that Professor Bermann’s question could be directed at comparative public law as much as at any other branch of comparative law studies.

28 To evaluate comparative law's performance, Bermann gave us a list of five objectives for comparative law in general. His list would appear to be equally valid for individual subfields, like comparative public law. Comparative law, he said,

> may serve a variety of objectives, running the gamut from *the intellectually ambitious* (e.g., achieving a better understanding of law and law's relationship to society, more fully elucidating general legal concepts), to the *programmatically ambitious* (e.g., unifying or harmonizing national law on different legal subjects to facilitate transnational transactions and relations, distilling general principles of law by which those transactions and relations may then more suitably be governed), to the *socially useful* (e.g., law reform, whether practiced by legislators, judges, or academic commentators), to the *professionally useful* (e.g., facilitating the application of foreign law in counseling, drafting and litigation settings whenever and wherever foreign law might be considered to be "applicable"), to the *culturally edifying* (e.g., demonstrating the relativity and contingency of one's own law and exposing its unstated assumptions and possible biases). [34]

29 Of these five goals, he thought the last two, professional utility and cultural edification, had gained the most widespread support in the U.S. and were generally regarded as "reasonably well achieved." [35] It was thinking about programmatic ambitions to harmonize laws and to identify general principles) and the social utility of comparison that led him to bemoan the failure of U.S. law to use comparative law for purposes of domestic law reform. But the "most deficient" aspect of comparative law in the United States, Bermann argued, concerned the intellectually ambitious goal. Comparative law was not "deepening our knowledge about law, whether as a social phenomenon or as a field of concepts and ideas. [36]

30 When I started trying to put together a reading list for a course about comparative regulation of a market economy in 1990, my experience confirmed Bermann's diagnosis. I found little comparative law literature that helped me grasp the basic differences that distinguished different systems of systems of public law. One exception was Mirjan Damaška's intellectually exciting book about different systems of civil procedure, [37] but it was not easy to read and

it was not about my core interest in the seminar, regulatory law. One of the most useful sources I found for my course was written by scholars who appeared to see themselves primarily as political scientists. [38]

31 Now the situation is quite different. I would argue that comparative public law scholarship is responding positively to Professor Bermann's call for deepening the analysis. In all the outpouring of literature, I believe we are starting to see more and more the kind of search for general principles, the study of fundamentals, and the effort to bring into the study the methods and insights of other disciplines that Bermann called for. For lack of space, I would name just a few of the promising projects regarding comparative administrative law, which is the area I know the best. A major milestone was the publication in 2010 of the first edition of a volume of essays edited by Professors Susan Rose-Ackerman and Peter Lindseth, now in its second edition. [39] A similar, analytically ambitious volume of essays edited by Francesca Bignami and David Zaring was published in 2016. [40] These volumes are better focused than is usually true of edited volumes, and the focus is on examining the different solutions in a variety of countries to key issues like judicial review, public participation, and privatization. The best essays make connections with history and political theory. My own project of studying the way differences in legal structures and rules reflect the differences in "political economy"—a term meant to capture the differences in the dominant expectations and preferences concerning the degree to which the state should intervene in the economy—is an attempt to use the new institutional literature of political science to forge connections between law, ideology, and political and economic structure. [41]

32 I do not mean to suggest that the field of comparative public law has achieved all five of Bermann's goals and that nothing remains to be done. I suppose that Professor Bermann would agree that the goals are true goals and therefore can never be fully achieved. My point is just that good starts have been made in the right direction. The volumes I mention above are among those pointing us in the right direction. But as Bermann said in his essay, "sound theoretical scholarship in any field is a difficult achievement, . . ." [42] There is probably a call for scholars to achieve a deeper level of analysis in

every area of legal scholarship, but perhaps this tendency is pronounced in comparative law because the field seems to hold such strong promise. Good comparative law scholarship may be, however, as Bermann, said, [43] especially difficult. Nevertheless, despite the need for continuing work to push the level of analysis to higher levels, I think it is right to say that the United States is now beginning to produce a comparative public law literature that is both voluminous and rich, holding great promise for the future.

4. Some Concluding Thoughts about Cosmopolitanism and Its Critics in American Comparative Public Law Study

33 I come back to the tension between advocates of cosmopolitanism and advocates of nationalism: The United States has been strengthening its openness to the world by developing a much larger and stronger body of comparative public law scholarship, but legislators apparently are still not interested in foreign models and the Supreme Court debate about citing foreign law gave expression to a form of legal nationalism or isolationism. It is hard to gauge the importance of the Supreme Court debate. It is not clear that it provides any closure on the issue of the relevance of comparative public law with respect to domestic constitutional issues. But I do believe that no knowledgeable advocate, either before that debate or afterward, would ever expect to succeed in the U.S. with the argument, in or out of court, that the United States should adopt a rule for domestic law solely because it has been adopted by one or more systems of foreign law. No one in the Supreme Court debate about citing foreign law made such an argument. There is something in the U.S. culture that rejects the notion that the U.S. should be governed by—or even decisively influenced by—foreign cultures. That kind of fierce sense of one's own identity may be found in other countries, as well, but it seems especially strong in the United State and seems to set real limits to cosmopolitanism in the United States.

34 There are also structural and institutional barriers in the United States to adopting foreign models, and this is especially true in the fields of public law. The presidential form of our national government is very different both from forms of parliamentarianism and from other forms of presidential government. The U.S. version of federalism is quite different from the German version. I have argued in a string of articles that these differences in institutional structure reflect different forms of "political economy"—a term by which I mean to capture the differences in national expectations and preferences concerning the degree of intervention by the state in the economy—from that in Germany and France, for example, or even from that in Great Britain or New Zealand. [44] If that is so, there may be very little chance that foreign constitutional ideas could be successful in the United States.

35 The barriers to importing foreign administrative law are probably even greater. The United States has long permitted broader delegations of lawmaking power to agencies than many other countries are comfortable with, and that difference has implications for judicial review of agency power, as well. Moreover, the U.S. model of combining in one administrative body or agency the functions of enforcing the regulations for a specific area of regulatory law and conducting the primary fact-finding for judicial review is quite unique. Most other countries put the fact-finding for judicial review in a court or at least in another administrative body.

36 Even for the most committed cosmopolitan, seeking confirmation in foreign law for some aspects of U.S. constitutional or administrative law may not make sense in light of the differences in law and legal structure. But these differences do not stand as barriers to all possible uses of foreign law to confirm the reasonability of arguments under U.S. law. It is especially difficult to see why they would stand in the way of finding confirmation in foreign law with respect to a court's interpretation of the open-textured human rights provisions at issue in the cases involved in the Supreme Court debate about citing foreign law. The claims there about homosexual rights and the death penalty turned on general constitutional clauses like "cruel and unusual punishments" or "due process." These standards may not be so different from the standards that apply in many other countries. It is always possible, of course, that on a specific point, foreign law

really does represent values different from those that underlie U.S. law. In that case, the foreign law would not serve as a source to confirm the argument under U.S. law. But it does not seem reasonable to claim that U.S. law is so different on all issues that foreign law can never provide confirmation. The objection to citing foreign law needs to be justified on a retail basis, not wholesale.

37 In fact, U.S. willingness to engage with other legal systems, especially on questions of public law, has in recent years more typically involved transfer of legal ideas in the opposite direction. The United States was very active in efforts to export its legal models in the wake of the various waves of democratization in the twentieth century. [45] It may be that a certain amount of pride—one might say, hubris—results from the fact that Americans think of themselves as exporting their law to others, and that pride may also account for some of the resistance to imports of foreign law.

38 The wealth of comparative public law scholarship in the United States today attests to a lively curiosity about and interest in foreign law. In that development we have been blessed by the wealth of our universities and law schools that enables them to attract foreign students and scholars, the miseries of world history that have driven some of them to our shores, and the fact that English has become de facto the world language for scholarly communication. There is thus another definitional issue hiding in the very title of this paper. What should count as U.S. comparative public law scholarship? Many of the people who publish their work in American journals like the *AJCL* live and work outside this country. The journal itself is edited currently by Europeans who teach, one at a U.S. law school and one at a Canadian law school. Home-grown scholars like me publish our work in journals outside the United States, as I am doing with this article. In short, the globalization of academic life has helped us immeasurably in the United States to develop a vigorous comparative literature because we have such easy access to foreign law and foreign scholars through English, and they have enriched us with their contributions.

39 Maybe the definitional issue is not so important. The point is that we now have a global comparative law literature, a significant portion of which is written in English by scholars from all over the world, and all that literature is available to scholars in the United States. Indeed,

U.S. scholars participate substantially in writing that literature. It is a sizeable and rich literature. So it seems reasonable to say that, despite the significance of a definite resistance to cosmopolitan views in the United States, there are also strong cosmopolitan forces in the United States that support a vigorous comparative public law scholarship. That scholarship has developed strongly in the last several decades in volume and quality and is well positioned for further development.

NOTES

1 For a useful discussion of cosmopolitanism and comparative law, see H. Dedek, 'Where the "Real Action" Is: From Comparative Law to Cosmopolitan Jurisprudence', in H. Dedek, ed, A *Cosmopolitan Jurisprudence: Essays in Memory of H. Patrick Glenn* (CUP 2022). Dedek quotes Ulf Hannerz' definition of cosmopolitanism as "first of all an orientation, a willingness to engage with the Other" that is premised on an intellectual openness to diversity itself." *Ibid* 5, quoting U. Hannerz, 'Cosmopolitans and Locals in World Culture' (1990) 7 *Theory, Culture & Society* 237, 239.

2 S. C. Symeonides & W. Collins Perdue, *Conflict of Laws: American, Comparative, International Cases and Materials* (3rd edn, West 2012) 99-123.

3 M. W. Janis, *An Introduction to International Law* (Little, Brown 1988) 206-11.

4 J. C. Reitz, 'Recognition of Foreign Administrative Acts', (2014) 62 (Supp.) *Am. J. Comp. L.* 589.

5 The U.S. has, for example, signed but not ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Some of the objection to the treaty comes from people who argue that the treaty might force the U.S. to restrict several constitutional rights, including privacy, freedom of speech and association. H. J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed., OUP 2000) 207-08.

6 D. Zambrano, 'How Litigation Imports Foreign Regulation', (2021) 107 *Virginia L Rev* 1165. Zambrano argues that plaintiffs in products liability litigation against companies also subject to regulation in other countries with stricter standards for liability or for document disclosure may be able

to obtain the documents and disclosures required by foreign law through document requests under U.S. civil procedure rules. If the foreign regulator makes findings against the defendant company or institutes enforcement proceedings based on a stricter form of regulation, an American court will not apply those same standards to the case in the U.S. if U.S. standards are different, but the foreign findings or proceedings may be enough to help the U.S. plaintiffs avoid summary judgment so that it can get to discovery and trial.

7 G. A. Bermann, 'The Discipline of Comparative Law in the United States', (1999) 51 *Revue internationale de droit comparé* 1041, 1043.

8 The example concerns methods of presenting expert testimony, which in common law courts can be quite confusing because each party may present its own expert and they may testify at very different times during the trial so that the trier-of-fact (the jury or, if there is no jury, the judge) can easily be confused. The method, known as "concurrent expert evidence" or more colorfully, "hot tubbing," was first developed in Australia and requires both sides' experts to work out a joint statement of agreed-upon facts and a clear indication of where they disagree. The rule has been adopted by a number of federal judges for particular cases in their courtroom, and it has been adopted into the rules the Colorado Supreme Court issued for their Water Court cases. K. Krause, 'Hot Tubbing and Expert Conferences—Using Concurrent Expert Evidence to Streamline Construction Arbitration', (2020) 74 *Disp Resol J* 79. Thanks to Christopher H. Reitz for telling me about this example of a public law import.

9 For constitutional law: J. F. Nowak & R. D. Rotunda, *Constitutional Law* (8th edn, Thomson West 2010); L. H. Tribe, *American Constitutional Law* (3rd edn, Foundation P 2000). For federal administrative law: K. E. Hickman & R. J. Pierce, *Administrative Law Treatise* (6th edn, Wolters Kluwer 2019); C. H. Koch, Jr., *Administrative Law and Practice* (3rd edn, West 2010) (with 2021 supplement by Richard Murphy and Charles H. Koch, Jr., with appendices, tables, and index). For state administrative law: A. E. Bonfield, *State Administrative Rule Making* (Little, Brown & Co, 1986). Only Tribe and Koch even mention foreign law at all and then only to show that there could be another way, but not to advocate for the foreign model. See notes 27-28 below and associated text.

10 543 U.S. 551 (2005).

11 *Ibid* 575.

12 *Ibid* 622-28. Justice O'Connor filed her own dissent to note her disagreement with Scalia's position on citing foreign law. *Ibid.* 604-07.

13 561 U.S. 742, 781 (2010). Justice Scalia's concurrence mentioned his objections, *ibid* 800-01, and Justice Stevens' dissent cited foreign law, *ibid* 895-96.

14 For extensive citation to cases, see S. G. Calabresi and S. Dotson Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision', (2005) 47 *Wm. & Mary L. Rev*. 742.

15 For citation to a large portion of the relevant U.S. literature, see S. G. Calabresi and B. G. Silverman, 'Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron', 2015 *Mich. St. L. Rev.* 1, 10 n 72. For international reaction to the debate, see M. Andenas and D. Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015).

16 S. G. Calabresi, '"A Shining City on a Hill," American Exceptionalism and the Supreme court's Practice of Relying on Foreign Law, (2006) 86 *Boston ULR* 1335. Relying on the idea of *ius gentium*, Professor Calabresi defended a much different and more positive approach to citing foreign law in a later article. Calabresi and Silverman (n 15).

17 Dobbs v. Jackson Women's Health Organization, 597 U.S. _____, 142 S. Ct. 2228, 2243 & n.15, 2249 (majority opinion); 2312 (Roberts, C.J., concurring); 2340-41 (dissent) (2022).

18 C. Larsen, 'The Future of Comparative Law: Public Legal Systems', (1998) 21 *Hastings Int'l & Comp L Rev* 847, 849 (footnotes omitted).

19 *Ibid* 852-56.

20 E.g., F. Goodnow, *Comparative administrative law* (1893); E. Freund, *Administrative Powers over Persons and Property: A Comparative Survey* (1928); W. Wilson, 'The Study of Administration', (1887) 2 *Pol. Sci. Q.* 197.

21 Goodnow (n 20); Ernst (n 20).

22 B. Schwartz, *French administrative law and the common-law world* (NYUP 1954).

23 B. Schwartz and H. W. R. Wade, *Legal control of government: administrative law in Britain and the United States* (Clarendon P 1972); B. Schwartz, *Lions over the throne: the judicial revolution in English administrative law* (NYUP 1987).

24 B. Schwartz, *Administrative Law* (3rd edn. Little, Brown 1991)

25 A. T. von Mehren and J. R. Gordley, *The Civil Law System* (Little Brown P, 1957; 2nd edn, Little Brown 1977).

26 N. Dorson and others, *Comparative Constitutionalism: Cases and Materials* (West 2003 and Thomson Reuters, 2nd edn 2010); V. C. Jackson and M. Tushnet, *Comparative Constitutional Law* (Foundation P 1999; 2nd edn Foundation P 2006); S. Ross, H. Irving and H. Klug, *Comparative Constitutional Law: A Contextual Approach* (LexisNexis 2014).

27 Tribe (n 9). Tribe cites the law of the European Union, the new South African constitution, and laws of Great Britain, Canada, Australia, and a variety of other European states. *Ibid* 129, 157 n 19, 172, 210 n 11, 265, 618, 624, 666, 796 n 4, 798 n 1, 799 n 2, 833 n 34, 874 n 78, 1015 n 15, 1027 n 27.

28 Koch (n 9) sections 1:14, 2:13, 7:43 [2].

29 In 2006 we published a symposium issue in the international journal at Iowa on comparative constitutional law with five tenured members of the Iowa faculty and two foreign law professors who taught regularly at Iowa, one of whom, Sir Geoffrey Palmer, had twice been a tenured member of our faculty. Six of the seven had taught courses on comparative constitutional law and all of them had published in the field. J. C. Reitz, 'Introduction to Symposium: Comparative Constitutional Law at Iowa', (2006) 15 *Transnatl L & Contemp Probs* 481.

30 The Iowa Law Library's collection peers are Yale, Harvard, University of Texas, Georgetown, Berkeley, University of Pennsylvania, Duke, and the University of Minnesota. The University of Iowa Library system is a leader in the Big Ten university library network, and our collection is so large that with respect to the interlibrary loan service, Iowa participates chiefly as a lender, not as a borrower. In short, the Iowa Law Library is one of the superior libraries in the United States for legal and interdisciplinary research.

31 D. S. Clark, 'Nothing New in 2000? Comparative Law in 1900 and Today', (2001) 75 *Tulane L Rev* 871. At the great international meetings, starting with the Congrès international de droit comparé in 1900, the focus was on harmonization of law codes and the most important law codes at the time were the codes of civil law. The French comparative law society was called at that time the "Société de législation comparée." *Ibid* 875-76.

32 Larsen (n 18) 857.

33 Bermann (n 7) 1048.

34 *Ibid* 1042.

35 *Ibid.*

36 *Ibid.* 1043-44.

37 M. R. Damaška, *The Faces of Justice and State Authority* (Yale UP 1986).

38 R. Brickman, S. Jasanoff, and T. Ilgen, *Controlling Chemicals: The Politics of Regulation in Europe and the United States* (Cornell UP 1985). At least one or two of the authors also had a legal education, but the book was presented as a work of political science.

39 S. Rose-Ackerman, P. L. Lindseth, and B. Emerson (eds), *Comparative Administrative Law* (2nd edn, Edward Elgar 2017).

40 F. Bignami and D. Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar 2016).

41 For example, 'Comparative Law and Political Economy', in D. S. Clark (ed), *Comparative Law and Society* (Edward Elgar 2012) 105; 'Political Economy and Separation of Powers', (2006) 15 *Transnatl L & Contemp Probs* 579; 'Political Economy and Abstract Review,' in S. J. Kenney, W. M. Reisinger, and J. C. Reitz (eds), *Constitutional Dialogues in Comparative Perspective* (McMillan Press 1999) 62.

42 Bermann (n 7) 1050.

43 *Ibid* 1051 (citing J. C. Reitz, 'How to Do Comparative Law', (1998) 46 *Am. J. Comp. L.* 617, 635).

44 For example, Reitz 2012 (n 41); J. C. Reitz, 'Political Economy and Separation of Powers', (2006) 15 *Transnatl L & Contemp Probs* 579; J. C. Reitz, 'Political Economy and Abstract Review', in Kenney and others (n 41) 62.

45 J. de Lisle, 'Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond', (1999) 20 *U. Pa. J. Intl Econ L Rev* 179; J. C. Reitz, 'Export of the Rule of Law', (2003) 13 *Transnatl L & Contemp Probs* 429.

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