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# The Rise and Fall of Comparative Constitutional Law in the Postwar Era

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# Article

## The Rise and Fall of Comparative Constitutional Law in the Postwar Era

David Fontana<sup>†</sup>

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<sup>†</sup> Associate Professor of Law, George Washington University Law School. This Article is the first part of two larger projects—one about comparative constitutional law specifically and another about legal scholarship more generally—so I should thank those who have commented on all of the threads of these projects. This list includes Michael Abramowicz, Bruce Ackerman, Nicholas Bagley, Emily Berman, Don Clarke, Thomas Colby, Rosalind Dixon, Barry Friedman, Stephen Galoob, Heather Gerken, Tom Ginsburg, Aziz Huq, Vicki Jackson, Ted Jones, Orin Kerr, Matthew Lindsay, Chip Lupu, David Marcus, Jerry Mashaw, Saira Mohamed, Alan Morrison, H. Jefferson Powell, Naomi Schoenbaum, Michael Selmi, Peter Smith, Brad Snyder, Steven Teles, and Howard Wasserman. I am grateful to participants in the faculty workshops at the law schools of FIU, GW, Loyola-LA, and UNC, and to the political science department at Johns Hopkins. Finally, thanks go to Christopher Callanan and Patrick Thompson, my talented research assistants.

## I. INTRODUCTION

There have been four confirmation hearings in the United States Senate for nominees to the Supreme Court since 2004—first, for John Roberts to be the new Chief Justice of the Supreme Court in 2005, and then for Samuel Alito in 2006, Sonia Sotomayor in 2009, and Elena Kagan in 2010 to be Associate Justices. Each nominee faced hundreds of questions from a range of senators on a range of different constitutional issues. Among the thousands of questions asked in these four different Senate confirmation hearings, there were only a few issues that were raised in each of the four. One such issue was the role of comparative constitutional law in the American constitutional system.

Senators performing for the television cameras are not the only ones with the feeling that something important and at least somewhat fresh and new is developing in our constitutional system. Just over ten years ago, Mark Tushnet wrote about the new possibilities of comparative constitutional law,<sup>1</sup> and Bruce Ackerman wrote about the rise of world constitutionalism.<sup>2</sup> Comparative constitutional law might offer different lessons to different scholars, but the sense shared by all is that something new and original is transpiring—that the Founding Moment for the domestic American Constitution might have transpired in 1787, but the Founding Moment for comparative constitutional law is right now.

However universal this sense is that comparative constitutional law is new to the world of the American law school, it was actually universally studied in American law schools in the first few decades after World War II. Within a year of being appointed Chief Justice of the Supreme Court in 1953, Earl Warren traveled to Germany, Japan, and South Korea, speaking to audiences about a “revival of comparative jurisprudence”<sup>3</sup> in the United States.<sup>4</sup> Indeed, fifty years before the Senate Judiciary Committee asked Chief Justice Roberts about comparative constitutional law, *Fortune Magazine* ran an essay written by Chief Justice Warren about the importance of studying the constitutions of other countries. In statements that today might have prompted calls for his impeachment, Chief Justice Warren indicated that the principles in the American Constitution were not “discovered by our Founding Fathers. They had learned from the experience of people of all ages. But put together as they were and adapted to our conditions and mores, they have served us well.”<sup>5</sup>

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1. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

2. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

3. Earl Warren, *The Law and the Future*, FORTUNE, Nov. 1955, at 106, 229.

4. At a dinner to honor his visit to South Korea, Chief Justice Warren spoke of the “common bond between men of law in all nations because . . . law . . . is not strictly our own.” Chief Justice Earl Warren, Remarks at Dinner Honoring Chief Justice Warren hosted by Korean Chief Justice Co Chin-Man (Sept. 12, 1967) (transcript available at Library of Congress, Register of Earl Warren papers). There are certainly Justices who travel around the world now, but it is hard to imagine them making such bold claims about the role of comparative law in the United States as Chief Justice Warren did in his lecture.

5. Thomas Ginsburg, *The Warren Court in East Asia: An Essay in Comparative Law*, in EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 265, 266 n.4 (Harry N. Scheiber ed., 2007).

Justice William O. Douglas gave a series of lectures and published a book about the constitutional law of India.<sup>6</sup> Justice Robert Jackson, after working on the Nuremberg Trials, traveled the country and the world discussing recent comparative constitutional changes.<sup>7</sup>

The actions of these three Justices were not anomalous, but were instead a reflection of the burgeoning interest in comparative constitutional law in American law schools during that time period. Many law schools created comparative constitutional law classes during the first few decades after World War II, and a substantial percentage of the articles in the two leading law reviews (the *Harvard Law Review* and *The Yale Law Journal*) touched in some way on comparative constitutional law—almost as many articles as touched on American Supreme Court cases resolving issues of American constitutional law. Erwin Griswold—Dean of the Harvard Law School for twenty-one years, Solicitor General of the United States under President Nixon, and the lawyer who argued more cases before the United States Supreme Court than any other during the twentieth century—wrote several law review articles about the constitutional experiences of foreign countries.<sup>8</sup>

But just as quickly as comparative constitutional law came to prominence in American law schools, starting in the early 1970s it began to disappear. Law schools that had earlier created comparative constitutional law classes scrapped those classes in the next few decades. The same two leading law reviews that had earlier published many articles on comparative constitutional law issues then went several decades before publishing another article touching on the topic. Just as soon as comparative constitutional law rose to prominence, it disappeared into thin air.

The reasons for the rise—and later the fall—of comparative constitutional law are complicated, but many of these reasons revolve around the changing focus of the elite members of the legal profession. This dynamic explains why comparative constitutional law first rose to prominence in the decades after World War II, when American lawyers returned from their service overseas and the attention of the profession and the country was focused overseas; it also explains why when the attention of the profession turned inward during the years of the Warren Court, comparative constitutional law largely disappeared. This dynamic of a profession engaged in comparative developments was also cultivated by scholars of comparative constitutional law themselves. The

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6. WILLIAM O. DOUGLAS, *WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA* (1956).

7. Helen J. Knowles, “Judgment of the Law”: Justice Robert H. Jackson and the Foundations of the London Charter (Feb. 18, 2010) (unpublished working paper), available at <http://ssrn.com/abstract=1340627>.

8. See, e.g., Erwin N. Griswold, *The “Coloured Vote Case” in South Africa*, 65 HARV. L. REV. 1361 (1952) [hereinafter Griswold, *Coloured Vote*]; Erwin N. Griswold, *The Demise of the High Court of Parliament in South Africa*, 66 HARV. L. REV. 864 (1953); Erwin N. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees: A Comparative Study*, 65 HARV. L. REV. 193 (1951); Erwin N. Griswold, *Law Schools and the Legal Profession*, 7 J. LEGAL EDUC. 305 (1955); Erwin N. Griswold, *Legal Education: Extent To Which Know-How in Practice Should Be Taught in Law Schools*, 6 J. LEGAL EDUC. 324 (1954); Erwin N. Griswold, *Observations on Legal Education in Australia*, 5 J. LEGAL EDUC. 139 (1952).

profession started to focus more on public law litigation in American federal courts during later years, and this activity occupied many of the resources and energy that had earlier gone to comparative constitutional examination. Examining this world of American law schools after the fall of comparative constitutional law can also point to some of the deficiencies in American constitutional scholarship and some of the reasons why an infrastructure and related social movements have organized and supported Warren Court-style domestic litigation—to the detriment of comparative constitutional law, and therefore to the detriment of American judicial review. A similar story and division of time periods could be told for comparative law more generally, but this Article begins this story by focusing in particular on comparative constitutional law, which I define as the study of the domestic constitutional law of other countries.

Part II examines the rise and fall of comparative constitutional law by examining the scholarship produced and classes taught by faculty at several dozen law schools. The Article then turns in Part III to offer some initial explanations for this dramatic turn of events. After Part III explains why comparative constitutional law succeeded and then disappeared, Part IV turns to discuss the significant costs of the disappearance of comparative constitutional law in particular. For constitutional scholarship, the “birth of an academic obsession”<sup>9</sup> focused almost exclusively on domestic constitutional litigation was disastrous. It is certainly true that this helped “constitutional law [become] the most prestigious field in the legal academy.”<sup>10</sup> The most notable scholars that the legal academy has ever produced wrote about how the American Constitution should be interpreted and how judicial review should operate. But, by ignoring comparative constitutional law, these and other scholars neglected to consider that other countries had been experimenting with some of the very ideas they advocated in their academic writings. Deprived of the insights to be gained from these comparative experiences, our domestic constitutional scholarship simply ignored significant insights that could have been gained from devoting attention to comparative constitutional law.

The damage that the fall of comparative constitutional law did to the vocation of constitutional scholarship is also matched by the damage that this disappearance did to comparative constitutional law and to judicial review. As Part IV also discusses, the focus of the legal profession on *domestic* constitutional litigation related to *domestic* constitutional arguments encouraged the creation of an institutional infrastructure and social movements related to this litigation, which in turn created the personnel, the resources, and the intellectual support for scholarship about these developments. From the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) on the jurisprudential left to the Institute for Justice on the jurisprudential right, an entire “support structure”<sup>11</sup>

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9. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

10. RICHARD A. POSNER, *OVERCOMING LAW* 87 (1995).

11. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME*

was created to develop arguments about domestic constitutional law. This came at a cost, one that scholars have yet to consider: because there was an infrastructure related to traditional domestic constitutional litigation but no similar infrastructure for comparative constitutional law, comparative constitutional law had no chance for success in the long term.<sup>12</sup> The result was bad for constitutional law and for judicial review, because the resources and intellectual support for judicial review were based solely on arguments that could be derived from the American constitutional experience, rather than including the many successful constitutional experiences of countries around the world.

After discussing the origins of this lack of interest in comparative constitutional law and the problems caused by this disinterest, Part V turns to some proposed solutions. Comparative constitutional law has enjoyed something of a revival in the past ten years, but it has been a fragile one. For the field to continue to reemerge, it must do what it did during the years when law schools were full of constitutional ideas from around the world: it must continue to solicit the interest of the legal profession, and of a wide range of legal scholars, in all of the many things that comparative constitutional law has to offer. Part V considers some strategies to ensure that the legal profession and law schools return to their interest in comparative constitutional law, but in a more durable and permanent manner.

## II. THE POSTWAR RISE AND FALL OF COMPARATIVE CONSTITUTIONAL LAW

The creation moment for American law schools was surely during the nineteenth century, either during the earlier portion of the century with the creation of Litchfield Law School in Connecticut or during the latter part of the century with the tenure of Christopher Columbus Langdell as Dean of Harvard Law School and the creation of the case method of teaching.<sup>13</sup> If the creation

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COURTS IN COMPARATIVE PERSPECTIVE 21 (1998).

12. Very few of the discussions about the social movements related to the emergence of the Warren Court focus on how these movements spurned comparative and international law and thereby precluded the creation of comparative and international legal movements. There is much scholarship about the relationship between social movements and the creation of constitutional law, but it is almost entirely focused on the domestic angle. *See, e.g.,* Bruce Ackerman, *Interpreting the Women's Movement*, 94 CAL. L. REV. 1421 (2006); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006) [hereinafter Siegel, *Constitutional Culture*]; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

13. The law school at Litchfield was really "[t]he first American school of law, organized strictly to prepare students to be lawyers, and distinct from a general bachelor's degree course." Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 564 (1997); *see also id.* at 565 ("The Litchfield [program] established the framework for instruction in the professional law school."). Langdell's most significant contribution was to create a system of legal education based on the idea that "knowledge of the law is best derived from its sources, the cases." *Id.* at 597. This system of legal education quickly became the most popular system in the country. *See id.* at 608.

moment was during the nineteenth century, though, the consolidation moment for American law schools was during the twentieth century, especially the years after World War II. It was during this period that the number of law schools skyrocketed, in part due first to the GI Bill and then to the Baby Boom during that time. It was also during this period that the modern system of legal scholarship was created.

Yet our knowledge of American legal education in the years after World War II is thin. The leading studies of American legal education focus on the Litchfield and Langdell creation moments of the nineteenth century, or the movement from the Harvard-inspired legal formalism of earlier generations to the Yale-inspired legal realism of the years before World War II.<sup>14</sup> There are several articles that have referenced, in passing, some changes in the classes being offered in American law schools over the years, in part by examining what classes were being offered by law schools during these decades after World War II or what articles were published by their law reviews.<sup>15</sup> But these articles have always examined a very small number of (not so randomly generated) course listings or law reviews from very few years from the very elite law schools.<sup>16</sup> That gives us only a partial picture of life in the legal academy during only a few years at a few elite law schools. Part of what this Article contributes, then, is to begin a discussion based on a more complete set of information about the teaching and scholarship of American law schools since World War II. This Article still contains more discussion about the elite law schools, for reasons that Laura Kalman has highlighted: there is simply

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14. Robert Stevens, author of the most comprehensive account of the history of American legal education, spends a small fraction of his book on more recent developments. ROBERT STEVENS, *LAW SCHOOL AND LEGAL EDUCATION FROM THE 1850S TO THE 1980S*, at 206-17 (1987).

15. See, e.g., Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 *VAND. L. REV.* 339, 339-66 (2007) [hereinafter Gordon, *Geologic Strata*] (examining changes in classes offered by law schools); Robert W. Gordon, *Lawyers, Scholars and the "Middle Ground,"* 91 *MICH. L. REV.* 2075, 2099-2100 (1993) [hereinafter Gordon, *Lawyers*] (examining changes in articles published in law reviews); Michael J. Saks, Howard Larsen & Carol J. Hodne, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship? A Systematic Comparison of Law Review Articles One Generation Apart*, 30 *SUFFOLK U. L. REV.* 1163 (1996).

16. For instance, Robert Gordon's study of changing courses being offered examined just a few years at six of the most highly ranked law schools. See Gordon, *Geologic Strata*, *supra* note 15, at 349 n.18 ("The following generalizations about changes in course offerings are based on sampling of law school catalogues in four private (Harvard, Stanford, Vanderbilt, Yale) and two public (Michigan, Texas) university law schools at ten year intervals from 1890 to 1990. We . . . went through the samples looking for first appearances of new courses and for the appearance and disappearance of required courses. Had we had more time, we would have liked to sample a much wider range of schools, including more non-elite schools . . ."). Gordon's examination of changing publication trends also focused on a small set of data about the most elite law reviews. See Gordon, *Lawyers*, *supra* note 15, at 2099 ("Ariela Gross searched at my request the contents of three major law reviews in 1910 and every tenth year thereafter, to sense historical trends; and of five major law reviews in the last five years, to sense current trends."). John Langbein's study of comparative law scholarship also focused on just a few elite law schools. See John Langbein, *The Influence of Comparative Procedure in the United States*, 43 *AM. J. COMP. L.* 545, 546 (1995) ("Of the twenty-five schools that were top-ranked in the 1993 national ranking of university law schools, I have obtained catalog listings for the curriculum at all but one."). The closest to a comprehensive study of changes in legal education we have is one study about changes in the content of law review articles published. See Saks et al., *supra* note 15. But the authors of that study, even though they examine ten law reviews, have other limitations in their data. For instance, in ensuring that they cover a range of schools, they rank schools "according to the size of their library holdings." *Id.* at 1171. They also examined only two years, 1960 and 1985. *Id.* at 1171-72.

more available information about these schools, and these schools tended to have an outsized influence on legal education.<sup>17</sup>

There are many trends to be gleaned from this information, but this Part focuses on one of them in greater detail: from 1945 until roughly 1972, comparative constitutional law became an accepted part of legal education in a much greater way than in the years before 1945. After 1972, as Part III will discuss in greater detail, the rise of the Warren Court (the political and legal prominence of that Court, the law clerks who clerked for that Court and then became professors, and a legal academy writing for and about that Court) led to the disappearance of comparative constitutional law. During earlier periods, the increasing interest in constitutional developments around the rest of the world took some time to become fully realized. As law professors returned from service in World War II and as constitutions were drafted overseas in greater numbers, gradually that interest affected law schools.

The same thing happened with the gradual disappearance of comparative constitutional law. It took time for the Warren Court to have this effect on the pedagogy and scholarship of law schools. The former Warren Court clerks had to finish their clerkships and begin their teaching and writing careers. The legal profession needed time to realize the importance of the Warren Court and arrange funding for activities related to the Court. The “second Warren Court”<sup>18</sup> presided from 1962 until 1969, and even before that, there were other major developments in constitutional law scholarship (many in response to *Brown v. Board of Education*<sup>19</sup>), like Herbert Wechsler’s article on neutral principles,<sup>20</sup> Learned Hand’s Holmes Lectures,<sup>21</sup> and Alexander Bickel’s *The Least Dangerous Branch*.<sup>22</sup> These types of scholarly developments were important on their own, but during the Rise Era (the period from 1945 until 1972) they were more exceptional than during the Fall Era (the period from 1972 until 1999). The elite law professors at the elite law schools in the elite law reviews sometimes wrote on issues related to the Warren Court during the Rise Era—even if not as much as during later periods—but an examination of other law reviews suggests that the attention paid to these issues was widespread only later. It was not until roughly 1972 that the Fall Era began, and domestic constitutional law supplanted—and almost entirely eliminated—comparative constitutional law. The global dimension of legal education that

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17. See Laura Kalman, *Professing Law: Elite Law School Professors in the Twentieth Century*, in *LOOKING BACK AT LAW’S CENTURY* 337, 340 (Austin Sarat, Bryant G. Garth & Robert A. Kagan eds., 2002). Note also that Barry Friedman’s article about postwar constitutional scholarship, the only other significant discussion of law schools and constitutional scholarship after World War II, is essentially exclusively about debates at the elite law schools by elite law professors. See Friedman, *supra* note 9.

18. Many have called the period from the appointment of Arthur Goldberg to the Court in 1962 until the retirement of Earl Warren in 1969 the “second Warren Court.” See, e.g., Friedman, *supra* note 9, at 201.

19. 347 U.S. 483 (1954).

20. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

21. LEARNED HAND, *THE BILL OF RIGHTS* (1958).

22. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

had an almost natural and assumed part in American legal education in the years after World War II quickly dissolved in favor of new areas of particular constitutional interest.

#### A. *The Postwar Rise of Comparative Constitutional Law*

In the years after 1945, American law schools started to expand their focus on comparative constitutional law. Legal scholarship featured discussions of comparative constitutional issues in its most prominent publication locations (including the emerging series of *Harvard Law Review* Forewords published every year) and in articles by the most prominent figures in American constitutional scholarship at the time. Moreover, consistent with a field both new and becoming increasingly accepted, the nation's leading law reviews contained methodological debates about what this new field should look like. This period of time—from 1945 until 1972—will be called the “Rise Era” in comparative constitutional law.

In the first issue it ran after the end of World War II, *The Yale Law Journal* decided to focus on a topic that was in the news at the time: what the end of World War II meant for constitutional democracies in the new international legal system. Justice William O. Douglas, himself a scholar of some stature,<sup>23</sup> wrote the lead article for the symposium about the potential domestic constitutional structures of countries in the new international community.<sup>24</sup> Yale Law Professor Grant Gilmore, known as perhaps the most influential contracts scholar of his generation,<sup>25</sup> wrote an article for the symposium about the International Court of Justice and comparative constitutional law.<sup>26</sup> Gilmore later wrote several other articles about comparative constitutional law.<sup>27</sup>

In the years to come *The Yale Law Journal* would publish many more articles with comparative constitutional law dimensions.<sup>28</sup> The *Harvard Law*

23. See, e.g., David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1091 (2000) (labeling Douglas a “prominent scholar”).

24. William O. Douglas, *Foreword*, 55 YALE L.J. 865, 868-69 (1946).

25. See, e.g., Anthony T. Kronman, *What Grant Gilmore Taught Us*, 92 YALE L.J. 6, 6 (1982) (“Grant’s reputation was enormous . . .”); Nathan Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 82 (2009) (discussing the “influential” scholarship of Gilmore).

26. Grant Gilmore, *The International Court of Justice*, 55 YALE L.J. 1049 (1946).

27. See, e.g., Grant Gilmore, *Circular Priority Systems: South African Apartheid Legislation*, 71 YALE L.J. 53 (1961).

28. Of the 517 articles published between 1945 and 1972 in *The Yale Law Journal*, fifty touched upon comparative constitutional issues. For some notable examples, see Charles E. Clark & William D. Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61 YALE L.J. 1147 (1952); Jan Deutsch, *Some Problems of Church and State in the Weimar Constitution*, 72 YALE L.J. 457 (1963); Walter Gellhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1 (1965); John N. Hazard, *Mali’s Socialism and the Soviet Legal Model*, 77 YALE L.J. 28 (1967); Hans Kelsen, *Law, State and Justice in the Pure Theory of Law*, 57 YALE L.J. 377 (1948); Karl Loewenstein, *The Bonn Constitution and the European Defense Community Treaties*, 64 YALE L.J. 805 (1955); Karl Loewenstein, *Law and the Legislative Process in Occupied Germany: I*, 57 YALE L.J. 724 (1948); Karl Loewenstein, *Law and the Legislative Process in Occupied Germany: II*, 57 YALE L.J. 994 (1948); Inga S. Markovits, *Civil Law in East Germany—Its Development and Relation to Soviet Legal History and Ideology*, 78 YALE L.J. 1 (1968); and Pradyumna K. Tripathi, *Free Speech in the Indian Constitution*:

*Review*, the other leading law review at the time and since, published a similar number of articles raising comparative constitutional topics.<sup>29</sup> When it was time to run a series of tributes to Justice Felix Frankfurter, *The Yale Law Journal* invited a noted judge from another country to write one of the tribute essays,<sup>30</sup> and the *Harvard Law Review* did the same in their tribute to Justice Frankfurter.<sup>31</sup> When major constitutional developments arose overseas, such as the creation of the innovative French Constitution of the Fifth Republic in 1958, law reviews usually ran an article discussing them.<sup>32</sup> Other law reviews of similar stature had a similar percentage and prominence of comparative constitutional law articles.<sup>33</sup> Even outside of the elite law reviews, there were many articles discussing comparative constitutional themes—albeit slightly fewer articles than in the top law reviews—and certainly more than during the Fall Era of comparative constitutional law.<sup>34</sup>

These articles discussing comparative constitutional themes were featured

*Background and Prospect*, 67 YALE L.J. 384 (1958).

29. Of the 694 articles published in the *Harvard Law Review* between 1945 and 1972, sixty-seven touched upon issues of comparative constitutional law. In addition to the Erwin Griswold articles cited in note 8, *supra*, for other notable examples see John Clarke Adams & Mauro Cappelletti, Comment, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966); Jeffrey M. Albert, *Constitutional Adjudication Without a Constitution: The Case of Israel*, 82 HARV. L. REV. 1245 (1969); Jerome Alan Cohen, *The Chinese Communist Party and Judicial Independence: 1949-1959*, 82 HARV. L. REV. 967 (1969); Morris R. Cohen, *Italian Contributions to the Philosophy of Law*, 59 HARV. L. REV. 577 (1946); Carl J. Friedrich, *The New French Constitution in Political and Historical Perspective*, 72 HARV. L. REV. 801 (1959); Walter Gellhorn, *Settling Disagreements with Officials in Japan*, 79 HARV. L. REV. 685 (1966); W. Barton Leach, Comment, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797 (1967); Karl Loewenstein, *Reconstruction of the Administration of Justice in American-Occupied Germany*, 61 HARV. L. REV. 419 (1948); Edward McWhinney, *Judicial Restraint and the West German Constitutional Court*, 75 HARV. L. REV. 5 (1961); and Roscoe Pound, *Comparative Law and History As Bases for Chinese Law*, 61 HARV. L. REV. 749 (1948).

30. Owen Dixon, *Mr. Justice Frankfurter: A Tribute from Australia*, 67 YALE L.J. 179 (1957).

31. Lord Evershed, *Mr. Justice Frankfurter*, 76 HARV. L. REV. 3 (1962).

32. See, e.g., Friedrich, *supra* note 29.

33. For some prominent examples, see, for example, José A. Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147 (1967); Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CAL. L. REV. 1017 (1970); Cornelius P. Cotter, *Constitutionalizing Emergency Powers: The British Experience*, 5 STAN. L. REV. 382 (1953); Cornelius P. Cotter, *Emergency Detention in Wartime: The British Experience* 6 STAN. L. REV. 238 (1954); Kenneth Culp Davis, *The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence*, 61 COLUM. L. REV. 201 (1961); Herman Finer, *The British System*, 18 U. CHI. L. REV. 521 (1951); Lon L. Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157 (1949); John N. Hazard, *The Soviet Union and a World Bill of Rights*, 47 COLUM. L. REV. 1095 (1947); Paul G. Kauper, *The Constitutions of West Germany and the United States: A Comparative Study*, 58 MICH. L. REV. 1091 (1960); Hans Kelsen, *On the Basic Norm*, 47 CAL. L. REV. 107 (1959); Viscount Kilmuir, *Justice Jackson and Nuremberg—A British Tribute*, 8 STAN. L. REV. 54 (1955); Karl Loewenstein, *The Union of Western Europe: Illusion and Reality—An Appraisal of the Methods: Part I*, 52 COLUM. L. REV. 55 (1952); Karl Loewenstein, *The Union of Western Europe: Illusion and Reality—An Appraisal of the Methods: Part II*, 52 COLUM. L. REV. 209 (1952); Symposium, *Man's Right to Knowledge*, 54 COLUM. L. REV. 710 (1954); M. Ramaswamy, *Constitutional Developments in India 1600-1955*, 8 STAN. L. REV. 326 (1955); and Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319 (1947).

34. For some prominent examples in these journals, see Bernard Green, *Federalism and the Administration of Criminal Justice: The Treatment of Obscenity in the United States, Canada and Australia*, 51 KY. L.J. 667 (1963); Frank R. Lacy, *Yugoslavia: Practice and Procedure in a Communist Country*, 43 OR. L. REV. 1 (1963); and Yasuo Tokikuni, *Obscenity and the Japanese Constitution*, 51 KY. L.J. 703 (1963).

in some of the most prominent locations for academic debate in American legal scholarship. Consider, first of all, the content of the annual Forewords to the *Harvard Law Review*, first published during the Rise Era.<sup>35</sup> These Forewords “are widely taken to be good indications of the state of the field [of constitutional law],”<sup>36</sup> and have “a considerable prestige and influence.”<sup>37</sup> During this period, many of these Forewords touched on comparative constitutional themes.<sup>38</sup>

In another sign of the role of comparative constitutional law during the Rise Era—a topic that will be discussed in greater detail in Part III—major scholars of constitutional law of all sorts were writing articles discussing comparative constitutional law. Lectures and essays by Chief Justice Warren were published for a general audience in places like *Fortune Magazine*, and Chief Justice Warren also spoke about comparative constitutional law in a speech reproduced in the *Kentucky Law Journal*.<sup>39</sup> Noted Senator William Fulbright wrote in the same journal about the importance of promoting constitutionalism around the world for American foreign policy.<sup>40</sup> As mentioned earlier, Dean Erwin Griswold of Harvard Law School wrote several articles with comparative constitutional themes.<sup>41</sup> Kenneth Karst, who wrote one of the leading articles justifying many of the Warren Court’s privacy decisions,<sup>42</sup> wrote about Latin American constitutional law.<sup>43</sup> Moreover, when a field of scholarship begins to increase in size and prominence, it goes through moments of significant self-definition. This type of methodological debate and angst about comparative constitutional law appeared even in the mainstream, general interest law reviews of the day, like the *Columbia Law Review*<sup>44</sup> and the *Harvard Law Review*.<sup>45</sup>

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35. Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 463 (1994) (“Since 1951 the editors of the *Harvard Law Review* have selected a prominent scholar of constitutional law to write a ‘Foreword’ to the *Review*’s annual survey of the work of the Supreme Court.”).

36. *Id.*

37. *Id.* at 464.

38. See, e.g., Erwin N. Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 81-82 (1960) (discussing the social situation of British judges); Mark DeWolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 93 (1953) (discussing a British House of Lords decision); Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143, 163 (1964) (discussing British federalism); Arthur E. Sutherland, Jr., *The Supreme Court, 1956 Term—Foreword: The Citizen’s Immunities and Public Opinion*, 71 HARV. L. REV. 85, 86 (1957) (discussing British rules about Communist sympathizers).

39. Earl Warren, *Address at the World Conference on World Peace Through the Rule of Law, Athens, Greece (July 1, 1965)*, 53 KY. L.J. 5 (1965).

40. William J. Fulbright, *Foreign Policy—Old Myths and New Realities*, 53 KY. L.J. 13 (1965).

41. See *supra* note 8.

42. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

43. Kenneth L. Karst, *Teaching Latin American Law*, 19 AM. J. COMP. L. 685, 685 (1971). Karst was a member of the Board of Editors for *The American Journal of Comparative Law*.

44. Kenneth S. Carlston, *The Teaching of International Law in Law Schools*, 48 COLUM. L. REV. 516 (1948); Ernst Rabel, *On Institutes for Comparative Law*, 47 COLUM. L. REV. 227 (1947); John R. Stevenson, *Comparative and Foreign Law in American Law Schools*, 50 COLUM. L. REV. 613 (1950).

45. Angelo Piero Sereni, *On Teaching Comparative Law*, 64 HARV. L. REV. 770 (1951).

Given the interest in comparative constitutional themes by American law professors in their writing, it should come as no surprise that many law schools featured new classes touching on these themes. In the early part of the 1950s, a series of new teaching materials related to comparative law more generally and comparative constitutional law in particular appeared for the first time.<sup>46</sup> The first law school to offer a comparative constitutional law class was the University of Alabama Law School, which offered a course billed as “a comparison of the American constitutional system with those of other nations, including a review of the political institutions on the background of the constitutional practice of various countries.”<sup>47</sup> Other schools created similar classes with a range of titles, from “Comparative Jurisprudence” at the University of California to “Comparative-Historical Method” at Harvard Law School.<sup>48</sup> But the content of the classes was substantially similar: an examination of the constitutional structures of the rest of the world.

In accord with this increased interest in infusing course offerings with classes on comparative law in general and comparative constitutional law in particular, American law schools also started to invite students and faculty from overseas to teach and collaborate with their American colleagues. At Yale Law School, for instance, several of the leading figures of the Israeli legal system enrolled as graduate law students around this time.<sup>49</sup> The law school also invited foreign faculty to become a part of the life of the law school: Otto Kahn-Freund of the London School of Economics became a regular visitor.<sup>50</sup> Notable foreign faculty also visited other American law schools for the first time: Julius Stone from Australia visited at Colorado, as did René David from France,<sup>51</sup> and Konrad Zweigert from Germany visited at Michigan.<sup>52</sup> Harvard Law School created a “Joseph Story Fellows” program to recruit young foreign academics to teach and write at the law school,<sup>53</sup> and also regularly invited Japanese law faculty to teach and visit.<sup>54</sup> The same was true of other law schools of all kinds, from Indiana to Tulane to Berkeley to Idaho.<sup>55</sup>

These new foreign visitors to law schools may have been mere visitors, but this was also the period when a substantial number of academic refugees from foreign countries played a substantial role in a number of American law

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46. See Max Rheinstein, *Teaching Tools in Comparative Law: A Book Survey*, 1 AM. J. COMP. L. 95, 95 (1952) (“Several books entitled comparative law or the like have appeared on the scene in recent years.”).

47. Stevenson, *supra* note 44, at 623.

48. *Id.* at 618.

49. Pnina Lahav, *American Moment[s]: When, How, and Why Did Israeli Law Faculties Come To Resemble Elite U.S. Law Schools?*, 10 THEORETICAL INQUIRIES L. 653, 660 (2009).

50. Joseph Dainow, *Exchange Opportunities for American and Foreign Law Teachers*, 9 J. LEGAL EDUC. 57, 57 (1956).

51. *Id.* at 60.

52. Alfred F. Conard & Eric Stein, *Foreign Law in Foreign Language*, 10 J. LEGAL EDUC. 232, 232 (1957).

53. Daniel R. Coquillette, *In Memoriam: Arthur T. von Mehren*, 119 HARV. L. REV. 1949, 1950 (2006).

54. Dainow, *supra* note 50, at 62.

55. See, e.g., *id.* at 62-63.

schools. Scholars like Max Rheinstein at the University of Chicago Law School and Rudolf Schlesinger enjoyed considerable success writing about comparative law, including sometimes about comparative constitutional law.<sup>56</sup> One refugee, Felix Frankfurter, held a position on the Supreme Court, and sometimes cited comparative constitutional law.<sup>57</sup> Indeed, in many ways it was the success of these refugees—and their failure to designate (domestic) successors, as John Langbein has noted<sup>58</sup>—that was part of the reason that comparative law in general (perhaps including comparative constitutional law) came to be seen as a “refugee field.”<sup>59</sup>

American law professors were also involved in advising other countries on the creation of their constitutional systems. Stanford Law School hosted a major conference related to the creation of the Indian Constitution and the Indian legal system.<sup>60</sup> Former Harvard Law School Dean Roscoe Pound advised pre-Communist China.<sup>61</sup> Arthur Von Mehren served as a visiting professor at the Indian Law Institute.<sup>62</sup> Stanford Law School Dean Carl B. Spaeth worked with leaders of the Indian bar on a range of public law issues in India.<sup>63</sup> And as a sign of how accepted comparative constitutional scholarship and pedagogy was, consider how uncontroversial all of these activities were, despite the fact that they took place during the McCarthy Era, when other American academics were fired for their writings about and interest in other countries.<sup>64</sup>

Of course, the prominence of comparative constitutional law in scholarship and pedagogy should not be overstated. Comparative constitutional law was far from the most substantial topic of discussion in American constitutional scholarship during the Rise Era. Most of the major pieces of constitutional law scholarship at the time were focused entirely on domestic constitutional law issues.<sup>65</sup> The most notable feature of the Rise Era was the

56. Langbein, *supra* note 16, at 547.

57. 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, 840-45 (2005) (discussing all of the opinions written by Justice Frankfurter that reference comparative constitutional law).

58. Langbein, *supra* note 16, at 547-48.

59. *Id.* at 547.

60. Lawrence R. Ebb, *Preface to PUBLIC LAW PROBLEMS IN INDIA: A SURVEY REPORT*, at v, v (Lawrence R. Ebb ed., 1957).

61. Arthur Taylor von Mehren, *Roscoe Pound and Comparative Law*, 13 AM. J. COMP. L. 507, 515-16 (1964). Pound later wrote an article about his experiences. Pound, *supra* note 29; see also Mitchel Lasser, *Comparative Readings of Roscoe Pound's Jurisprudence*, 50 AM. J. COMP. L. 719, 728 (2002) (“The depth and breadth of Pound’s multinational and trans-historical field of substantive and theoretical references suggest that Pound might possess a remarkably panoramic vista for large-scale comparative analysis.”).

62. Arthur Taylor von Mehren, *Law and Legal Education in India: Some Observations*, 78 HARV. L. REV. 1180 (1965).

63. Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447, 454 n.43 (2004).

64. See PAUL F. LAZARSFELD & WAGNER THIELENS, JR., *THE ACADEMIC MIND* 70 (1958).

65. See, e.g., Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Arthur E. Sutherland, *The Supreme Court and the General Will*, 82 PROC. AM. ACAD. ARTS & SCI. 169 (1953).

high level of interest in comparative constitutional law scholarship and teaching during this period—and how much that contrasted with what was to follow.

### B. *The Fall of Comparative Constitutional Law*

As rapidly as comparative constitutional law ascended in American law schools, it disappeared just as quickly from 1972 until 1999—what this Article calls the “Fall Era,” a twenty-seven year period similar in length but radically different in focus from the Rise Era. As Part III discusses in greater detail, in place of comparative constitutional law came attention to the Supreme Court and the changes in domestic constitutional law resulting from the Court’s decisions. Consider, for instance, the pages of the nation’s law reviews. The *Harvard Law Review* went a few decades after 1972 before publishing another article on comparative constitutional issues. Only two *Harvard Law Review* Forewords during the Fall Era discuss comparative constitutional law.<sup>66</sup> Outside of the highest ranked law reviews, the change was similar and even more dramatic.

While during the Rise Era comparative constitutional law was a topic of scholarly interest to all sorts of scholars, during the Fall Era hardly any major, notable legal scholar outside of the specialized field of comparative constitutional law took any interest in the subject.<sup>67</sup> The attention of American legal scholars turned instead to the Warren Court and the developments in constitutional law generated by Warren Court decisions. Every single year during the Fall Era, the *Harvard Law Review* and *The Yale Law Journal* published at least one article about a Supreme Court case and one article about the career or recent death of a scholar who wrote about the Supreme Court. This scholarship about the Warren Court was so substantial that there began to be substantial scholarship about Warren Court scholarship. D.C. Circuit Judge J. Skelly Wright took to the pages of the *Harvard Law Review* to write about “Professor Bickel, the Scholarly Tradition, and the Supreme Court.”<sup>68</sup> Anthony Lewis, the Supreme Court reporter for *The New York Times*, covered Bickel’s Holmes Lectures.<sup>69</sup>

Just as it was earlier important to qualify the limitations of the increase in attention to comparative constitutional law during the Rise Era, so too it is

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66. Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 17 (1980) (discussing free speech in Britain); Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 34 (1974) (discussing a British case related to executive privilege).

67. David Currie is an exception. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (1994); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). Currie’s contribution to our understanding of the German Basic Law was memorialized in a symposium issue dedicated to his work. See, e.g., Peter E. Quint, *David Currie and German Constitutional Law*, 9 GERMAN L.J. 2081 (2008). Gerhard Casper, later Dean of the University of Chicago School of Law and President of Stanford University, was another comparative constitutional law scholar writing at the time who was integrated into other constitutional and legal debates. See, e.g., Gerhard Casper, *The Constitutional Organization of Government*, 26 WM. & MARY L. REV. 177 (1985).

68. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

69. Anthony Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305 (1961).

important to note that even during the Fall Era there was still some lingering interest in comparative constitutional law—just not much. The Fall Era was the period when interest in international law grew substantially, as Part III discusses in greater detail, and part of that discussion inevitably involved some discussion of comparative constitutional law. More importantly and more directly related, this was roughly the same period as the creation of the law and development movement,<sup>70</sup> which represented essentially the exclusive source of interest in comparative constitutional law during the Fall Era.

But, for several reasons, the rise of the law and development movement was not enough to stem the disappearance of comparative constitutional law scholarship during the Fall Era. The law and development movement was a much more isolated and much less popular movement than, among other movements, the comparative constitutional law movement during the Rise Era. A few law schools—primarily Yale and Wisconsin—focused their energies on law and development, but most law schools had neither a single scholar nor a single class focused on the topic. Perhaps a decade or less after its creation, whatever there was of the law and development movement faded and almost disappeared, although there are some signs of a small recent revival.<sup>71</sup>

At the same time that comparative constitutional law was disappearing from the scholarship of law professors, it was also disappearing from the classes being offered by these professors. Law schools instead began to offer classes in fields related to the decisions of the Warren Court.<sup>72</sup> Searching through the course offering directories shows almost no listings of comparative constitutional classes, but lots of listings of new constitutional law classes.

In terms of the role of comparative constitutional law during the years after World War II, then, there were two clear periods. The first period featured broad and robust interest in comparative constitutional law. Journals of all sorts published articles on the topic. Faculty of all kinds wrote on the topic. Students of all backgrounds enrolled in classes on the topic. During the second period, almost the complete opposite was true. Very few articles were published. Very few faculty wrote about the topic. Classes on the topic were scaled back and in some places eliminated. Such a dramatic change in such a relatively short period of time leads to the obvious question: what happened?

### III. EXPLAINING THE RISE AND FALL OF COMPARATIVE CONSTITUTIONAL LAW

The rise and fall of comparative constitutional law took all of a

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70. See Brian Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 470 (1995) (book review) ("Law and development has been a field of academic study for about thirty years.").

71. See, e.g., DAVID M. TRUBEK, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74, 81 (David M. Trubek & Alvaro Santos eds., 2006).

72. See Gordon, *Geologic Strata*, *supra* note 15, at 361 ("The constitutional law of free speech and religion, of criminal procedure, and of federal jurisdiction have become topics so large as to have been broken off and made into separate courses.").

generation. Such a dramatic story is more than mere accident. This Part explores this narrative of comparative constitutional law and the reasons for its initial success and eventual disappearance. In doing so, it highlights some of the dynamics that lead to the rise and fall of jurisprudential movements more generally, dynamics that I will discuss in greater detail in future writings. As this Part discusses, a crucial variable—perhaps not the only variable, but an indispensable one—in explaining the rise and fall of comparative constitutional law was its relationship with elite sectors of the legal profession. A strong relationship with the profession might not be a sufficient basis for a movement’s success, but it is a helpful one. This relationship between the legal profession and a scholarly movement has been noted in passing before,<sup>73</sup> but this Part will explain this strong relationship in the context of comparative constitutional law in greater detail.

This relationship in the context of comparative constitutional law was created because of the structure of the production of legal scholarship, on both the “supply side” and the “demand side.” By the “supply side,” I refer to those who actually produce the classes and scholarship—law professors. By the “demand side,” I mean those who consume the classes and scholarship of law professors—law students and lawyers.

On the “supply side,” during the Rise Era, the most accomplished personnel of the legal academy were coming from a legal profession that was itself more interested in the rest of the world, and thus had practiced in areas more tied to the rest of the world. The profession affects the pedagogical and scholarly agenda of the law professor because it provides the developments (and in the case of the elite profession, the most important developments) that serve as the potential topics about which law professors write and teach. During the Rise Era many of the more interesting developments were transpiring outside of the United States. The comparative orientation of the profession, then, was “jurisgenerative”<sup>74</sup> in the sense of generating law and debates about law.

On the “demand side,” too, the profession mattered enormously in creating interest in comparative constitutional law during the Rise Era and discouraging interest during the Fall Era. Part of the reason for the decline of classes about comparative constitutional law during the Fall Era, for instance, was because of the decline in student interest in comparative constitutional topics; similarly, part of the increase in classes during the Rise Era was due to student interest in comparative constitutional law. Law students are the consumers of the pedagogy of law schools. These changes in student preferences also affected the production of scholarship. Law students, after all, are the ones who decide which articles to publish, and changes in their interests

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73. See, e.g., Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1539 (1991) (“[T]he academy has had difficulty understanding how people could be interested in the law without being interested in influencing policymakers . . . . The concern of law schools with those presently holding power, or likely to do so in the near future, makes the more radical program associated with critical legal studies seem disconnected from the mission of the law school.”).

74. Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 33 (1983).

and priorities affected which articles were accepted (at all and by the most prestigious journals) during the Rise and Fall Eras.

The elite parts of the legal profession were also partly responsible for the change in interest in comparative constitutional law because of a shift in the allocation of resources. Resources from elite parts of the profession shifted from legal issues outside of the United States to domestic federal public law litigation. The legal arms of groups like the Ford Foundation shifted their focus from creating or recreating domestic legal systems in the rest of the world to funding federal litigation and law school clinics in the United States.

This shift in focus in law schools was also affected by the behavior of law professors. During the Rise Era, professors writing about comparative constitutional law were producing “integrated” scholarship—scholarship that speaks to what a broader community of scholars *and* American legal professionals might find interesting.<sup>75</sup> Scholarship will speak more to the profession if it is normative rather than descriptive—telling lawyers and judges what they can and should do—which is why so much of legal scholarship is in fact normative. The revival of constitutional history, for instance, was assisted by the ability of constitutional historians to speak about what courts should decide in actual cases in American courts.<sup>76</sup> For comparative constitutional law today, integrated scholarship may be biased in favor of discussing what comparative constitutional law means for *American* institutions.

The production of integrated scholarship during the Rise Era also led to a wider range of law schools and law professors finding comparative constitutional law scholarship useful. The elite and wealthy law schools tend to have faculty who are more interested in intellectual luxury goods—scholarship with a less obvious relationship to the profession.<sup>77</sup> But if this elite, luxury scholarship is integrated into other fields of scholarship and made of interest to the profession, then students and faculty at other schools will find it of interest. It will thus attract the interest of a broader range of law professors, increasing the status of the field in law schools, exposing more students to the field, and

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75. I used this concept in an earlier article where I was asked to respond to an article by Mark Tushnet about comparative constitutional law. See David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445, 448 (2004) (“We need to move beyond ‘all or nothing’ scholarship on this topic and find a way to create a principled system of integrative activities. Consequently, the best way forward is to begin considering how to create a world where the domestic and foreign *are* integrated, but integrated in the optimal manner.”). Imperialism might be good for the power of all intellectual fields. See Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53 (1985) (discussing how the imperialism of economics has helped that field). But what is different about legal scholarship is that its imperialism must extend not just to other fields of scholarship, but to the practice of law itself.

76. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 545 (2006) (“Drawing on the work of pioneer conservative academics like Robert Bork and Raoul Berger, originalism became a central organizing principle for the Reagan Justice Department’s assault on what it regarded as a liberal federal judiciary.”).

77. See J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 951 (1996) (“It is important to recognize that the picture is somewhat different at non-elite law schools. Interdisciplinary scholarship has gained less of a foothold there; it is not hegemonic in the way it has become at some of the fancy schools.”). It is hard to argue that this scholarship is really “hegemonic” at these schools since most of the scholarship being produced by faculty there is not substantially interdisciplinary—even though most new faculty might be doing this kind of work.

thereby making the profession more interested as well.

Casting the net widely by producing integrated scholarship can also attract scholars of high intellectual status, which can help the field.<sup>78</sup> If renowned scholars are writing about issues related to a particular jurisprudential movement, then the movement is more likely to attract other scholars to write about the area and to attract students to take classes in the area. The movement is also more likely to gain the attention of the profession, which is more likely to have heard of the professor—and therefore the area—because of the high status of the professor. Simply put, during the Rise Era there was much more integrated scholarship about comparative constitutional law of interest to both academics and legal professionals; during the Fall Era there was much less.

The prominence of comparative constitutional law was also influenced by developments in cognate disciplines. Cognate disciplines produce data and information that legal scholars can then integrate into a more transferable series of programmatic and practical normative lessons for other scholars and for the profession. For instance, the revival of constitutional history was sparked in part by the resurgence of interest in legal history among history departments. It might be hard to remember now, but Daniel J. Boorstin had it right in 1958 when he called the field of legal history a “Dark Continent.”<sup>79</sup> But since then, “the turn to history”<sup>80</sup> has been assisted by the resurgence of legal history in history departments.<sup>81</sup> During the Rise Era, scholars writing about constitutional law, comparative law, and in political science departments were all interested in comparative constitutional law. During the Fall Era, almost none of these fields cared about comparative constitutional law.

This relationship between the professors and the profession is not meant to exclude the role that larger political and social developments played in the change from the foreign to the domestic. During the Rise Era, the country in general was focused more on the rest of the world; during the Fall Era, our attention turned inward, and that is part of the reason why our law schools did as well.

#### A. *The Rise Era*

##### 1. *The Legal Profession and the Rise Era*

The American legal profession was fascinated by the rest of the world during the Rise Era, and once World War II ended, it turned its attention to legal developments abroad. When it came to comparative constitutional law in

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78. See Neil Gross, *Becoming a Pragmatist Philosopher: Status, Self-Concept, and Intellectual Choice*, 67 AM. SOC. REV. 52 (2002).

79. DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 399 (1958).

80. Kalman, *supra* note 17, at ch. 5 (discussing the “turn to history” among law professors).

81. See Stephen Botein, *Professional History Reconsidered*, 21 AM. J. LEGAL HIST. 60, 60-66 (1977) (reviewing MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976), and JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1977)) (discussing how the state of American legal history has “improved markedly” since Boorstin’s comments).

particular, the years after World War II were the most active years the world had ever seen. Samuel Huntington has written about “waves of democracy,”<sup>82</sup> but there have also been similar waves of constitutionalism—with the most substantial one transpiring in the years after World War II. In the first few decades after World War II constitutional law spread around the world, from the former Axis powers (Japan in 1947, Italy in 1948, and Germany in 1949), to the formerly defiantly anti-constitutionalist France (in 1958), and so on.

These developments outside of the United States captured the attention and commanded the energies of the legal profession inside of the United States. The profession was intimately involved in what Chief Justice Earl Warren in 1955 called a “revival of comparative jurisprudence.”<sup>83</sup> As mentioned before, Chief Justice Warren traveled the world to give speeches about comparative constitutional law. He wrote an essay for *Fortune Magazine* about this burst of constitutional activity around the world, and noted that “American lawyers are already taking an active part.”<sup>84</sup> Warren wrote essays for a range of law reviews about the spread of constitutionalism around the world, including for a new academic publication focused exclusively on comparative law, the *American Journal of Comparative Law*.<sup>85</sup>

He was not alone: Justice Felix Frankfurter, himself born in Austria<sup>86</sup> and a frequent consumer of comparative constitutional law in his opinions,<sup>87</sup> wrote a notable scholarly Foreword—not for the *Harvard Law Review*, but for the *American Journal of Comparative Law*—discussing the historical linkages between the American Supreme Court and the constitutional discussions of other countries.<sup>88</sup> Justice Douglas wrote a book on the constitutional law of India.<sup>89</sup> Justice Jackson delivered lectures and wrote about comparative constitutional law.<sup>90</sup> The Supreme Court cited comparative constitutional law with great frequency.<sup>91</sup> And it was not just the Supreme Court that was interested in legal developments in the rest of the world. American judges hosted visits from foreign constitutional dignitaries in the United States, such as when Justice Frankfurter and Learned Hand met with visitors from India to discuss the new Constitution of India.<sup>92</sup>

Because the profession was interested in the rest of the world, a greater comparative orientation in law schools naturally followed. Large numbers of

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82. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

83. Warren, *supra* note 3.

84. *Id.*

85. See Earl Warren, *Preface*, 5 AM. J. COMP. L. 1 (1956).

86. HELEN SHIRLEY THOMAS, *FELIX FRANKFURTER: SCHOLAR ON THE BENCH* 4 (1960).

87. See Calabresi & Zimdahl, *supra* note 57, at 839 (noting that Justice Frankfurter, as well as Justice Breyer, “frequently looked to foreign sources of law for guidance during this period and have advocated their use”); *id.* at 840-85 (discussing all of the opinions written by Justice Frankfurter that reference comparative constitutional law).

88. Felix Frankfurter, *Foreword*, 3 AM. J. COMP. L. 1 (1954).

89. DOUGLAS, *supra* note 6.

90. See Knowles, *supra* note 7.

91. See Calabresi & Zimdahl, *supra* note 57, at 755-810.

92. B.N. RAU, *INDIA’S CONSTITUTION IN THE MAKING* 302-08 (1960).

law professors, before and even during their time teaching, had experience interacting with the rest of the world. Regardless of whether the average member of the legal profession had spent time abroad, many of the elite members of the profession who then became law professors had international experience. Noted constitutional scholar Paul Carrington of Duke Law School, who joined the Duke faculty in 1957, served in the U.S. Army during the Korean War.<sup>93</sup> Eugene Rostow, professor at Yale Law School starting in 1937, and Dean from 1955 until 1965, worked on the Lend-Lease Program in the State Department and later worked as a policy advisor to Assistant Secretary of State Dean Acheson.<sup>94</sup> Kingman Brewster, hired to teach at Harvard Law School in 1950 and later the President of Yale University, worked for a year for the General Counsel of the Office of Special Representative in Europe.<sup>95</sup>

Between 1954 and 1955, when Harvard hired three tenure-track faculty members, only one had clerked, while another had served as an ambassador in Europe from 1950 to 1951.<sup>96</sup> In 1964, the one new law professor Stanford hired had served as a special assistant to an undersecretary of state.<sup>97</sup> With experiences overseas before becoming law professors, it was natural that the research and pedagogical agenda of law professors at their peak during this time was focused on the rest of the world.

With all of the constitutional law-related events transpiring around the world, too, there was certainly plenty of grist for the scholarly mill. Within a few years, the three theretofore *most* proudly anti-constitutionalist countries in the world—Japan, Germany, and Italy—all adopted constitutions, and each adoption generated a wave of scholarly commentary.<sup>98</sup> Law was a central part in the globally discussed battle over race in South Africa, which prompted commentaries from Yale Law Professor Grant Gilmore and Harvard Law Dean Erwin Griswold, among others.<sup>99</sup> France created its most substantial constitution, the Constitution of the Fifth Republic, in 1958, prompting an immediate article in the *Harvard Law Review*.<sup>100</sup>

## 2. *The Structure of Scholarship During the Rise Era*

During the Rise Era, scholarship on comparative constitutional law

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93. See *Faculty Profiles: Paul D. Carrington*, DUKE LAW, <http://www.law.duke.edu/fac/carrington/cv> (last visited Oct. 26, 2010).

94. See Todd S. Purdum, *Eugene Rostow, 89, Official At State Dept. and Law Dean*, N.Y. TIMES, Nov. 26, 2002, at C19; *Eugene Rostow Oral History Description*, MILLER CENTER FOR PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/oralhistories/detail/2944> (last visited Nov. 29, 2010).

95. ASS'N OF AM. LAW SCH., DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1950-1951, at 61 (1950).

96. Milton Katz served as an ambassador and previously had been a professor at Harvard from 1940-1950. ASS'N OF AM. LAW SCH., DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1955, at 23-24 (1955). David Herwitz and Donald Turner were also hired. *Id.* at 141, 159, 275.

97. Bayless Manning served in this capacity from 1962-1963. ASS'N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS 1965, at 237 (1965).

98. See, e.g., Adams & Cappelletti, *supra* note 29; Deutsch, *supra* note 28; Friedrich, *supra*, note 29; Gellhorn, *supra* note 29; McWhinney, *supra* note 29.

99. See Gilmore, *supra* note 27; Griswold, *Coloured Vote*, *supra* note 8.

100. See Friedrich, *supra* note 29.

discussed American constitutional law as well, and this scholarship featured articles by prominent scholars from a range of fields and areas. During the Fall Era, comparative constitutional law discussed a more specialized range of topics and featured articles by a more specialized group of scholars.

During the Rise Era, the scholarship that addressed comparative constitutional law issues touched on a wide range of concerns, thereby creating interest in comparative constitutional law issues across a large cross-section of law schools and the legal profession. This comparative constitutional scholarship that was of use to other law professors and to the profession grew out of an alliance between two key scholarly factions: the more specialized comparative constitutional scholars who wrote about the American constitutional implications of their scholarship, and the more traditionally American constitutional scholars who integrated comparative information into their otherwise purely American constitutional law.

The more specialized comparativists writing at the time—scholars like Karl Loewenstein and Arthur Taylor von Mehren at Harvard, and Edward McWhinney at Toronto—sometimes wrote articles with non-comparativists, and they often wrote for a non-comparativist audience. Harvard Law Professor and later Massachusetts Supreme Court Justice Benjamin Kaplan, for example, wrote an article about civil procedure and public norms in Germany and America with von Mehren.<sup>101</sup> McWhinney wrote articles about the German constitutional system and its lessons for the United States.<sup>102</sup> This meant that comparative constitutional law was creating scholarship of relevance to a broad range of those in law schools and the legal profession.

At the same time, those professors with the greatest reputations as scholars of American law were writing articles that included discussions of comparative constitutional law developments. During the Rise Era, Harvard Law School Dean Erwin Griswold wrote articles with comparative constitutional themes,<sup>103</sup> as did Grant Gilmore<sup>104</sup> and Justice Douglas.<sup>105</sup> Walter Gellhorn, the leading administrative law scholar of the time, wrote a series of articles about comparative administrative and constitutional law.<sup>106</sup> Lon Fuller wrote about the emerging genre of Marxist and constitutional legal theory in Europe.<sup>107</sup> Future General Counsel of the NAACP Jack Greenberg wrote about the constitutional law of human rights in Europe.<sup>108</sup> Other prominent scholars

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101. See Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 HARV. L. REV. 1193, 1443 (1958).

102. See, e.g., McWhinney, *supra* note 29.

103. See *supra* note 8 and accompanying text.

104. See, e.g., Gilmore, *supra* note 27.

105. Douglas, *supra* note 24.

106. See Walter Gellhorn, *Citizens' Grievances Against Administrative Agencies—The Yugoslav Approach*, 64 MICH. L. REV. 385 (1966); Walter Gellhorn, *The Norwegian Ombudsman*, 18 STAN. L. REV. 293 (1966); Walter Gellhorn, *The Ombudsman in New Zealand*, 53 CAL. L. REV. 1155 (1965); Walter Gellhorn, *Review of Administrative Acts in the Soviet Union*, 66 COLUM. L. REV. 1051 (1966); Gellhorn, *supra* note 29; Gellhorn, *supra* note 28.

107. See Fuller, *supra* note 33.

108. See Jack Greenberg & Anthony R. Shalit, *New Horizons for Human Rights: The European Convention, Court, and Commission of Human Rights*, 63 COLUM. L. REV. 1384 (1963).

like William Van Alstyne and an elderly Roscoe Pound also wrote about comparative issues as part of their scholarship.<sup>109</sup>

These articles also appeared in the nation's leading law reviews, a feature of the Rise Era discussed earlier in Part II. The combination of the leading law professors of all kinds of the time writing in the nation's leading law reviews was very helpful for comparative constitutional law. The Dean of Harvard Law School, Erwin Griswold, wrote about the area for the *Harvard Law Review*; one of the leading figures in the history of American law, Roscoe Pound, also wrote about it for the *Harvard Law Review*; a symposium on the area in *The Yale Law Journal* featured a keynote by a noted scholar and then member of the Supreme Court, Justice Douglas. This was good for comparative constitutional law. It should also be noted that political science at the time—unlike during the Fall Era—was very much interested in comparative constitutional law. There were many articles on the topic, with information and arguments that could be used by law professors as part of their Rise Era integrative mission.<sup>110</sup>

### 3. *The Larger Political Environment*

During the Rise Era, even beyond the interests of the profession, the interests of the country more generally focused on the rest of the world. The Rise Era lasted from 1945 to 1972, a period when Americans were much more interested in developments abroad than they would be during the Fall Era. These general social and political dynamics are particularly important for constitutional law scholarship and pedagogy in the United States, since constitutional law in the legal academy tends to be more related to politics in the United States than independent of it as in Europe.<sup>111</sup>

At the time that law schools were focusing more and more on constitutional developments abroad, the country was as well. A few months before the Supreme Court decided *Brown v. Board of Education*,<sup>112</sup> the country was focused intensely on issues related to the rest of the world. When asked by Gallup what constituted the “most important problem” facing the nation—in a poll permitting multiple responses to this question—a full fifty-seven percent answered peace, seventeen percent the atom bomb, sixteen percent Asia/Korea/Indochina, nine percent war/Russia.<sup>113</sup> Domestic concerns rated very low—things like civil rights rated very low (two percent), and though economic concerns rated slightly higher (sixteen percent for

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109. See, e.g., William W. Van Alstyne, *International Law and Interstate River Disputes*, 48 CAL. L. REV. 596 (1960); Pound, *supra* note 29; Roscoe Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70 (1955).

110. See, e.g., Taylor Cole, *Three Constitutional Courts: A Comparison*, 53 AM. POL. SCI. REV. 964 (1959); David Deener, *Judicial Review in Modern Constitutional Systems*, 46 AM. POL. SCI. REV. 1079 (1952).

111. See, e.g., Robert Post, *Constitutional Scholarship in the United States*, 7 INT'L J. CONST. L. 416 (2009); Alexander Somek, *The Indelible Science of Law*, 7 INT'L J. CONST. L. 424 (2009).

112. 347 U.S. 483 (1954).

113. Gallup Org., Gallup Poll #528 (Mar. 17, 1954), available at <http://institution.gallup.com/documents/questionnaire.aspx?study=AIPO0528>.

depression/inflation/recession), they were still far below foreign concerns.<sup>114</sup> With occasional and brief exceptions, the country's focus overseas remained constant throughout the immediate years to come.<sup>115</sup>

The country's international focus was part of the reason the Supreme Court was not as salient in law schools as it would later become. During the Rise Era, "the public was more focused on issues as to which the Supreme Court in particular and constitutional adjudication in general were largely spectators."<sup>116</sup> This was the era of the Berlin Wall, the Cuban Missile Crisis, and Red China. There was only so much time for the domestic when the country felt that the foreign threatened its very existence.

Not only was the country focused more on the rest of the world, but the focus was of a type that encouraged interest in comparative constitutional law. Simply put, a form of cultural and legal imperialism is good for interest in comparative constitutional law, for better or for worse. Given the normative bias of the American law professor, when other countries have constitutional cultures similar to the United States, explaining the similarities is less interesting to law professors than pointing out differences and looking for normative lessons to be gleaned. And the desire to export normative differences rather than to import them also encourages certain types of comparative legal scholarship and pedagogy in order to attract the interest of those in power wishing to export and project American power of all sorts.

Thus it should not be surprising that the Rise Era was an era of greater American exceptionalism, both inside and outside of the world of the law. Outside of the world of the law, the Rise Era was the period of the Marshall Plan and the American encouragement of economic development in Europe. It was the period of the Truman Doctrine and efforts to protect and encourage democracies around the world. It was also the period of the Korean and Vietnam Wars and the projection of American power into remote parts of the world that had interested the United States only in very minor ways before.

This American exceptionalism found its way into the legal culture's treatment of comparative constitutional law. The articles in the new *American Journal of Comparative Law* and Erwin Griswold's *Harvard Law Review* essays on comparative constitutional law were often about exporting American constitutional ideas to the rest of the world. And, notwithstanding some Supreme Court citations to comparative constitutional law that did not privilege

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114. *Id.*

115. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 37-38 (2006) ("The reality is that in the 1950s, the public's attention was focused less on race and equality than on the Cold War. What concerned—obsessed—the American people were the foreign policy and defense issues of nuclear disarmament, relations with the Soviet Union and Red China, the space race, tensions over Quemoy and Matsu, the Suez crisis, and the Hungarian revolution, among others.").

116. *Id.* at 40; see also *id.* ("Apart from the Court's intervention in Truman's seizure of the steel mills during the Korean War, the Court stayed away from the foreign policy crises of the 1950s and early 1960s, and in the later 1960s and early 1970s the Court was involved with the Vietnam War only peripherally, as it dealt repeatedly with questions of protest and occasionally with the issue of conscription.").

the American constitutional experience,<sup>117</sup> some of the more notable citations to comparative constitutional law (in cases like *Youngstown*) treated the foreign constitutional experience as the negative role model—the experience to avoid—and the American constitutional experience as the one to prioritize.<sup>118</sup>

One way or another, though, the debates around constitutional imperialism featured discussions of comparative constitutional law. And this meant that for every *Youngstown* decrying the constitutional experiences of other countries, there was a *Miranda* borrowing from them. One might prefer a comparative constitutional law that borrows to one that distinguishes, but even if the constitutional culture during this time featured some anti-borrowing, exceptionalist ideas, the discussions and interest this triggered were part of the reason there were more pro-borrowing ideas.

## B. *The Fall Era*

### 1. *The Legal Profession and the Fall Era*

#### a. *Federal Litigation and the Federal Clerkship*

When the legal profession was interested in the rest of the world during the Rise Era, the pedagogy and scholarship of the American law professor reflected this interest. Law professors came to teaching with their research agendas shaped by their experiences abroad. The legal profession cultivated this interest in the rest of the world, and law professors created a brand of scholarship that kept the legal profession interested in comparative constitutional scholarship. The story during the Fall Era is different, if more familiar. The attention of the profession turned toward domestic litigation, particularly the Warren Court. This turn meant that prominent law professors came from clerkships on the Warren Court, and the events of the day for law professors to write about related to the Warren Court. It meant that the profession was more supportive of scholarship related to the domestic constitutional issues decided by the Warren Court.

It might appear to everyone today that the legal profession has always focused on constitutional litigation in the Supreme Court, but that was not always the case. The interests of the profession turned inward toward domestic courts (particularly the Supreme Court) starting around the time of the Fall Era. Due substantially to the Warren Court, the work of the legal profession and of the Supreme Court became one of the defining *national* issues of the day, as

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117. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 488-89 (1966) (considering the experiences of a range of countries as a source of positive support for the rule announced by the Court).

118. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650-51 (1952) (Jackson, J., concurring) (contrasting the successful American constitutional experience of constraining emergency power with failed experiences elsewhere). For other examples during this time period using comparative constitutional law in this manner, see, for instance, *Rochin v. California*, 342 U.S. 165, 169 (1952) (referencing “English-speaking peoples”); *Wolf v. Colorado*, 338 U.S. 25, 29 (1949) (referencing “the English-speaking world”); and *Adamson v. California*, 332 U.S. 46, 67-68 (1947) (Frankfurter, J., concurring) (referencing “notions of justice of English-speaking people”).

“Richard Nixon largely ran against the Supreme Court in 1968.”<sup>119</sup> While several decades ago the Supreme Court had been doing very little to gain attention, now the Court was a major topic during a presidential election.<sup>120</sup> As *Newsweek* reported about the Warren Court, “For the sheer breadth and depth of its impact on the life of the nation, its work is unprecedented.”<sup>121</sup>

And so it was that the profession focused its energies on the process of domestic litigation, particularly in federal courts, much more than in previous periods. As the interests of the profession changed, so did the backgrounds of those who became law professors. The new scholars of the previous generation had practiced law and served overseas in some capacity. By contrast, during the Fall Era, clerking for a judge (particularly a federal judge) for the first time became a broadly recognized status symbol for aspiring elite lawyers and therefore for potential law professors.<sup>122</sup> As early as 1971, one article in the *Harvard Law Review* noted that the trend was for “[t]he background[s] of law professors [to be] strikingly homogeneous; almost all were law review, [and] many clerked for Supreme Court Justices or other notable judges . . . .”<sup>123</sup>

Consider the significance of the change: in 1950, Michigan Law School hired one new tenure-track or tenured professor, and Harvard hired five.<sup>124</sup> Of these six new professors (many of whom became noted legal scholars, like Louis Jaffe), only one had clerked.<sup>125</sup> Between 1954 and 1955, Michigan and Harvard each hired three new law professors, one of whom had clerked.<sup>126</sup> In 1960, out of fourteen new professors among the schools, only one had clerked.<sup>127</sup> In 1975, when Harvard hired three new tenure-track faculty, all three had clerked.<sup>128</sup>

119. Frederick Schauer, *supra* note 115, at 29 n.81; *see also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 192 (1983) (“Richard Nixon’s charge that the Warren Court was soft on crime contributed to his election in 1968.”).

120. *See* John P. Frank, *Court and Constitution: The Passive Period*, 4 VAND. L. REV. 400, 400 (1951) (“The affirmative influence of the Court and the Constitution on American life since 1946 has been very little.”); Friedman, *supra* note 9, at 178 (“The telling feature of the 1940’s, however, is that although the issues on the docket held the potential for conflict, the Supreme Court was not doing much to arouse attention, let alone popular ire.”).

121. *The Warren Court: Fateful Decade*, NEWSWEEK, May 11, 1964, at 24.

122. *See* William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation*, 62 VAND. L. REV. 1749, 1761 (2009).

123. Alan Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 403 (1971).

124. Michigan hired Roy L. Steinheimer. *See* ASS’N OF AM. LAW SCH., DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1950-1951, at 28, 293, 302 (1950). Harvard hired Kingman Brewster, William Hardee, Louis Leventhal Jaffe, and Arthur Sutherland. *See id.* at 18-19, 61, 140, 163, 299-300.

125. Arthur Sunderland clerked for Oliver Wendell Holmes in 1927-1928. *Id.* at 300.

126. Michigan hired Alfred Conrad and Richard Wellman. *See* ASS’N OF AM. LAW SCH., DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1955, at 38, 86-87, 284 (1955). Harvard hired David Herwitz and Donald Turner, who clerked for Thomas Clark on the Supreme Court. *Id.* at 23-24, 141, 275. Milton Katz also rejoined the Harvard faculty in 1955. He had served as a professor at Harvard from 1940-1950. *See id.* at 23, 159.

127. Frank E.A. Sander at Harvard clerked for Judge Macgruder and Judge Frankfurter. *See* ASS’N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS 1960, at 31-32, 37, 289 (1960).

128. These faculty were Douglas Ginsburg, Sally Neely, *see* ASS’N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS 1975 SUPPLEMENT, at 43-44, 122, 150 (1975), and Hal Scott, *see* ASS’N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS 1976, at 850 (1976).

The new law professors hired during the Fall Era, then, were more likely to have been law clerks during notable periods for notable federal judges and Supreme Court Justices. They were “[m]embers of a new generation who went to law school during the Warren Court years and entered law teaching[,] . . . a group that included Jesse Choper, Bruce Ackerman, Ronald Dworkin, John Hart Ely, Owen Fiss, Frank Michelman, and Laurence Tribe.”<sup>129</sup> Each one of these scholars had one biographical detail in common: a clerkship for at least one prominent judge after graduating and before teaching. Choper<sup>130</sup> and Ely<sup>131</sup> clerked for Chief Justice Warren; Ackerman for Henry Friendly and Justice Harlan;<sup>132</sup> Dworkin for Learned Hand;<sup>133</sup> Fiss for Thurgood Marshall and Justice William J. Brennan, Jr.;<sup>134</sup> Michelman for Brennan,<sup>135</sup> and Tribe for Justice Potter Stewart.<sup>136</sup> These clerkships were the gold star that the profession valued and that helped members of this generation land their teaching jobs. The new intellectual mandarins were hired not after they had experiences in the world, but rather after and no doubt in substantial part because of their experiences in the federal courts as law clerks.

And these clerkships had a profound impact on the careers of these future leaders of legal pedagogy and scholarship. Ely wrote the defining scholarly book of the time to justify the work of the Warren Court, in that book saying of Warren that “you don’t need many heroes if you choose carefully.”<sup>137</sup> Michelman wrote an entire book dedicated to articulating Justice Brennan’s constitutional philosophy.<sup>138</sup> Those who had clerked for and wrote about the Warren Court, from either a supportive or critical perspective, authored the most cited scholarship of the time. This influential scholarship was about the Court,<sup>139</sup> showing that constitutional law was becoming more clearly predominant than perhaps ever before.<sup>140</sup>

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129. STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 44 (2008) (quoting LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 50 (1996)).

130. *Faculty Profiles: Jesse H. Choper*, BERKELEY LAW, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=19> (last viewed Nov. 1, 2010).

131. *John Hart Ely*, UNIVERSITY OF MIAMI SCHOOL OF LAW, <http://www.law.miami.edu/facadmin/jely.php> (last viewed Nov. 1, 2010).

132. Bruce Arnold Ackerman, Curriculum Vitae (Nov. 30, 2010), [http://www.law.yale.edu/documents/pdf/Faculty/Ackerman\\_CV.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Ackerman_CV.pdf).

133. *Ronald Dworkin*, U. OF OKLA. DEPARTMENT OF POL. SCI., <http://www.ou.edu/cas/psc/dworkin.htm> (last viewed Nov. 1, 2010).

134. Curriculum Vitae: Owen Fiss, YALE LAW SCHOOL, <http://www.law.yale.edu/faculty/fisscurriculumvitae.htm> (last viewed Nov. 1, 2010).

135. ASS’N OF AM. LAW SCH., *DIRECTORY OF LAW TEACHERS* 1970, at 331 (1970).

136. *Id.* at 459.

137. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, at v (1980) (dedicating his book to Warren).

138. FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* (1999).

139. On one list of the most cited articles of *all time*, for instance, four of the five most cited articles are related to a decision by the Warren Court. See Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1549 tbl.1 (1985) (listing articles by Gerald Gunther, Herbert Wechsler, Charles Reich, and John Hart Ely as among the five most cited articles of all time); see also Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 TEX. L. REV. 1707, 1709 (1994) (discussing “the most basic characteristic of constitutional scholarship—it is oriented to Supreme Court decisions”).

140. See Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood*

On the demand side, the interests of the law students who later became the law professors and the members of the profession—and who were the law review editors selecting articles to be published—changed as well. One survey of entering law students found that those who went to law school to work to pursue “civil rights or civil liberties work” quadrupled between 1960 and 1975.<sup>141</sup> The editors of *The Yale Law Journal* wrote that Earl Warren “made us all proud to be lawyers.”<sup>142</sup> The editors of the *Harvard Law Review* dedicated an issue to the Warren Court, writing: “To Chief Justice Earl Warren, who with courage and compassion led a reform of the law while the other branches of government delayed, the editors respectfully dedicate this issue.”<sup>143</sup>

With the focus then on litigation in American federal courts, the degree to which these courts paid attention to the teaching and scholarship of American law professors became a real sign of status for these academics. As Pierre Schlag has written, “[L]egal academics could understand themselves to be doing something important because they understood themselves to be important to the work of judges who in turn were portrayed by legal academics as very important.”<sup>144</sup> Charles Reich from Yale introduced a new theory of property rights in his articles,<sup>145</sup> and noted proudly that the Warren Court cited his article in *Goldberg v. Kelly*.<sup>146</sup> Status came from recognition not just by the profession—as was always the case—but by the new institutions of significance to the profession, the American federal courts.

#### b. *Comparative Constitutional Law and International Law*

A large part of the fall of comparative constitutional law during the Fall Era also relates to the rise of international law. During the same time that comparative constitutional law was declining in law schools, international law was rising—and very much because of increased interest by the elite profession. This interest in international law came in part because it was another source of legal argument to use to support activities related to federal litigation. After all, Article VI of the Constitution provides that “all Treaties made . . . under the Authority of the United States . . . shall be the supreme Law

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*and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 318 (2002) (reviewing LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000)) (“The Warren Court vaulted constitutional law scholars to the head of the legal pecking order. Legal luminaries during the first half of the twentieth century, Roscoe Pound . . . Karl Llewellyn . . . and others, are best known for their writings on common law subjects. The most celebrated work of legal scholarship during the decades before the Second World War, Benjamin Cardozo’s *The Nature of the Judicial Process* (1921), is devoted almost entirely to how justices make decisions in nonconstitutional cases. Legal luminaries during the second half of the twentieth century are best known for their constitutional analysis.”).

141. Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 579-90 (1973).

142. The Editors, *Dedication*, 84 YALE L.J. 405 (1975).

143. The Editors, *Dedication*, 83 HARV. L. REV. 1 (1969).

144. Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419, 420 (1992).

145. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

146. 397 U.S. 254, 262 (1970); Charles A. Reich, *Commentary on Charles A. Reich, The New Property*, 73 YALE L.J. 733 (1964) and *Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965), in Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1465 (1991).

of the Land . . . and the Judges in every State shall be bound thereby.”<sup>147</sup> When the Second Circuit decided *Filártiga v. Peña-Irala*<sup>148</sup> in 1980, and the D.C. Circuit decided *Tel-Oren v. Libyan Arab Republic*<sup>149</sup> just a few years later, there was more explicit, clear, and prominent judicial authorization for the idea that many of the central legal battles of the time could not only be litigated in federal court, but could be litigated using international law. Amnesty International and the ACLU started to bring cases raising issues related to how domestic federal courts might address international legal issues.<sup>150</sup> One of the primary government offices entrusted with representing the government in these cases, the State Department Legal Adviser’s Office, increased in size and prominence during this time and employed many young lawyers who would go on to become a new wave of professors of international law.<sup>151</sup> As international law became a topic of interest, in substantial part because it was a topic of interest for federal litigation, law schools began to devote increasingly greater attention to that area. Around the same time *Filártiga* and *Tel-Oren* were decided, law schools started to create international human rights clinics.<sup>152</sup> These clinics proliferated in the late 1980s and early 1990s.<sup>153</sup> The number of law reviews focusing substantially on international law increased from less than fifteen in 1972 to more than seventy thirty years later.<sup>154</sup> Scholars started to write about international law in much greater amounts during the Fall Era, and new and important theories were introduced. These included, most notably, Harold Koh’s theories of transnational legal process,<sup>155</sup> and Yale’s important new Lowenstein International Human Rights Clinic worked on issues similar to Koh’s theories.<sup>156</sup> Indeed, today it is hard to imagine a major law school not having at least one faculty member focusing primarily on international law in his or her scholarship and teaching. Nonetheless, it is fair to state that most law schools have no one writing and teaching about comparative constitutional law—or comparative law in general, for that matter.

This rise of international law had much to do with the fall of comparative constitutional law. There is only so much scholarly and pedagogical oxygen to

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147. U.S. CONST. art. VI.

148. 630 F.2d 876 (2d Cir. 1980).

149. 726 F.2d 774 (D.C. Cir. 1984).

150. See, e.g., Press Release, American Civil Liberties Union, ACLU Convenes First National Conference on the Use of International Human Rights Law in the U.S. Justice System (Oct. 8, 2003), available at <http://www.aclu.org/human-rights/aclu-convenes-first-national-conference-use-international-human-rights-law-us-justice-s>.

151. See MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER (2010).

152. See Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT’L L. 505, 525 (2003).

153. See Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527, 530 n.15 (2004).

154. See Donna E. Arzt & Anna G. Kaminska, *From Soviets to Saddam: Introduction to the Thirtieth Anniversary Symposium*, 30 SYRACUSE J. INT’L L. & COM. 181, 185 (2003).

155. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) [hereinafter Koh, *Transnational Litigation*].

156. Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 SMU L. REV. 189, 190 (1994).

go around, and much of it was being absorbed by the focus on domestic federal litigation. The oxygen that was going to non-American legal materials was increasingly going to international law. Comparative constitutional law was an obvious competitor to international law, particularly international human rights law. Both areas of law had much to say about the major legal issues of the day—civil liberties and public law issues. Just as international law had answers to questions about how far governments should protect the freedom of speech, so too did the domestic constitutions of other countries. But why, then, did international law surpass comparative constitutional law during the Fall Era?

One reason that this attention was going to international law and not to comparative constitutional law was that international law was speaking to the elite profession in a way that comparative constitutional law simply was not, and the profession was interested in international law in a way that it was not interested in comparative constitutional law. Article VI may have established international law as a source of binding domestic law in the late nineteenth century, and the Alien Tort Claims Act may have followed suit,<sup>157</sup> but it was really cases like *Filártiga* and *Tel-Oren* that opened the door to American lawyers and American courts spending more and more time on international law-related litigation in American federal courts.

The law professors who revitalized international law during this time came from a profession more and more interested in international law—in particular as a source for American federal litigation. Thus, their backgrounds and their scholarship furthered this interest in international law as an area of interest on its own, but in particular as a source of legal argument in American federal courts. The new hires teaching international law had practiced for these human rights groups bringing international law cases in federal court or had worked for the Legal Adviser's Office on these issues. Once in teaching, these professors' scholarship focused on the relevance of international law to federal courts deciding federal cases. The leading scholarship related to international law deals with these issues,<sup>158</sup> and the leading scholars are very much involved with federal litigation. Harold Koh of Yale Law School is now the Legal Adviser in the Obama administration and is sometimes mentioned as a candidate for the U.S. Supreme Court.<sup>159</sup> Koh is assisted by Sarah Cleveland of Columbia Law School (who writes on similar issues<sup>160</sup>), and a law professor

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157. 28 U.S.C. § 1350 (2006).

158. Note that, for instance, those on the list of most-cited legal scholars who write about international law tend to write about it from this perspective. See Fred R. Shapiro, *The Most Cited Legal Scholars*, 29 J. LEGAL STUD. 409 (2000). On Shapiro's list, Louis Henkin is the highest ranked scholar whose work focuses on international law, see *id.* at 424 n.6, and Henkin's most important piece of scholarship was about the role of international law in federal litigation in the American federal courts, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1996). One federal judge noted that Henkin was important precisely because "[h]e has taught international law to over 300 judges who have attended the Aspen Institute's Justice and Society program, and more specifically, the international law seminars at Wye." Judge Rosemary Barkett, *Louis Henkin and the Education of the Federal Judiciary*, 38 COLUM. HUM. RTS. L. REV. 471, 473 (2000).

159. See, e.g., Justin Jouvenal, *Ten Picks for Obama's Supreme Court*, SALON (Nov. 18, 2008), [http://www.salon.com/news/feature/2008/11/18/supreme\\_court](http://www.salon.com/news/feature/2008/11/18/supreme_court).

160. See, e.g., Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A.

and leading scholar of international law (Anne-Marie Slaughter<sup>161</sup>) can even be found running the State Department's Office of Policy Planning.

This is not just a liberal phenomenon. During the second Bush administration, Curtis Bradley of Duke Law School worked on these issues.<sup>162</sup> Jack Goldsmith, head of the Office of Legal Counsel (not technically an international law position), made his scholarly name in part for his writings on international law in domestic courts<sup>163</sup> and coauthored a casebook on Foreign Relations Law with Bradley.<sup>164</sup> After all, one of the major legal debates over the past decade has been about international law and its role in American federal courts—namely, whether the Geneva Conventions are “quaint”<sup>165</sup> or still relevant in the era of the war on terror. A career in practice and scholarship characterized by experience in leading legal positions and citations in the leading legal debates of the day provide academics with enormous status in law teaching, and thus it is no surprise that international law scholars have focused on these activities and have been rewarded with influence in ways that comparative constitutional law scholars have not.

It is hard for comparative constitutional law to compete with this. It is true that, during some periods more than others, the Supreme Court has cited to comparative constitutional law in major cases,<sup>166</sup> indicating that comparative constitutional law could be just as relevant as international law in American federal litigation. This was particularly true during the Rise Era, and these citations declined during the Fall Era. Even given that, though, while international law is the “supreme Law of the Land” under Article VI of the Constitution, and Congress has the authority to punish “offenses against the law of nations,”<sup>167</sup> there is no similar constitutional authority for discussing comparative constitutional law. This is not South Africa, whose Constitution discusses not only international law but also comparative constitutional law.<sup>168</sup>

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Compa & Stephen F. Diamond eds., 1996)).

161. For examples of her leading scholarly works, see, for instance, ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN INTERNATIONAL AND NATIONAL LAW* 110 (Andre Nolkaemper & Janne Nijman eds., 2007); Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 *FOREIGN AFF.* 102 (2000); and Anne-Marie Slaughter & Laurence R. Helfer, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 *CAL. L. REV.* 899 (2005).

162. For examples of Bradley's scholarship in this area, see, for instance, Curtis Bradley, *The Treaty Power and American Federalism*, 97 *MICH. L. REV.* 390 (1998); and Curtis Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815 (1997).

163. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 *VA. L. REV.* 1617 (1997); Jack Goldsmith, *Sovereignty, International Law, and International Relations Theory*, 52 *STAN. L. REV.* 959 (2000).

164. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (2009).

165. See Eric Lichtblau, *Gonzales Speaks Against Torture During Hearing*, *N.Y. TIMES*, Jan. 7, 2005, at A1.

166. See generally Calabresi & Zimdahl, *supra* note 57 (discussing the various periods during which the Supreme Court has cited comparative constitutional law in interpreting the Constitution).

167. U.S. CONST. art. I, § 8, cl. 10.

168. Even the Constitution of South Africa, in its section 39, states that courts “must consider international law” and “may consider foreign law.” *S. AFR. CONST.*, 1996, § 39 (emphasis added).

Now that lawyers and judges and scholars have recognized its relevance, international law has surged ahead and pushed comparative constitutional law aside.

It is interesting to note as well that during the Fall Era American law schools' study of international law opened their eyes to diversity, as did the changing composition of the student body and faculties at law schools. The Fall Era was essentially the same period when female and minority law students started to enroll in American law schools in larger numbers, and then eventually to teach in American law schools in larger numbers. For instance, in 1964 there were only about three hundred first-year black students in the entire nation, and about 100 of them were enrolled at historically black law schools.<sup>169</sup> Barely one percent of law students were black.<sup>170</sup> Nearly forty years later, almost eight percent of law students were black.<sup>171</sup> In 1965-1966, women comprised about four percent of law students, and now they are about half.<sup>172</sup> This affected the composition of law faculties as well. Lani Guinier became the first tenured African-American female member of the faculty at Harvard Law School in 1998.<sup>173</sup>

This increasing diversity domestically, however, did not coincide with an increasing interest in diversity as viewed through a global lens, as I have written about elsewhere.<sup>174</sup> There certainly was a greater recognition of the ways in which law was specific to particular cultures and places, as well as the notion that viewing law from the perspective of different communities and places could make a difference. This insight was part of what led to critical race studies and legal feminism, but these movements largely focused on domestic legal issues. There was very little in the way of scholarship about how different countries deal with race, even among the leading lights of critical race studies. In the rest of the university, this increasing campus diversity led to questions about universality that triggered domestic doubts (postmodernism, for example) and comparative attention (increasing area studies requirements). By contrast, in law schools this increasing campus diversity led to questions about universality that triggered almost exclusively domestic doubts (like critical legal studies).

## 2. *The Structure of Scholarship During the Fall Era*

At the same time that the attention of the profession changed, the nature of the scholarship of those writing about comparative constitutional law

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169. See Richard A. Sander, *A Systematic Analysis of Affirmative Action*, 53 STAN. L. REV. 367, 375 (2004).

170. See *id.*

171. See *Minority Enrollment 1971-2002*, AM. BAR ASS'N, <http://www.abanet.org/legaled/statistics/minstats.html> (last visited Oct. 26, 2010).

172. Lee E. Teitelbaum, *First-Generation Issues: Access to Law School*, ASS'N OF AM. LAW SCH., <http://www.aals.org/diversity/teitelba.html> (last visited Oct. 26, 2010).

173. *Lani Guinier Home Page*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/faculty/directory/index.html?id=24> (last visited Oct. 26, 2010).

174. See David Fontana, *American Law Schools, Meet the World*, CHRON. OF HIGHER EDUC., May 26, 2006, at B10.

changed as well. Part of the reason that law reviews went decades between publishing articles about comparative constitutional law during the Fall Era—while earlier they published several articles per issue—is the changing nature of the comparative constitutional scholarship being produced. Comparative constitutional scholarship became more specialized. Moreover, there were essentially no substantial articles about comparative constitutional law written by prominent American constitutional scholars during the entire Fall Era.

During the Rise Era, there were many articles each year by famous American constitutionalists who were not really comparative constitutional scholars, such as Lon Fuller and Erwin Griswold. During the Fall Era, law reviews instead were full of discussions of litigation in American federal courts—of the issues presented by those cases, of the judges deciding those cases, and of the scholars writing about the judges deciding those cases. Starting in 1975, for a twenty-year period, both *The Yale Law Journal* and the *Harvard Law Review* had *at least* one issue per year featuring articles celebrating the career of a famous federal judge *and* a scholar writing about the famous cases decided by the Warren Court.

During the Fall Era, the literature about comparative constitutional law was written by those with an exclusive interest in comparative issues, not American issues. These articles were published in specialized journals like the *American Journal of Comparative Law* or the literally hundreds of other specialized comparative and international law journals created during that time.<sup>175</sup> Cognate disciplines also changed. Comparative law became more focused on private law,<sup>176</sup> and political science stopped writing about law and constitutions and explicitly disavowed analysis of institutions and rules<sup>177</sup>—the precise subject that law professors study.

In other words, at the moment the profession became keenly interested in developments in American law and American courts, the scholars they were most likely to read were writing only about American law and American courts, and comparativists were not writing much at all about American law and American courts. Examples abound. During the Rise Era, Ruth Bader Ginsburg spent time in and coauthored a casebook about Sweden<sup>178</sup> and wrote articles about the comparative constitutional treatment of gender.<sup>179</sup> During the Fall Era, the ACLU tapped her to write the brief for the appellant in an

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175. See Tracey E. George & Chris Guthrie, *An Empirical Evaluation of Specialized Law Reviews*, 26 FLA. ST. U. L. REV. 813, 814 (1999).

176. See BASIL MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORT 22 (1986) (noting how comparative law scholars write more about “unpolitical” areas of private law).

177. The most remarkable document is the statement by the editors of the leading comparative political science journal, in its first issue, expressing “skepticism about the value of institutional and legal analysis.” Bernard E. Brown, John H. Herz & Arnold A. Rogow, *A Statement by the Editors*, 1 COMP. POL. 1 (1968).

178. See RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965).

179. See, e.g., Ruth Bader Ginsburg, *The Status of Women*, 20 AM. J. COMP. L. 585 (1972). Professor Ginsburg, now Justice Ginsburg, also coauthored a casebook on sex discrimination that incorporated comparative constitutional materials. KENNETH M. DAVIDSON, RUTHER BADER GINSBURG & HERMA HILL KAY, SEX-BASED DISCRIMINATION: TEXTS, CASES & MATERIALS (1974).

important domestic constitutional law case before the Supreme Court, *Reed v. Reed*.<sup>180</sup> During the Rise Era, Erwin Griswold wrote about South African judicial decisions, discussed Australian legal education, and created the comparative law program at Harvard Law School.<sup>181</sup> During the Fall Era, first as Solicitor General and later in private practice, he appeared before the Warren and Burger Courts arguing American constitutional law cases.<sup>182</sup>

### 3. *The Larger Political Environment*

Just as the attention of the country was focused overseas during the Rise Era, during the Fall Era the attention of the country began to shift to domestic issues. The Rise Era ended in 1972, the year of Richard Nixon's reelection and the first mobilization for and counter-mobilization against the Great Society and the War on Poverty. With the American withdrawal from Vietnam, there was no major American military effort overseas until the first Gulf War in 1991. Stagflation and the oil crisis of the 1970s gave way to the recession of the first term of the Reagan administration and the continuing domestic focus it caused. The "moral majority" that Nixon relied upon was focused on domestic affairs, and, as polls at the time showed, public concern in general centered on these issues.<sup>183</sup>

Likewise, the cultural and legal imperialism of the earlier period gave way to a more balanced view of foreign constitutional experiences. Constitutional scholars were no longer writing about the failures of the foreign experience and the triumphs of the domestic one. The few articles in the *American Journal of Comparative Law* on comparative constitutional topics highlighted the similarities between the rest of the world and the American constitutional experience. A few articles talked about constitutional lessons for the United States, an endeavor less likely to succeed than the exporting model of comparative constitutional law practiced earlier. This was the era of postmodernism and cultural relativism, not cultural imperialism.

## IV. THE COSTS OF THE FALL OF COMPARATIVE CONSTITUTIONAL LAW

Why should the rise and fall of comparative constitutional law be of particular concern? For one thing, the field of scholarship that comparative constitutional law was part of—and later was in part replaced by—is a field of scholarship particularly reliant on the type of factual insights that comparative experience could have potentially and particularly provided. Many of the most significant developments in American constitutional law in the past half century could have been foreseen if the time had been taken to look at

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180. 404 U.S. 71 (1971); *see also* Siegel, *Constitutional Culture*, *supra* note 12, at 1371 (discussing the selection of Ginsburg to argue *Reed*).

181. *See supra* note 8 and accompanying text.

182. *See* Dennis Hevesi, *Erwin Griswold Is Dead at 90; Served as A Solicitor General*, N.Y. TIMES, Nov. 21, 1994, at B10.

183. *See* Schauer, *supra* note 115, at 41 ("And as the 1960s gave way to the 1970s . . . [there were] worries about inflation, the cost of living, crime, and employment.").

constitutional experiences abroad. Another reason that the disappearance of comparative constitutional law was consequential is that it will now be difficult to piece the field back together. An entire infrastructure, encouraged by the actions of our courts, was built to support the development of domestic constitutional litigation. The creation of this infrastructure, to the almost complete neglect of an infrastructure for comparative constitutional law (or many parts of foreign law more generally), makes it that much harder to create a comparative constitutional law infrastructure now. The major scholarly change that happened between the Rise and the Fall Eras is, in some ways, irreversible. The domestic litigation infrastructure encouraged by the Warren Court meant that research, resources, and social movements have all been created to support domestic constitutional litigation—and not anything else. This also has had negative consequences for the core institution of American judicial review, which is now dependent on a narrow range of domestic law arguments to justify its very existence.

A. *The Costs to American Constitutional Scholarship*

1. *The Methodology of American Constitutional Scholarship*

One reason why American constitutional scholarship has suffered from the absence of comparative constitutional scholarship is because of the kinds of arguments that American constitutional scholarship predominately makes: arguments based at least in part on assumptions about how the world actually operates. American constitutional scholarship is, as Robert Merton would describe it, “middle-range theory.”<sup>184</sup> To be sure, there are scholars interested in what Sanford Levinson has called “meta-constitutional theory” as opposed to “constitutional theory.”<sup>185</sup> These scholars make arguments about constitutional law purely on normative legal theory (based either on first principles of jurisprudence, or on traditional legal sources like text) rather than empirical reality. But this is the exception, and the almost universal rule is that American constitutional scholarship includes arguments about the effects of rules or institutional arrangements on empirical reality.

This should not be surprising, since the decisions of the Supreme Court cases that dominate the attention of so many American constitutional law scholars themselves are exercises in middle-range theory. When the Supreme Court addresses the constitutionality of race-conscious affirmative action programs, for example, it considers whether such programs “are [actually] narrowly tailored to further compelling governmental interests.”<sup>186</sup> Regardless of whether courts should be referencing comparative constitutional sources,

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184. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 39 (1968).

185. Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389, 398 (1992) (defining constitutional meta-theory scholarship as “writing about ‘first-order’ theorists from a ‘second-order’ perspective . . . [T]hey seek to analyze and structure contending constitutional theories, for what they tell us about the enterprise of engaging in the practice of constitutional analysis.”).

186. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

there are many good reasons to think that *scholarship* about constitutional law—so much affected by these middle-range concerns—could consider comparative sources across all different types of issues. Since nearly ninety percent of the countries in the world now have some form of constitutional review, comparative constitutional law potentially offers enormous amounts of factual information, information that is particularly relevant because constitutional scholars make arguments based on facts.

Not only is comparative constitutional experience methodologically relevant to American constitutional scholarship given its arguments, but there is also plenty of comparative constitutional law, in terms of relevance and sheer amount. Indeed, it might be a bold statement, but it is a true one: for every major American constitutional issue, there is some relevant comparative constitutional experience that either predated or postdated the American constitutional experience. We have tiers of scrutiny, and the rest of the world has proportionality.<sup>187</sup> We have the “living constitution,”<sup>188</sup> and Canada has the “living tree.”<sup>189</sup> Abram Chayes wrote about impact litigation<sup>190</sup> but was advocating an approach to justice that the Indian Supreme Court was trying at around the same time.<sup>191</sup> It might be true that “we are all realists now,”<sup>192</sup> and because of that it is certainly true that almost all of us should be comparative constitutionalists now. If any American constitutional scholar advocates an approach based on predictions about how the world will operate in response, it is essential to study all available information related to that approach. There will almost always be directly relevant and intellectually accessible comparative information that would “cast an empirical light on the consequences of different solutions to a common legal problem,”<sup>193</sup> and almost all constitutional scholarship makes arguments about such consequences. In this way, almost all American constitutional scholarship could and should be informed by comparative constitutional law.

This is particularly true given how long and how much scholars have been discussing constitutional issues in the United States. Even apparently new

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187. See Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367 (2009) (noting the similarities between tiers of scrutiny and proportionality doctrines); see also *District of Columbia v. Heller*, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting) (“Contrary to the majority’s unsupported suggestion that this sort of ‘proportionality’ approach is unprecedented, the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases.” (citation omitted)); DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159, 171-76 (2004) (noting the universality of the proportionality doctrine).

188. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

189. See *Edwards v. Attorney-General for Can.*, [1930] A.C. 124 [136] (P.C.) (appeal taken from S.C.C.) (first introducing this metaphor into Canadian constitutional law).

190. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

191. See Roberto Gargarella, Pilar Domingo & Theunis Roux, *Courts, Rights and Social Transformation: Concluding Reflections*, in *COURTS AND SOCIAL TRANSFORMATIONS IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR* 255, 266 (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006).

192. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985).

193. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

constitutional ideas in the United States might not be truly novel, since the American ideas are so thickly and deeply embedded in the history and practice of the United States that they only allow for narrowly original claims. From the *Federalist Papers*, to James Wilson's *Lectures on Law* and Joseph Story's *Commentaries on the Constitution*, to James Bradley Thayer's *The Origin and Scope of the American Doctrine of Constitutional Law*,<sup>194</sup> scholarly writing about American constitutional scholarship goes back several hundred years. This may make it difficult to come up with truly new ideas or arguments, and even novel ideas are often constrained by the effect of this long history and practice of American constitutional writing.

It is notable, for instance, how many major pieces of constitutional scholarship in the past several decades have been affected by the touchstone American debate on originalism that emerged in the 1980s. Even scholars unsympathetic to originalism, like Bruce Ackerman, still write books about the Founding legacy in the midst of making otherwise new and provocative arguments.<sup>195</sup> Ackerman's idea of "dualist democracy" might be novel, but imagine how much more novel it would have been if it were less influenced by a constitutional culture moving in an originalist direction.

As an example of the methodology of American constitutional scholarship and how comparative constitutional law is relevant—because of its methodology and because of the usefulness of comparative insight—consider the debate over the proper role for American courts in constitutional adjudication. Scholars have long been "preoccupied with the antidemocratic nature of judicial review,"<sup>196</sup> Barry Friedman has termed this debate the "obsession" that dominates American constitutional scholarship.<sup>197</sup> Some have written to deny that this "difficulty" even exists.<sup>198</sup>

The leading attempts to respond to this difficulty (and the most cited articles in the history of American legal scholarship<sup>199</sup>) involve a focus on different procedural options that courts have at their disposal to mitigate the interference with the democratic process that their decisions might create. This "procedural response" literature, the work of Bickel, Guido Calabresi, Sunstein, and others, is meant to propose a series of techniques to minimize the impact of judicial decisions. But these scholars have largely missed the comparative experience with their suggested procedural responses and so have entirely missed the ways in which these responses have actually led to more judicial

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194. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

195. Ackerman has been known for his liberal perspective on legal issues, in particular related to some of the debates about originalism. See Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990) (book review). Yet he still relies on originalist evidence in much of his writing. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

196. Neal Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1709 (1998).

197. See Friedman, *supra* note 9, at 155.

198. For good examples of these arguments, see, for instance, Bruce Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013 (1984); and Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

199. Shapiro, *supra* note 139, at 1549 (featuring several of the leading articles from this debate among the most cited articles in the history of American legal scholarship).

power—in the United States and elsewhere—rather than less.

The notion that American constitutional scholars addressing procedural responses to the countermajoritarian difficulty might consider comparative experience is not revolutionary. Indeed, the first substantial scholarly contribution to the debate, James Bradley Thayer's *The Origin and Scope of the American Doctrine of Constitutional Law*,<sup>200</sup> was itself probably the first important comparative constitutional law article published in an American law review. Thayer was, as the article's title suggests, discussing the (distinctively) *American* doctrine of constitutional law. This was not mere rhetoric, as Thayer spent substantial parts of his otherwise short article discussing comparative constitutional law regarding judicial review. Thayer discussed the practice of France, Germany, Switzerland, Colombia, and the United Kingdom.<sup>201</sup> During the Rise Era, there were many other articles that discussed the proper role for American courts by referencing comparative constitutional experience.<sup>202</sup>

During the Fall Era, though, as the proper role for courts in constitutional cases became a major issue during the Warren Court and going forward, much of the comparative dimension of the discussion disappeared. Consider, for instance, the hugely important and insightful scholarship of Guido Calabresi, himself one of the most informed scholars about comparative legal developments more generally.<sup>203</sup> Calabresi transformed the debate about the proper role for courts in constitutional cases, first through his Oliver Wendell Holmes Lectures and book<sup>204</sup> and then through his *Harvard Law Review* Foreword.<sup>205</sup> Calabresi argued that courts should have the power to force legislatures to take a "second look" at problematic laws.<sup>206</sup> A central element of his argument for this second-look doctrine was the actual relationship that it would create between courts and the other branches of government. Calabresi argued that this second-look doctrine would meet resistance from the other branches of government but would prompt them meaningfully to reconsider their decisions without courts overwhelming them or interfering with them too much.<sup>207</sup>

Although he was making empirical arguments, Calabresi did not consider the full range of empirical resources that would help him validate his

200. Thayer, *supra* note 194.

201. *Id.* at 130, 136-37 n.1. Thayer was otherwise interested in comparative legal issues. *See, e.g.*, James Bradley Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169 (1895).

202. *See, e.g.*, Edward McWhinney, *Judicial Positivism in Australia: The Communist Party Case*, 2 AM. J. COMP. L. 36 (1953); McWhinney, *supra* note 29; Arthur T. von Mehren, *Constitutionalism in Germany: The First Decision of the New Constitutional Court*, 1 AM. J. COMP. L. 70 (1952); Arthur von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. COMP. L. 197 (1956).

203. *See, e.g.*, Guido Calabresi, *Policy Goals of the "Swedish Alternative,"* 34 AM. J. COMP. L. 657 (1986).

204. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

205. Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991).

206. *Id.* at 104 ("When the legislature has acted with haste or hiding in a way that arguably infringes even upon the penumbra of fundamental rights, courts should invalidate the possibly offending law and force the legislature to take a 'second look' with the eyes of the people on it.")

207. *Id.* at 80.

predictions and expectations. To his credit, Calabresi did discuss some comparative constitutional experiences, a rarity among the scholars during the Fall Era. In his Holmes Lectures and in his book, he did so just in passing, but in his *Harvard Law Review* Foreword, he discusses comparative experience in greater detail.<sup>208</sup> His discussion of the comparative material, though, only highlights some different forms of judicial review, and does not address the empirical lessons related to his second-look proposal to be drawn from other countries. At the time, there were already several foreign constitutional provisions and experiences very similar to Calabresi's second-look procedure that suggested that legislatures would not reconsider their laws even if judicial decisions used a second-look approach. The most prominent debate at the time was about the second-look doctrine in Canada, whose experience suggested that legislatures would defer to courts even when those courts invite the legislature to reconsider their laws.<sup>209</sup> Going back several decades, both Germany and Italy also had substantial experiences with second-look doctrines (often called "admonitory powers"), and there legislatures still generally deferred to courts even when invited to reconsider.<sup>210</sup> Even when scholars make comparative references, then, sometimes they might not fully consider the empirical lessons to be drawn from them.

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208. *Id.* at 124-30.

209. Section 33 of the Canadian Charter of Rights and Freedoms, which became the official Canadian "Constitution" in 1982, is a provision granting courts a second-look power. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 33 (U.K.). Even before section 33, there were already analogues to his second-look doctrine in place in Canada, at the federal level via the Canadian Bill of Rights, *see* R.S.C. 1985, app. III, s. 2, and in the provinces via the Saskatchewan Human Rights Code, *see* R.S.S., c. S-24.1, s. 44, the Alberta Bill of Rights, *see* R.S.A. 2000, c. A-14, s. 2, and the Quebec Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 52. Even in the face of the second-look doctrine, legislatures still deferred enormously to courts. *See* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 288-92 (1995).

210. *See* Wiltraut Rupp-v.Brünneck, *Admonitory Functions of Constitutional Courts*, 20 AM. J. COMP. L. 387, 395-99 (1972). The German phrase for admonitory decisions is *Appellentscheidung*. For the use of this phrase in the Italian context, *see* Vincenzo Vigoriti, *Italy: The Constitutional Court*, 20 AM. J. COMP. L. 404, 406-08 (1972). In Germany, the legislature has usually responded immediately by implementing the judicial decision using the second-look doctrine rather than reconsidering its initial decisions. *See* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 61 n.117 (1989) (giving an example of a case involving the constitutionality of discrimination based on the illegitimacy of a child). Even when legislatures have ignored these admonitory decisions, they still have not created a dialogue because the German Federal Constitutional Court would simply issue another decision after its earlier decision had been ignored and compel the legislatures to comply. *See* Vigoriti, *supra*, at 409 ("Later the Court, faced with clear parliamentary disregard of an explicit warning, was compelled to take further action."). Other countries have experimented with versions of these admonitory powers. In Austria, the Constitutional Court will sometimes invalidate a law but then delay publication for up to a year to permit the political branches to respond to the decision. *See* William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1, 12 n.35 (1999). The Italian Constitutional Court sometimes does the same. *See* Vigoriti, *supra*, at 410. The South Korean Constitutional Court has similar powers, *see* Tom Ginsburg, *The Constitutional Court and the Judicialization of Korean Politics*, in *NEW COURTS IN ASIA* 145, 147-48 (Andrew Harding & Penelope Nicholson eds., 2010), as does the Turkish Constitutional Court, *see* MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 89 (1971).

## 2. *Alternatives to Comparative Constitutional Scholarship*

Some of the criticisms levied against procedural response scholars for neglecting comparative constitutional law could also be levied against them for neglecting other sources of insight as well. For instance, perhaps Calabresi would have realized that the second-look doctrine would not create true dialogue and that legislatures would be very deferential to courts if he had read the political science research of James L. Gibson and Gregory A. Caldeira about “positivity bias.” This scholarship shows how people’s impressions of courts are *more* favorable the more they are exposed to them, thereby explaining why courts tend to overwhelm other branches of government.<sup>211</sup> Or one could look at American constitutional history, as Calabresi did, for “antecedents and roots” to this second-look doctrine.<sup>212</sup> There certainly are many American Supreme Court cases employing something like the second-look doctrine, as an enormous (302-page) article by Dan Coenen full of examples demonstrates.<sup>213</sup> The federal Declaratory Judgment Act also grants courts powers similar to the powers that Calabresi envisions courts having as part of his second-look doctrine.<sup>214</sup> There is also experience similar to popular constitutionalism from American constitutional history.<sup>215</sup> With all of this available information, why look at comparative constitutional law in particular?

There is no reason to examine comparative constitutional law exclusively, or perhaps even primarily or to the exclusion of these other sources of research insight. Many of the concerns voiced in this Article about the absence of attention to comparative constitutional law can and have been raised, for equally valid reasons, about the absence of scholarly attention to history,<sup>216</sup> political science,<sup>217</sup> or other sources of insight. But there are also reasons to believe that comparative constitutional law, if not the *only* source of insight, might be a *particularly helpful* one.

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211. See JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009). There are similar articles in comparative political science about constitutional courts elsewhere, reaching similar conclusions. See Jeffrey K. Staton, *Constitutional Review and the Selective Promotion of Case Results*, 50 AM. J. POL. SCI. 98 (2006); Georg Vanberg, *Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers*, 32 COMP. POL. 333 (2000).

212. CALABRESI, *supra* note 204, ch. 2; see also Heckler v. Matthews, 465 U.S. 728, 733 (1984) (employing a similar technique to that of the Italian Court); Nardini, *supra* note 210, at 26 n.11 (discussing admonitory powers exercised by the Italian Constitutional Court, noting that one example of those powers “is not completely foreign to the United States Supreme Court’s jurisprudence,” and discussing a case that Calabresi discusses, *Califano v. Goldfarb*, 430 U.S. 199 (1977)).

213. See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1594 (2001) (noting that the author provides examples of “structural review,” which Calabresi “reflected extensively on” earlier); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) (discussing similar ideas in their American and comparative forms).

214. See Declaratory Judgment Act, 28 U.S.C. § 2201 (2006).

215. See Mark V. Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2783 (2003) (“Departmentalism . . . was a reasonable description of constitutional practice for much of the nineteenth century.”).

216. See generally Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

217. See Graber, *supra* note 140.

One reason why this might be the case is the type of evidence produced by comparative constitutional research. Particularly when it is in the form of integrated scholarship, comparative constitutional scholarship and experience may be easier for American law professors to understand than other sources of insight. There are cultural literacy reasons for academics to care about comparative constitutional scholarship, for sure, but those might not be the most important reasons for them to read about comparative constitutional law. Instead, comparative constitutional law might be relevant to scholars because it can generate new ideas and can also be a form of “social science on the cheap.” Empirical evidence of the sort mostly provided in pure social science articles can be difficult for law professors to understand. The same is true of the technical language and methodology of history scholarship. Comparative constitutional law scholarship, however, is still often *legal* scholarship of the more traditional sort. It involves (translated) cases and discussions of those cases, but in a format and language that law professors can understand.<sup>218</sup> It can cast an “empirical light”<sup>219</sup> on issues, but an empirical light without the confusion and complication that might come from consulting other sources of empirical insight.

Another major potential alternative source of scholarly insight is international law. As discussed in Section III.B, international law has increased in prominence, and there are now many treaties, cases, and articles that might inform constitutional scholarship. But while this field may have some helpful insights for American constitutional law, there are some problems with considering it in the context of American constitutional scholarship and teaching.

International law might have helpful answers, but the questions it asks are different from the questions comparative constitutional law asks. Devising rules to govern several countries is different from devising a rule to govern the domestic constitutional order of one country. A rule for international human rights law might be constructed at a higher level of generality, or in a weaker way, because it needs to be implemented by a range of countries in a range of places by a range of different types of courts and institutions. Looking for a rule to govern a single country and its inevitably more homogeneous institutions is different.

In this way, domestic constitutional law has a certain similarity of language across different countries that international law does not share with domestic constitutional law. David Law can write about the “generic constitutional law”<sup>220</sup> that characterizes every constitutional system, and Justice Breyer can discuss the “common legal problem[s]”<sup>221</sup> that domestic

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218. See Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1339 (2002) (“[I]nterpreting and evaluating accessible legal texts is the cheapest, easiest, and quickest way for authors to get into print. This approach requires no special expertise beyond what is available through traditional law school training, and it offers the potential of influencing the subjects of its inquiry.” (citation omitted)).

219. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

220. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005).

221. *Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

constitutional systems face. Constitutional law seems to have certain similarities across countries, which suggests that borrowing is possible and insights can be gleaned, since the questions are roughly similar. Tiers of scrutiny are another way to address a problem like the one proportionality is trying to address. International law has a different language and doctrinal and political structure because it is trying to address a different set of problems.

In addition to the costs of other alternatives, there are also reasons to think that comparative constitutional law in particular has some particular benefits as a source of insight. As a methodological matter, since the potential sources of comparative insight are much greater in number (hundreds of countries rather than simply the history of one country, the United States, or of fifty states) it is much more likely that there will be a constitutional experience directly on point rather than simply tangentially related. If we want to know what happens when a country adopts a national constitutional rule requiring gay marriage, there is no directly on-point American experience. There is experience with state rules, but the only directly applicable experience is foreign. Then there can be scholarship translating that experience into a more comprehensible format for American legal scholars.<sup>222</sup>

This is comparative constitutional law as empirically relevant—but there is more. After several hundred years of American constitutional experience, and with several hundred law schools producing several thousand scholars writing about constitutional law for several decades, we may simply have run out of truly new ideas in the American constitutional context. Where comparative experience is similar to ours, it can be helpful for empirical reasons. But where comparative experience is truly different, it might be one of the last sources of genuinely new ideas or empirical insights.

Many of the concerns about comparative constitutional scholarship are not unique to comparative scholarship and are shared by all forms of scholarship that do not involve reading basic American legal texts found on Lexis or Westlaw. The problems involved in understanding the experiences of other countries are significant, but not necessarily any more formidable than other sources of insight based on experience. There is no reason why it is easier fully to understand the American constitutional situation in 1787, or the intricacies of the constitutional experience of Alabama in 2010, if one is not from either of those times or places.<sup>223</sup>

This is particularly true now that comparative constitutional law, as will

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222. See, e.g., WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* (2006) (discussing these foreign experiences and what they suggest for the American context).

223. Those who are critical of *courts* citing foreign law argue that comparative constitutional law is too difficult. See, e.g., Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 86 (2005) (“To know how much weight to give a decision of the German Constitutional Court in an abortion case, one would want to know such things as how the judges of that court are appointed, how they conceive of their role, and, most important and most elusive, how German attitudes toward abortion have been shaped by peculiarities of German history.”). Judge Posner might be correct that it is hard for courts to consider foreign law, because they do not have the resources, the time, or the training to engage in that type of analysis. But they also lack more training and the ability to analyze the practical implications of their decisions, as he advocates. *Id.* at 90.

be discussed in greater detail in Part V, is developing an intellectual infrastructure. It became much easier to discuss the Constitutional Convention once Max Farrand's *The Records of the Federal Convention*<sup>224</sup> was published. Likewise, now that Zachary Elkins and Tom Ginsburg have compiled a database of the large majority of constitutional texts over history<sup>225</sup> and reports analyzing that database,<sup>226</sup> it is getting easier to talk about foreign constitutional experience. The difficulties of this type of research are substantial, but particularly now, they are no more substantial than any type of research that extends beyond reading American legal texts and cases.

### B. *How the Warren Court and Reactions to It Affected Comparative Constitutional Law*

Comparative constitutional law largely disappeared from law schools, as Part II discussed, and this was in part because of the obsessive focus by the profession on the Warren Court, as Part III explained. But only now that the field of comparative constitutional law is enjoying something of a resurgence can the damage done by this Warren Court-induced disappearance become clearer. It is not merely the absence of comparative constitutional law scholarship that was damaging. Instead, this absence plus the entrenchment of an alternative infrastructure means that it will be very difficult for comparative constitutional law to revive itself. Starting from zero is hard enough, but because of the nature of the disappearance of comparative constitutional law, the field is actually starting from less than zero. Other fields have become more entrenched, and it is hard to undo the scholarly infrastructure they have created in absolute or relative terms.

During the Fall Era, the American legal system sent those potentially interested in comparative constitutional law a clear message: we do not care about what you care about. Because of this message, an infrastructure was built to support domestic litigation and to support scholarship related to this litigation. This infrastructure was created at the expense of any infrastructure related to comparative and international law, and it was created by and for social movements that focused on domestic litigation and were largely oblivious to comparative constitutional issues. This infrastructure was initially created to support and extend the decisions of the Warren Court, but in some ways those in opposition have joined in to limit or roll back the decisions of the Warren Court. The rise of the "conservative legal movement" that Steven Teles describes<sup>227</sup> was in many ways an attempt to repeal the decisions of the Warren Court. But even if its goal was to develop new domestic legal arguments for why the Warren Court was wrong (based in originalism or law and economics, for example), this movement was still engaging with the domestic legal

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224. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

225. *Constitutions Repository*, CONSTITUTIONMAKING.ORG, <http://www.constitutionmaking.org> (follow "Repository" hyperlink) (last visited Dec. 5, 2010).

226. See *Reports*, CONSTITUTIONMAKING.ORG, <http://www.constitutionmaking.org/reports.html> (last visited Dec. 5, 2010).

227. See TELES, *supra* note 129.

arguments pushed by the Warren Court and not with comparative constitutional law.

The Warren Court made some references to comparative constitutional law, but besides those occasional references and one international law case (*Banco Nacional de Cuba v. Sabbatino*<sup>228</sup>), it largely rejected nondomestic legal arguments. This became most obvious when a range of “American courts consistently . . . turned away challenges”<sup>229</sup> to the Vietnam War based in part on comparative legal arguments. A range of civil rights claims were brought to American courts and other legal institutions as comparative legal arguments, but these arguments were roundly defeated or, more often, ignored.<sup>230</sup> The message was clear: arguments based on non-American legal sources, particularly comparative legal sources, were a complete waste of time, while domestic legal arguments were a worthwhile focus of attention. Groups like the civil rights movement, the women’s movement, and the environmental movement structured themselves to bring domestic legal claims and nothing else.

Because there is no infrastructure of ideas and action related to comparative constitutional law, there are no institutions or actors to reiterate a message about the role of comparative constitutional law in the American legal system. It is simply harder to convince people to accept something if they were socialized without even knowing of its existence.<sup>231</sup> There is a strong normative power of the actual, and with no cases decided and no arguments articulated related to comparative constitutional law, the field has an enormous uphill battle to fight.

As a result, when a decision like *Lawrence v. Texas*<sup>232</sup> references comparative constitutional law, it is seen as somehow new and therefore unsettling—a cynical and revolutionary strategic ploy (in that case by constitutional liberals), rather than a normal and accepted part of our constitutional praxis. Comparative constitutional law now has to convince people that it is helpful and relevant because it is viewed as a new constitutional subject. Part of the normative power of the actual is that the inevitable conflict that is produced when legal institutions take jurisprudential arguments seriously produces certain settled understandings or basic agreements on first principles. As the literature about social movements explains, “Vying movements may view each other with enmity, but to make claims that satisfy the . . . public . . . movements need, however indirectly, to answer objections the other has raised. Answering an opponent’s objections is a

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228. 376 U.S. 398 (1964).

229. Koh, *Transnational Litigation*, *supra* note 155, at 2364.

230. See generally Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

231. See Michael Roskin, *From Pearl Harbor to Vietnam: Shifting Generational Paradigms and Foreign Policy*, 89 POL. SCI. Q. 563 (1974) (showing that a generation’s formative experiences establish its dominant normative paradigms, which are not supplanted until the arrival of a new generation).

232. 539 U.S. 558, 573 (2003).

practice of recognition, however begrudging.”<sup>233</sup> This is entirely lacking when it comes to comparative constitutional law.

There might have been intense conflict about the Warren Court at first and for a while, but with time there came to be certain basic shared core principles that many groups could accept—perhaps equivalent to what the conservative Rehnquist Court, in declining to overrule *Roe v. Wade*, called “essential”<sup>234</sup> to *Roe* and the constitutional treatment of abortion.<sup>235</sup> Reva Siegel has argued that this is what transpired in conflicts about the constitutional treatment of gender, resulting in a shared understanding of formal equality.<sup>236</sup> The same is true of race. The battle over race was bitter at the time, but because it was a battle, at a minimum, “*Brown* became a fixed point in the legal culture.”<sup>237</sup> A Republican President, Richard Nixon, agreed with it,<sup>238</sup> and John Roberts cited it as substantial positive precedent in his central opinion on race and the Constitution.<sup>239</sup>

When it comes to the more purely theoretical—as opposed to practical—implications of jurisprudential movements, the same dynamic prevails. Conflict can be good and clarifying for jurisprudential movements in creating consensus on first principles. It was helpful for law and economics to have both the conservative, later Reagan judicial appointee Posner, as well as the liberal, later Clinton judicial appointee Calabresi writing in that movement.<sup>240</sup> Calabresi and Posner might have disagreed about outcomes, but “both . . . embraced the core of economic analysis as a mechanism for thinking about legal problems.”<sup>241</sup>

With no litigation, intellectual, or other infrastructure built up around comparative constitutional law, there has been no conflict about these issues. Groups like the ACLU or NAACP on the left, or the Christian Coalition or Right to Life Coalition on the right, did not bother to argue about comparative

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233. Siegel, *Constitutional Culture*, *supra* note 12, at 1365.

234. *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992) (“A decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*’s original decision, and we do so today.”).

235. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 3-8 (1970); Mark Tushnet, *Politics, National Identity, and the Thin Constitution*, 34 U. RICH. L. REV. 545, 548 (2000).

236. See Siegel, *Constitutional Culture*, *supra* note 12; see also Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CAL. L. REV. 1465, 1471-72 (2006) (“Siegel’s major historical thesis is that this understanding of what is now called formal equality—where women are the same as men they must be treated the same—was the product of social struggle . . . . It is worth noting . . . that if her characterization of this constitutional contestation in the public sphere is correct, each side gave something up to forge this new constitutional meaning.”).

237. Bruce Ackerman, *supra* note 12, at 1431.

238. *Id.*; see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004) (arguing that social movement conflict shaped the modern understanding of discrimination on account of race).

239. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (arguing that the “fundamental principle” behind the decision “goes back . . . to *Brown* itself”).

240. See George L. Priest, *Henry Manne and the Market Measure of Intellectual Influence*, 50 CASE W. RES. L. REV. 325, 328 (1999) (“It was the debate between the Chicagoan and the Yale, the conservative and the ultra-liberal, which had the influence.”).

241. *Id.*

constitutional law, because courts and others told them not to bother. And with no conflict, we are still debating first principles about whether scholars and courts should even be examining what other countries are doing in the first place. Conservatives writing about comparative constitutional law, with few exceptions, write to contest its very validity rather than to engage with it, and liberals are still encouraging people to study comparative constitutional law in the first place. Everyone is still debating first principles.

The Court's decision in *Lawrence* is a good example of this dynamic. One of the core principles articulated in the decision—that private consensual sodomy is constitutionally protected—was contested within the professional legal culture,<sup>242</sup> but for the most part it was not contested in the White House, Congress, or the general public. However, the use of comparative constitutional law citations was contested within the professional culture,<sup>243</sup> leading members of Congress to call for the potential impeachment of Supreme Court Justices.<sup>244</sup> Even the minimal use of the jurisprudential practices of comparative constitutional law—a tangential and largely irrelevant citation of a few paragraphs in a Supreme Court case—was deeply controversial and contested. The recent intense conflict over this issue, though perhaps unfortunate on its own terms, is therefore perhaps encouraging because it means that there will be the types of conflicts in our constitutional culture that eventually move jurisprudential movements forward.

A major part of the reason that the Warren Court's interest in domestic litigation set comparative constitutional law further back concerns the relationship between the profession, social movements, and jurisprudential movements. There is much scholarship on the role that social movements can play in changing the profession and what the profession can do for social movements, but jurisprudential movements are also part of the equation. The jurisprudential movements created by the Warren Court were also in part created by social movements. The arguments, infrastructure, and personnel of the civil rights movement certainly played a substantial role in creating modern constitutional scholarship. Some scholars, like Mark Tushnet, write about that social movement;<sup>245</sup> others, like Owen Fiss, were in the Justice Department and working on these issues.<sup>246</sup> There are Women's Studies departments and African-American Studies Departments and changed classes and scholarship in the rest of the university in substantial part because of social movements.

But no social movement ever really cared about comparative

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242. See, e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1577-79 (2004).

243. See *id.* at 1580-81.

244. See Tom Curry, *A Flap Over Foreign Matter at the Supreme Court*, MSNBC.COM (Mar. 11, 2004), <http://msnbc.msn.com/id/4506232> (quoting Congressman Tom Feeney as stating, "To the extent [judges] deliberately ignore Congress's admonishment [about the use of foreign law in court decisions], they are no longer engaging in 'good behavior' in the meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment").

245. See, e.g., MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (2005).

246. See Curriculum Vitae: Owen Fiss, *supra* note 134.

constitutional law. There are many reasons that they could have. Comparative constitutional law could have strategic legal uses for various sides, and its comparative nature might have been a natural fit for an internationally oriented movement like the nuclear peace movement or the immigrants' rights movement. Led by a Warren Court and then a profession that focused everything on domestic law, however, there was no strategic reason for any social movement to invest in or care about comparative constitutional issues. A good example of this dynamic comes from the recent confirmation hearings for Sonia Sotomayor. When Sotomayor said potentially negative things about race or gender during the confirmation hearings, the groups related to those social movements reacted with criticism and political pressure.<sup>247</sup> When she said negative things about comparative constitutional law, there were no groups to react.<sup>248</sup>

Because of this entire infrastructure related to domestic law, not only has comparative constitutional law suffered, but so too has American judicial review. The singular concern of those who studied the Warren Court was to find a domestic legal justification for the Court's decisions. For instance, Frank Michelman provided a Rawlsian justification.<sup>249</sup> John Hart Ely provided a justification based on democratic theory.<sup>250</sup> Their arguments were different, but their *raison d'être* was the same: to find a way to justify a court decision and the judicial authority to issue that decision based on domestic legal sources. But there have been and continue to be other arguments in favor of judicial review, particularly from comparative experience, stemming from the fact that about ninety percent of the countries in the world use it, many with great success.

This has also been damaging for political movements that want to elicit favorable decisions from the Supreme Court and other courts, and so want to encourage scholars to write about issues that support these movements. The Warren Court handed down several decisions that supported liberal causes. Some liberals argued that the Court should use only domestic law in support of these decisions because the use of nondomestic sources risked drawing additional and unnecessary criticism to its already controversial holdings.<sup>251</sup>

The result was that, once the Court was less favorable to the domestic legal claims being brought by liberals—as the Warren Court turned into the Burger, Rehnquist, and Roberts Courts—liberals had to make claims that might have been constitutionally worthy, but were much more radical in the eyes of the Court than they needed to be. There were many law professors who first made their careers in practice related to the domestic legal infrastructure and/or

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247. See, e.g., Amy Goldstein & Paul Kane, *Liberalism Had Little Presence in Sotomayor Hearings*, WASH. POST, July 19, 2009, at A3 (discussing objections of liberal interest groups to comments on abortion and gay rights).

248. *Id.* (featuring no mention of Sotomayor comments on foreign law).

249. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

250. See ELY, *supra* note 137.

251. See Koh, *Transnational Litigation*, *supra* note 155, at 2364 n.96 (“My colleague Owen Fiss has suggested to me that some Supreme Court justices hesitated to take such a step for fear of undermining the Court’s domestic advances in the area of civil rights.”).

clerked for Warren Court Justices (Harold Koh, who worked at the Justice Department's Office of Legal Counsel, and Vicki Jackson, who clerked for Justice Thurgood Marshall, for example) who later turned to comparative constitutional issues once the more conservative Supreme Court turned against many of their arguments about domestic constitutional law. By that point, though, however compelling their work was, they were working in academia, and the Supreme Court had years of experience in justifying its decisions based exclusively on domestic law arguments. It was completely new territory for these scholars and for the courts they were trying to convince.

The same could be said of the conservative legal movement and its relationship to judicial review. Although the conservative movement might now have a Supreme Court more favorable to its claims, the current climate of renewed interest in comparative constitutional law might lead the Court to turn more to the right than it would otherwise to be consistent with comparative constitutional law that is more conservative. There is plenty of conservative comparative constitutional law, as Justice Scalia, among others, has noted.<sup>252</sup> When the conservative legal movement faced a completely inhospitable Warren Court, maybe it would have helped if conservative legal scholars also made comparative constitutional arguments. And, if a liberal Supreme Court exists again, maybe it would help if conservatives prepared that liberal Court for the conservative comparative constitutional law it would have considered earlier and therefore should consider again.

Of course, all of these concerns might be avoided if liberals and conservatives and domestic and comparative scholars alike create a durable structure for comparative constitutional law. The next Part discusses how that might be done.

#### V. REVERSING THE FALL AND RECREATING THE RISE

Comparative constitutional law has enjoyed something of a resurgence in the past ten years. The years since 1989 have featured an increasingly globally engaged legal profession. Just as the years after World War II featured a wave of constitutional creation around the world that attracted the interest of the American bar, so too have the years since the fall of the Berlin Wall.<sup>253</sup> The profession has responded by creating groups like the Central and East European Law Initiative (CEELI) of the American Bar Association,<sup>254</sup> and law firms have opened offices overseas in record numbers.<sup>255</sup>

It took nearly ten years after 1989 for these developments to affect legal pedagogy and scholarship, but now they certainly have. A series of *Harvard*

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252. See *Roper v. Simmons*, 543 U.S. 551, 624-27 (2005) (Scalia, J., dissenting) (discussing comparative constitutional law that favors more conservative constitutional outcomes).

253. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 715-16 (2001).

254. See Sandra Day O'Connor, *CEELI Award Ceremony and Luncheon: ABA Annual Meeting*, 42 ST. LOUIS U. L.J. 715 (1998).

255. See Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 738 (1994).

*Law Review* Forewords have discussed comparative constitutional law, including one written by a Supreme Court Justice of another country.<sup>256</sup> Prominent law reviews are publishing more articles related to comparative constitutional law,<sup>257</sup> and law reviews in general are publishing comparative constitutional law articles in greater numbers than during the Fall Era.<sup>258</sup> During the recent Supreme Court confirmation hearings for Elena Kagan, she was asked about her decision as Dean of Harvard Law School to require a comparative or international law class but not a constitutional law class.<sup>259</sup> Because of efforts to “bring the state back in,”<sup>260</sup> cognate disciplines have started to examine comparative constitutional politics again.

This time, though, this interest in comparative constitutional law needs to be more durable. Interest in the field is of course not new, but durability would be. Based on some efforts that were successful during the Rise Era, and some of the tactics used by other successful jurisprudential efforts, this Part begins the project of creating a durable second Rise Era by suggesting several reforms to American legal education.

#### A. *Speaking to the Profession and to Law Schools*

First, just as Henry Manne did for law and economics, a series of seminars could be offered every year in comparative constitutional law for judges, law professors, and law review editors. Manne’s seminars reached over five hundred judges, from conservatives to liberals like Ruth Bader Ginsburg (when she was on the D.C. Circuit).<sup>261</sup> At one point, Manne’s seminars had been attended by forty percent of the federal judiciary.<sup>262</sup> The judges attending the seminars generally considered the program to be a success, and it influenced their decisions, therefore making law and economics of greater

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256. See Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19 (2002); Calabresi, *supra* note 205, at 110-12, 124-30; Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L. REV. 13, 24, 27 (1995); Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 25 (2008); Morton J. Horowitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change—Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 47-48, 96 (1993); Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 54-55, 67 (2007); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 29-30, 32-34, 48, 78-79, 99-101, 128 (2004); Posner, *supra* note 223, at 55, 86-88, 100, 102; Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 29-30 (1999).

257. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

258. While law reviews published very few articles on comparative constitutional law between 1972 and 1989, as well as between 1989 and 1999, since 1999 they have published a great number of articles on the subject (though nowhere near the numbers that they published during the Rise Era). For a good example, see, for instance, Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

259. See, e.g., 156 CONG. REC. S6669 (daily ed. Aug. 3, 2010) (statement of Sen. Grassley).

260. PETER B. EVANS, DIETRICH RUESCHEMEYER & THEDA SKOCPOL, *BRINGING THE STATE BACK IN* 28 (1985).

261. See TELES, *supra* note 129; Ronald A. Cass, *One Among the Manne: Changing Our Course*, 50 CASE W. RES. L. REV. 203, 208 (1999).

262. TELES, *supra* note 129, at 113.

interest to the profession.<sup>263</sup> Manne involved a range of law professors in these seminars, which interested a range of law professors who were otherwise uninterested in law and economics.<sup>264</sup> These seminars also educated law review editors in law and economics, which made them more comfortable with articles about the topic.<sup>265</sup> These programs also received a great amount of media attention, which led to even more awareness and therefore discussion of law and economics.<sup>266</sup>

George Priest has identified several reasons why these programs were successful: the seminars were free, featured prominent scholars, were held in great locations (often Miami), and featured illuminating (and cross-ideological) content.<sup>267</sup> One could imagine a similar situation for comparative constitutional law seminars. A group like the Ford Foundation, so crucial to the success of comparative constitutional law during the Rise Era, could also subsidize these classes during a more durable Rise Era right now. It should also be easy to hold classes about *comparative* constitutional law in appealing geographical locations. Just as Manne's seminars featured liberal instructors like Paul Samuelson,<sup>268</sup> along with liberal attendees like Justice Ginsburg and District Court Judge Jack Weinstein,<sup>269</sup> these comparative constitutional law seminars could feature conservatives like Steven Calabresi.<sup>270</sup>

In addition to seminars, other efforts could be taken to ensure that the profession realizes the relevance of comparative constitutional law. An overview of the field, provided either in the form of treatises or restatements, could also help interest lawyers practicing in the field, as well as scholars writing about the field. Originalism was substantially assisted by the creation of books documenting discussions about the Constitution at the time of the Founding. G. Edward White has written about how many jurisprudential movements and areas of law were assisted by the intellectual aid provided by the creation of the Restatements in the early part of the twentieth century,<sup>271</sup>

263. See Celia W. Dugger, *Paid Course May Pass Judges' Group*, WASH. POST, Aug. 23, 1980, at C1 (quoting Manne as saying, "If I wasn't doing my job well, the judges wouldn't come in droves. I'm waiting for someone to come up with a better program.")

264. See Marylyn Bender, *Lawyers and Economics*, N.Y. TIMES, July 11, 1971, at F1; Editorial, *Economics Anyone?*, WALL ST. J., June 24, 1971, at 8; Edwin McDowell, *Bringing Law Profs Up to Date on Economics*, WALL ST. J., July 23, 1973, at 8.

265. See Henry N. Butler, *The Manne Program in Economics for Federal Judges*, 50 CASE W. RES. L. REV. 351, 355 (1999).

266. See Walter Guzzardi, Jr., *Judges Discover the World of Economics*, FORTUNE, May 21, 1979, at 58. There was also a front-page story in *The Washington Post*. Fred Barbash, *Big Corporations Bankroll Seminars for U.S. Judges*, WASH. POST, Jan. 20, 1980, at A1.

267. See Priest, *supra* note 240, at 330.

268. See Butler, *supra* note 265, at 354 n.8.

269. See Jack B. Weinstein, *The Contribution of Henry G. Manne Towards the Education of the American Judiciary*, 50 CASE W. RES. L. REV. 421 (1999).

270. Steven Calabresi is one of the few conservatives actually writing about comparative constitutional law, not just objecting to its existence. See, e.g., Steven G. Calabresi & Kyle Brady, *Is Separation of Powers Exportable?*, 33 HARV. J.L. & PUB. POL'Y 5 (2010); Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong To Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001). He also teaches comparative law and comparative constitutional law. See *Faculty & Research: Steven G. Calabresi*, NORTHWESTERN UNIVERSITY LAW SCHOOL, <http://www.law.northwestern.edu/faculty/profiles/StevenCalabresi/> (last visited Nov. 4, 2010).

271. See G. Edward White, *The American Law Institute and the Triumph of Modernist*

and the same could be true of comparative constitutional law.

An amicus group briefing the Supreme Court on what comparative constitutional law says about the issues before the Court could draw attention to the field and encourage the Court to reference these materials—which in turn would cause the profession to care about these issues and scholars to write about them. Right now, briefs referencing comparative constitutional law are presented to the Court, but only rarely, and generally only to support liberal positions on constitutional issues.<sup>272</sup> There is certainly plenty of comparative constitutional law that would favor conservatives, and therefore no reason for lawyers trying to win particular cases for conservative causes to fear this discussion of comparative constitutional law.<sup>273</sup>

As part of interesting the profession in comparative constitutional law, it would also be helpful to attract the interest of advocacy groups. Part of the reason that the Warren Court dominated American constitutional law is that it created social movements with a strategic interest in the rhetoric and outcome of its cases. There is no comparative constitutional law social movement. It might be true that the infrastructure related to the international human rights movement (including groups like Amnesty International, referenced earlier) could at some point decide to use comparative constitutional arguments, but for some time now their attention has been almost entirely directed elsewhere.

Activists on both sides have an interest in pushing comparative constitutional law. Liberals will like how much more progressive comparative constitutional law is than American constitutional law on many race and gender issues, like affirmative action.<sup>274</sup> Conservatives will like how much more restrictive comparative constitutional law is when it comes to abortion rights.<sup>275</sup> Various groups—from liberals to conservatives to those who care about foreign policy to immigrants' rights groups—might find in comparative constitutional law shared outcome-based and process-based grievances.<sup>276</sup>

### B. *Constructing Law Schools*

Law schools, supported by the profession, need to provide the resources to train those potentially interested in comparative constitutional law.

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*Jurisprudence*, 15 LAW & HIST. REV. 1 (1997).

272. For instance, Harold Koh has filed several amicus briefs before the Supreme Court, but always only to support “liberal” positions on the constitutional issues before the Court. *See, e.g.*, Brief for Mary Robinson et al., as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

273. *See Roper v. Simmons*, 543 U.S. 551, 624-26 (2005) (Scalia, J., dissenting), discussed *supra* note 252.

274. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 344 (2002) (Ginsburg, J., concurring) (discussing how the Court’s decision “accords with the international understanding of the office of affirmative action”); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999) (discussing the comparative and international law of affirmative action).

275. *Roper*, 543 U.S. at 625-26 (2005) (Scalia, J., dissenting), discussed in *supra* note 252 and accompanying text.

276. *See* John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212, 1214 (1977) (demonstrating that shared grievances and shared claims are the essence of social movements).

Specialized fellowships have proven crucial to jurisprudential movements and to cultivating the personnel to support them. Specialized fellowships create a deep bench of potential scholars who can teach at schools of all kinds and all rankings. The Burger, Hurst, and Warren Fellowships were crucial to the development of professors to teach and write about legal history.<sup>277</sup> The Olin Fellowships were similarly important for law and economics.<sup>278</sup> During the Rise Era, the Story Fellowships at Harvard Law School were crucial to the development of comparative constitutional law.<sup>279</sup> Critical legal studies, a much less successful jurisprudential movement, by contrast, never had a substantial future law professor fellowship.

With the creation of the type of intellectual infrastructure mentioned earlier, there would be more resources available for those interested in writing about comparative constitutional law. But beyond just this, there needs to be a substantial return to the integrated method, both in the teaching of law school classes and the writing of constitutional scholarship. In the classroom, constitutional law classes can feature discussions of comparative constitutional issues as part of introductory or basic constitutional law courses. Some, most notably Roscoe Pound, have raised the general idea of “the pervasive method” for comparative law,<sup>280</sup> which was used widely during the Rise Era. Importantly, this method would involve teaching the domestic, American constitutional issue, and then using the comparative constitutional approach as a *policy alternative*.<sup>281</sup>

This approach has worked well before, in the Rise Era, and it can work well again.<sup>282</sup> If students learned comparative constitutional law in this way, they would not be resistant to its relevance. They would embrace it, because they would be likely to see it as a normal part of learning domestic

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277. See G. Edward White, *The Origins of Modern American Legal History*, in TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 6 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009) (“In the higher tiers of law schools in 1967 . . . only Penn, Wisconsin, N.Y.U. and Virginia, in addition to Harvard, had legal historians on their faculties . . . . Allowing for some mobility, between 1971 and 1978 participants in the Warren [Fellowship] program had secured positions on the Buffalo, Chicago, DePaul, Maine, Michigan, North Carolina, Northwestern, Pennsylvania, Rutgers-Camden, UCLA, Vermont and Virginia, and Wisconsin faculties.”).

278. See TELES, *supra* note 129, at 175.

279. See *supra* notes 53-54.

280. Roscoe Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161, 168 (1934). For other endorsements of this approach, see Fontana, *supra* note 174; Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49 (1996); and Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615, 622-23 (1938). For a criticism of teaching comparative law this way, see Rudolf B. Schlesinger, *The Role of the “Basic Course” in the Teaching of Foreign and Comparative Law*, 19 AM. J. COMP. L. 616, 616-17 (1971).

281. For arguments in favor of this approach, see Mark Tushnet, *How (And How Not) To Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671, 674 (2004).

282. See Brian K. Landesberg, *The Use of International and Comparative Sources in a Domestic Constitutional Law Course* 1, 3-4, [http://www.ialsnet.org/meetings/constit/papers/LandsbergBrian\(USA\).pdf](http://www.ialsnet.org/meetings/constit/papers/LandsbergBrian(USA).pdf) (last viewed Oct. 26, 2010) (“About half the students [learning comparative law] even said the materials were more interesting than their domestic law materials, and about half also said that their exposure to global materials made them more likely to take international electives. A slight majority also said that the materials aided their understanding of law, and three quarters of the students said that the global materials helped them to see alternate approaches to legal problems . . .”).

constitutional law, which they have no concerns about doing and see themselves as potentially practicing and needing to know about after they graduate. If comparative materials were placed in our regular domestic law casebooks, then students might take comparative constitutional law more seriously—as something that American law students studying to be American lawyers might have to know, and as something they cannot avoid anyway because it is in the casebook they have been assigned (meaning there is no extra expense involved in purchasing an additional book, and no degrading of the comparative material because it is in a separate book).<sup>283</sup> Faculty might embrace teaching comparative constitutional law through the pervasive method,<sup>284</sup> since they are generally not interested in comparative constitutional law per se but may be interested in its relationship to the domestic constitutional law issues they teach and write about more usually.<sup>285</sup>

Law professors do not need as much expertise to teach the comparative as it relates to the American rather than the comparative on its own. Faculty might not know much about the history and political context of *Marbury*, but are comfortable teaching it as part of a few class sessions. The same might be true of comparative constitutional law. And again, comparative constitutional law still involves teaching cases and drawing on traditional legal materials. It does not ask professors to teach statistics, negotiations, or some other entirely different sort of pedagogical material than is normally part of the constitutional law class. With the pervasive method in place, current law students, and therefore future lawyers and law professors, would be more interested in comparative constitutional law.

Teaching comparative constitutional law through the pervasive method would also remedy some of the problems that have prevented other attempts at promoting comparative constitutional law from succeeding. There have been two new comparative constitutional law casebooks in the past ten years or so,<sup>286</sup> as well as several readers discussing comparative constitutional issues.<sup>287</sup> But requiring students to purchase an entirely new book—and asking faculty to assign that book—simply for the sake of teaching comparative materials will

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283. It is here, then, where I admire but have some concerns with the impressive project led by Hiram Chodosh of the S.J. Quinney College of Law at the University of Utah to create a series of supplements highlighting comparative elements that might be used in domestic law classes. I fear that creating separate books might discourage students from taking these supplements seriously, and discourage faculty from assigning them for that reason (not to mention the cost and resulting dissatisfaction that might come from having to purchase an additional book).

284. See Tushnet, *supra* note 281, at 671 (“Law faculties seem increasingly interested in figuring out how to incorporate non-U.S. legal materials in basic courses.”); see also Neil S. Siegel, *Some Modest Uses of Transnational Legal Perspectives in First-Year Constitutional Law*, 56 J. LEGAL EDUC. 201, 201 (2006) (“[E]ven professors who remain focused on U.S. constitutional law incorporate transnational legal perspectives in their instruction.”).

285. Tushnet, *supra* note 281, at 671.

286. See NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

287. Aspen Publishers has a series of comparative constitutional law readers, each one focused on a particular constitutional law topic and meant to supplement the domestic law teaching on that topic. See *Academic Bulletin: University of Utah S.J. Quinney College of Law*, AM. SOC’Y INT’L L. (Summer 2009), <http://www.asil.org/ab/academibullsummer09/utah.html> (describing the new Aspen series).

not be popular or successful. This is part of the reason that the pervasive method of teaching legal ethics failed: there were not enough students or faculty willing to purchase a separate book that talked about legal ethics and how those issues arise in each area of law.<sup>288</sup>

Just as the pervasive method would create a legal pedagogy to improve comparative constitutional law, so too would integrated scholarship create a scholarship to help comparative constitutional law. There might be concern about whether integrated scholarship—particularly when it comes to something potentially intellectually challenging like comparative constitutional law—might promote a certain amount of superficiality in scholarship and the unfortunate phenomenon that Mark Tushnet has called the “lawyer as astrophysicist,”<sup>289</sup> according to which someone with a law degree can learn enough about any topic that they care to study. This same concern arose when law and economics started to produce integrated scholarship.<sup>290</sup> In the study of other countries, there has been a similar debate between those who do area studies—deep studies of particular countries—and those who do large-N studies—studies of more countries with less depth for each country.

But integrated scholarship need not be superficial scholarship. Just as jurisprudential movements like law and economics turned to the more detailed studies of cognate disciplines like economics for support for their claims, so too could integrated comparative constitutional law scholars turn to more detailed cognate scholarship to support substantially American conclusions. (Indeed, they already have.)<sup>291</sup> Comparative constitutional law is a field that is big enough for those coming from the American constitutional scholarly tradition, like Bruce Ackerman, Vicki Jackson, or Mark Tushnet, as well as from the more comparative tradition, like Tom Ginsburg or Alec Stone Sweet.

At a more fundamental level, jurisprudential movements like law and economics and comparative constitutional law face choices. These choices are not always dichotomous, but they do involve setting priorities. A jurisprudential movement can choose to be methodologically pure and therefore speak only to the abilities and concerns of those writing in the narrow field. Or it can decide to accept that at least some of its scholars some of the time will have to sacrifice methodological purity and topic selection to make research of interest to a larger community.<sup>292</sup> For jurisprudential movements, the wider community is the all-important rest of the law school and the profession, which can make or break a movement. Sometimes a jurisprudential

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288. See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 33 (1992).

289. Mark Tushnet, *Constitutional Scholarship: What Next?*, 5 CONST. COMMENT. 28, 31 (1999).

290. See James E. Krier, *Economic Analysis of Law*, 122 U. PA. L. REV. 1664, 1683 (1974) (reviewing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972)) (“In sum, my point about the property materials in *Economic Analysis of Law* is that so much could have been explored that was not. What is done is generally done well; the few points pursued are pursued effectively.”).

291. For a helpful example of this, see Tushnet, *supra* note 1, at 1230 (“By far the bulk of this Article deals with U.S. constitutional law, not the constitutional law of other nations.”).

292. See, e.g., Kimberly D. Krawiec, *Fairness, Efficiency and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443, 481 (2001) (noting that law and economics sacrificed much of its methodological rigor and adopted “no single economic theory”).

movement has to prioritize being relevant almost as much as it has to prioritize being right.

## VI. CONCLUSION

At a time when members of Congress threaten to impeach Supreme Court Justices for citing the constitutional law of other countries,<sup>293</sup> it is hard to remember back to a period when there was widespread interest in the constitutions of other countries. Comparative constitutional law is now seen as polarizing—an issue to campaign for or against—rather than as a staple of the intellectual and pedagogical diet of law schools. But there was an earlier period where interest in the field was both common and assumed, rather than rare and contentious.

That period has passed, though, and the disappearance of a jurisprudential movement is not rare. Movements come and go, because the interests and activities of the legal profession come and go. What is most consequential about the disappearance of comparative constitutional law, though, is what the scholars who studied similar questions have produced in its absence: scholarship with brave, bold, and original new ideas, but ideas that we could have better understood in light of the experiences of the rest of the world.

As law schools continue to respond to these increasingly dynamic times in the law and in the university, the challenge is to ensure that such an important jurisprudential movement does not entirely disappear yet again. The structures of American legal education that helped law schools be cosmopolitan during the Rise Era and helped jurisprudential entrepreneurs like Richard Posner create law and economics must be applied to create a durable and permanent interest in comparative constitutional law. As the late Chief Justice William Rehnquist wrote when dozens of countries were creating constitutions after the fall of the Berlin Wall, “now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”<sup>294</sup>

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293. See Curry, *supra* note 244.

294. William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).