

Hauser Globalization Colloquium Fall 2010

Professors Ryan Goodman & Robert Keohane

Furman Hall 900, Pollack Colloquium Room
Wednesdays 2:00 pm-3:50pm
(unless otherwise noted)

Schedule of Sessions (subject to modification)

- September 15 **Professor Eric Posner**
Human Rights, the Laws of War, and Reciprocity
- September 22 **Professor Michael Doyle**
A Global Constitution? The Struggle over the UN Charter
- October 6 **Professor Mary Dudziak**
Law, War, and the History of Time
- October 13 **Professor Tim Buthe**
The Rise of Supranational Regulatory Authority: Competition Policy in the European Union
- October 20 **Professor Kal Raustiala**
Information and International Institutions
- October 22 **Professor Peter Katzenstein**
(Friday) *The Transnational Spread of American Law: Legalization as Soft Power*
- November 10 **Professors Oona Hathaway & Scott Shapiro**
Outcasting: Enforcement in Domestic and International Law
- November 17 **Professor Kathryn Sikkink**
"Information Effects and Human Rights Data: Is the Good News about Increased Human Rights Information Bad News for Human Rights Measures?"
Background Reading: Emilie M. Hafner-Burton, & James Ron, *Seeing Double: Human Rights Impact Through Qualitative and Quantitative Eyes*, World Politics, 2009.
- December 1 **Professor Benedict Kingsbury**
Obligations Overload for Fragile States
- December 3 **Professor Beth Simmons**
(Friday) *Subjective Frames and Rational Choice: Transnational Crime and the Case of Human Trafficking*

Draft 1.6.0. 7/9/10. Current total word count 32,800 without the conclusion. Please do not cite or quote without express permission from the authors. Comments most welcome.

Note to Readers: This draft will eventually split into two separate papers.

- The first paper would be framed in terms of Part 1, subsection 1 (a modified discussion of Americanization and Legalization) and subsection 2 (Soft Power and Soft Law), and focus on Part 2 (In the Shadow of the State: Political Programs and the Americanization of Law) and Part 3 (In the Shadow of the State: Corporate Expansion and the Americanization of Law), followed by a conclusion.
- The second paper would be framed in terms of Part 1, subsections 1 (a modified discussion of Americanization and Legalization) and subsection 3 (Legal Transplants: Processes, Origins, and Translations), and focus on Part 4 (Legalization: Civil Procedure and Constitutional Review), followed by a conclusion.

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The Transnational Spread of American Law: Legalization as Soft Power

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This paper analyzes the process of the spread of American law and its effect on the process of legalization in world politics. Legalization is a process, legalism a mental state¹. Legalization refers to the obligatory nature of rules, the precision of those rules, and third-party delegation of rule interpretation, monitoring, and implementation.² Legalism describes the structure of meaning that inheres in different legal systems, such as common and civil law. Processes of legalization and the effects they have on legalism typically are engineered by states or occur in the shadow of the state. This paper analyzes legalization and legalism from the perspective of soft power. It does so with specific reference to the partial Americanization of global law, identifying distinct causal mechanisms that are observable in the transplanting of legal norms and practices.

Legalization is a subject of profound political importance and controversy. The legal system is an important constitutive part of national identity and central to the regulatory norms that shape patterns of behavior in state and society.³ In the current era of legalization on a global scale, American law is a powerful source of innovation in many countries. The influence of American law on the legal systems of other states affects diverse areas: general approaches to law (theories of legal realism, pragmatism, law and economics), specific areas of legal practice (constitutional law, tax law, securities law, antitrust law), legal education (credit system for coursework, post-graduate studies such as the LLM degree, law student clinics), the structure of the legal profession (mega-law firms, private practice), procedural reform (constitutional exclusionary rules, class actions, plea bargaining) and constitutional arrangements (the separation of powers, judicial review).⁴ In the words of Daniel Kelemen, “the American legal system has become the most influential nation in the world and many U.S. legal norms have spread to other jurisdictions through a variety of diffusion processes.”⁵

Opposition to the Americanization of law is also a prominent feature of contemporary global politics. Sometimes this takes the form of rhetorical hyperbole. Australia’s Robert Lusetich’s, for example, wrote that “it is impossible for me to overstate how decayed modern American society, the most litigious in the history of this planet, has become because of lawyers.”⁶ At other times countries have adopted legal strategies seeking to obstruct efforts to cooperate with U.S.-style pre-trial discovery. Many states, for example, have erected blocking statutes, which apply generally but are directed specifically toward countering American styles of litigation. These blocking statutes create a penal sanction for the disclosure, copying, inspection, or removal of documents for the purposes of aiding pretrial evidence gathering in foreign states.⁷ In short, the Americanization of law is a contested and highly political process.

Processes of legalization are political and interactive rather than doctrinal and directive. In some contexts they show power flowing from top to bottom. In others they reveal bottom-up processes of arriving at workable arrangements among numerous actors. Legalization creates competition between and imitation of different practices. Legalization processes always entail openly or indirectly asymmetries of power and conflicts of interest. We develop these points in Part 1 while discussing the concept of Americanization, soft power, and transnational legal process such as legal transplantation and translation

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¹ Schilling 2005, 2.

² Goldstein, Kahler, Keohane and Slaughter 2000a.

³ Nader 1965, 3; and Smith 1993, 13-14.

⁴ Langer, 2004, 1-3.

⁵ Kelemen 2010, MS 12.

⁶ Lusetich 2000, 13.

⁷ Restatement (Third) of Foreign Relations Law of the United States 1987, § 442 note 4.

between common and civil law systems. Parts 2 and 3 focus on some of the main actors active in the Americanization of legal processes, Part 4 on legal processes. Part 2 argues that the limits the U.S. government has encountered in its attempts to export directly to other states whole systems of the rule of law is in sharp contrast to the profound influence NGOs, universities, and international organizations have on the Americanization of legal practices abroad. Part 3 analyzes the far-reaching impact that the organizational form of the American law firm has had on legal practices in increasingly global markets serviced by a small number of mega-law firms offering legal services. Part 4 views legalization as a process that operates in civil procedure, here illustrated empirically by pre-trial discovery and class action suits, and also in constitutional law, here illustrated by the citation practices of foreign courts as well as the intense controversy spawned in recent years by the citation of foreign legal opinions by the U.S. Supreme Court.

Part 1: Theory: (1) Americanization and Legalization; (2) Soft Power and Soft Law [for Parts 2 and 3]; (3) Legal Transplants: Origins, Translations, Processes [for Part 4]

Broadly speaking scholars of international relations analyze legalization and legal change in world politics through roughly similar optics that are employed also by economists and scholars of comparative law: rationalist and social.⁸ One highlights the importance of states, international institutions, efficiency, regulatory norms, treaty law, and clear outcomes. The other focuses on numerous actors operating in the shadow of the state, prestige, national and transnational processes of diffusion, constitutive norms and domestic law, and diffuse outcomes. This paper draws on both optics in its inquiry into the extent and variability in the spread of American legal doctrines and practices. We argue in Parts 2 and 3 that superior power and greater efficiency often make actors and institutions closely allied with the American state the drivers of the Americanization of global law. Part 4, by contrast, argues that constitutive processes and domestic contexts are central in the variable reception of American law and politics, as well as the recursive process by which American law is itself transformed by the ways in which U.S. law affects political outcomes abroad.

The first, rationalist optic views legalization as a political process that regulates state conduct and typically deals with dispute resolution among states in international institutions, through treaties, tribunals, courts and case law.⁹ Legalization, in this optic, is the product of state choice. It is a specific type of institutionalization that varies together with different combinations of obligation, precision and delegation. Variation along each of the three dimensions creates different ideal types of legalization. They can be scaled from high to low and are useful in the analysis of real world phenomena such as human and civil rights tribunals¹⁰ and trade regimes.¹¹ Heightened obligations are created by formal contract and state choice. Precise rules are more readily enforceable than imprecise ones. And the delegation of broad enforcement authority to third parties advances legalization more than the delegation of narrow or no authority. As a particular form of institutionalization, legalization varies not only logically but also across locales, issue area and time. It imposes more or less legal constraints on governments. In this view law

⁸ Although these two optics are included in the broader range of approaches that mark the field of international law which organizes itself into a larger number of frameworks. Ratner and Slaughter 1999, for example, distinguish between seven different schools of thought.

<http://www.uio.no/studier/emner/jus/humanrights/HUMR4100/h06/undervisningsmateriale/Slaughter%20-%20IL%20Method.pdf>.

Like international relations, anthropology and law operates with a two-fold distinction: “moving outward into the grand historical machinations of class and cash, power and privilege, or moving inward to the nubs and slubs in the fabric of meaning and belief.” See Just 1992, 376.

⁹ Goldstein, Kahler, Keohane and Slaughter 2000; and Abbott, Keohane, Moravcsik, Slaughter and Snidal 2000.

¹⁰ Borgen 2007; and Helfer 2002, 1834.

¹¹ Sokol 2008; and Nakagawa 2007.

regulates acceptable state behavior and interacts powerfully with domestic politics.¹² Mediated by institutions in this way, the relationship between law and politics becomes deep and reciprocal.

The second, social optic pushes the analysis of legalization beyond legal rules established for and by states and includes the diffusion of legal rules through socialization and persuasion.¹³ It points to the generative powers that enable actors to do new things by constituting new political and social relationships and practices. This power is revealed in the broader social context in which law operates, such as when legal actors are exposed to and adopt the litigating strategies and procedures of foreign attorneys. Law is deeply embedded in the domestic practices, norms, and institutions of society and encompasses issues of legitimacy and obligation and the requirement to align legal practices with legal traditions and underlying social practices. Legalization in this optic includes the two elements of customary international law—state practice and *opinio juris*, the belief held by states that a certain form of conduct is required by international law. Customary international law thus refers in the empirical sense to what states do or do not do, but also to the subjective understanding of actors in the international system. Legalization thus includes the rules by which states are legally bound, such as in *jus cogens* and the laws of war, but also imprecise constitutive norms that do not necessarily rely on mechanisms of compulsory adjudication, such as nascent concepts of human rights. The process of legalization under this optic can occur in settings as varied as an arbitral tribunal, a courtroom, a classroom, or a conference hall. It can occur top-down, with cosmopolitan judges importing legal solutions from foreign courts and foreign scholarship, or bottom-up, with attorneys attempting to implement strategies from successful litigation overseas.¹⁴ Legalization is thus best conceived of not as a product of state choice but as a dynamic, open-ended process brought about by the interactions of multiple political actors.¹⁵

Americanization and Legalization

The trafficking of American law often occurs in a similar way, with no unified power or purpose. Significant legal reform often comes from abroad, with or without the permission or complicity of a national government or its judiciary. In the past, imposition was often coerced and involuntary, as illustrated by the extension of Roman law during the expansion of the Roman Empire, the imposition of French law during the Napoleonic conquests, and colonial rule or military occupation.¹⁶ Ugo Mattei's Marxist theory of imperial law similarly stresses the unity of purpose of an imperial power.¹⁷ For Mattei, America's imperial law is a dominant layer of the global legal system that creates unity in a world of underlying plurality.¹⁸ Imperial law rests on a combination of dominance and hegemony, coercion and voluntary acceptance, brute force and cultural constructions of presumed consent embedded in the rhetoric of democracy and the rule of law. Imperial law can thus spread through colonial rule, imposition by bargaining and different forms of blackmail, or the diffusion of prestige reinforced by propaganda.¹⁹ With its roots in multiple European legal constructs and practices, as well as its reactive character and decentralization, American law is particularly well-suited to play this imperial role.

¹² Kahler 2000, 661-62.

¹³ Finnemore and Toope 2001; and Goldstein, Kahler, Keohane, and Slaughter 2001.

¹⁴ Sweet and Mathews 2008, 161; Slaughter 2003, 44; and Widner 1998.

¹⁵ An analogous set of optics also divides the economic and comparative approaches to legal change, with their respective emphasis on changes in relative prices and prestige as the main engines of legal change. Like this paper, Mattei 1994 and Spamann 2009 argue the case for the advantage of complementary or eclectic styles of analysis.

¹⁶ On "imposed law," see, for example, Burman and Harrell-Bond 1979. They note that imposed law, a concept they admit is difficult to operationalize, is that law which "does not reflect the values and norms of the majority of the population or of that segment which will be subject to it."

¹⁷ Mattei 2003.

¹⁸ Mattei 2003, 383.

¹⁹ Mattei 2003, 388-89.

Steven Calabresi's analysis of the American legal tradition focuses on the uniqueness of American purpose and power in an argument that re-articulates the theory of American exceptionalism for the legal domain.²⁰ Calabresi argues for the existence of two legal cultures in the U.S. One culture consists of a tiny Europhile lawyerly elite that relies on foreign law to decide American cases. He notes that since 1804 this lawyerly elite has been responsible for at least 43 Supreme Court cases that relied in part on the authority of foreign decisions in their reasoning justifying their decisions. The second culture rests on the dominant mainstream national ideology of American exceptionalism. Calabresi argues at great length that in its opinions the Supreme Court should line up with the second, popular and against the first, elite culture. What this argument misses is the wide diversity of opinion as to how the Court should interpret and apply the U.S. Constitution (which includes hard and soft originalism, textualism, but also non-originalist approaches that stress history or tradition, consensualism, natural law, structuralism, moralism, and minimalism). He cites Jefferson selectively.²¹ And his distinction between the lawyerly elite and the national mainstream is less than crystal-clear. In his overview of American popular culture of exceptionalism, at least 22 of the 46 notable advocates of America's unique position in the world—such as John Winthrop, John Adams, Henry Clay, and John L. O'Sullivan (who originated the phrase "manifest destiny")—were lawyers or one-time students of law. The lawyerly elite thus appears to be as divided on this point as does, most likely, the American public. This division undermines Calabresi's central point. Finally, Calabresi's overview of America's exceptional constitutional law doctrine and practice belies persistent tensions that look inevitable, on questions of capital punishment and socio-economic rights, only in hindsight. A few appointments to the bench that could have gone this rather than that way might have made for a very different and less conservative jurisprudence. Put differently, Calabresi underplays the diversity among Supreme Court justices and the varied approaches to law among different American states—the laboratories of democracy, as Justice Louis Brandeis called them.²² America does not have one dominant legal culture, but is made up of multiple, competing strands.

Depictions of an American imperialism and exceptionalism frame the question of legalization unconvincingly in terms of unitary power and unity of purpose. The nature of American power and purpose is more variegated. America's international power is vast as it straddles the boundaries between state and imperium. But it lacks both the resources and the unity of material and ideological power to impose a uniform imperial will on all the world. Instead it confronts a set of choices: using and shaping international law through instrumentalization; limiting the constraining effects of international law through withdrawal; and domesticating international rule through substitution.²³ The variety of strategies and different outcomes that follow from these three choices—instrumentalization, withdrawal and substitution—accommodate a much broader range of political possibilities than allowed by any theory of unitary power or purpose. Different political choices lead to different outcomes and variable constellations between an imperial politics of domination and the constraining rule of law as two limiting conditions. Martti Koskenniemi's analysis of legalization, for example, emphasizes sharply conflicting political preferences. International law is neither a single set of substantive rules or principles, nor an open-ended process of interaction among relatively equal actors.²⁴ Rather, legalization translates political

²⁰ Calabresi 2006.

²¹ For instance, he cites as evidence of America's strict and quasi-religious reverence for the U.S. constitution a quote by Thomas Jefferson, who commented that, "some men look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched." Calabresi does not, however, quote Jefferson's more nuanced understanding of constitutional interpretation in full, which also states that, "laws and institutions must go hand in hand with the progress of the human mind." Jefferson 1816 calls the quasi-religious approach of some sort of fixed American exceptionalism "preposterous.... We might as well require a man to wear still the coat which fitted him when a boy."

²² *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

²³ Krisch 2004.

²⁴ Koskenniemi 2004.

preferences into legal claims that cannot be detached from the conditions and contestations in which they arise. In this view law is a hegemonic technique of indirect rule that serves the interest of the powerful. It is the object of the political projection of collective structures of meaning to transform specific into universal preferences. Alternatively, Robert Wolfe views legalization as creating common frameworks that guide the future interaction of relevant parties.²⁵ On economic issues these frameworks structure ongoing negotiations that can drive down transaction costs and create convergent expectations. Such self-directed human interactions on questions of law remain open-ended and experimental. They do not yield adherence to a single standard. People and institutions are not only law-abiding but also law-creating. In this view law is a social and plural human creation that leads to open-ended interactions. A plausible frame for the analysis of the Americanization of legal processes thus must make space for a pluralist world.

Any analysis of the Americanization of legal processes must account also for America's multiple traditions. Far from being unique like all other polities, America is distinctive. The separation of powers and the institutionalized political fragmentation which it encourages are distinctive traits of the American state. Rudolf Schlesinger and Hedley Bull did valuable early work on the "common core" of legal systems. But a static picture of commonalities provides little insight into how legal systems like that in the United States change over time and become more or less like legal systems found elsewhere.²⁶ American society is marked not by the crystallization of its political culture around only one set of liberal core values. Instead it is composed of multiple traditions. Prominent among them are liberalism, republicanism, and racism which Rogers Smith has tracked in the court rulings of the 19th century.²⁷ American political development is thus multivocal and complex and dynamically evolving over time. If any one aspect of American culture and legal culture has crystallized then it is the constancy of change.

In the analysis of international relations and international law Americanization is best conceived of as a two-way street.²⁸ The process includes a broad range of social and political practices that covers the spontaneous spread of American practices, products and values, through markets and networks, explicit strategies of corporate and political actors such as NGOs and the U.S. government, as well as how those practices in turn affect U.S. legal practices and norms. Americanization offers an idiom for discussing American and non-American concerns. These interactive processes of Americanization vary widely. Jonathan Zeitlin distinguishes between the diffusion of best practices from America on the one extreme to locally effective ensembles of practices that absorb American influences and recombine them at the behest of self-reflective actors on the other.²⁹ Like popular culture, technology, and national security, legal institutions and practices reflect this two-way street. Since the context of the production of law is very different from the context of its reception, there is nothing mechanical about it; it needs to be understood in its specific cultural context.³⁰

Soft Power and Soft Law

Increasingly, scholars of comparative and international law are recognizing that the export of foundational U.S. legal principles and practices can serve as an effective instrument of soft power.³¹ Soft

²⁵ Wolfe 2005, 341-44.

²⁶ Schlesinger 1968; Bull 1977, 4; and Bussani and Mattei 1996.

²⁷ Smith 1988, 1993, 1997.

²⁸ Katzenstein 2005, 198-207.

²⁹ See also Reed and Sutcliffe 2001, who note that international legal practices have been "homogenized" rather than Americanized, with American influences balanced by civil law traditions.

³⁰ Just 1992, 407-08. Mattei 2003, 23-24.

³¹ See, for example, Robert Knowles 2009, 91; Kochan 2008; Gerwitz 2006, 1695; Peal 2005, 1667; and Koh 2003, 1525.

power captures elements of power that elude our conventional understanding of that term as efforts to influence the specific behavior of others in directly targeted interactions. The power that operates in Americanized transnational legal processes affect instead the underlying social structures, knowledge systems, and the general environment of other polities and states. Soft power highlights both the regulatory and constitutive processes that operate normally indirectly and diffusely. In recent years politicians and pundits all over the world have been eager to appropriate the soft power concept. It has panda-like connotations—warm, cuddly, and fuzzy. To make the concept analytically useful requires more than deploying it as an appealing metaphor that describes traditional economic and diplomatic means of statecraft that eschew military violence. Soft power captures the invisible and at times non-behavioral aspects of legalization processes.³²

According to Joseph Nye, who coined the concept, and William Owens soft power is the ability to get what you want through co-optation, agenda-setting or attraction rather than coercion and inducement.³³

“It is the ability to achieve desired outcomes in international affairs through attraction rather than coercion. It works by convincing others to follow, or getting them to agree to, norms and institutions that produce the desired behavior. Soft power can rest on the appeal of one’s ideas or the ability to set the agenda in ways a that shape the preferences of others. If a state can make its power legitimate in the perceptions of others and establish international institutions that encourage them to channel or limit their activities, it may not need to expend as many of its costly traditional economic or military resources.”³⁴

Nye views soft power in terms of the endowment of actors with an appealing culture, attractive political values, and the adoption of congenial policies at home and abroad.³⁵ To generate favorable political outcomes deep knowledge, good strategies, skillful leadership, and favorable context also matter.³⁶ Soft power makes the exercise of hard power less costly. Since the exercise of soft power relies often on the actions of non-governmental actors, it is rarely controlled fully by governments. And since information technologies empower many more actors in a growing web of transnational relations, the importance of soft power assets is increasing in world politics.³⁷

Nye’s argument rests on the notion that soft power works directly through persuasion rather than coercion in interaction with specific actors. This conceptualization leaves out a vital prior step. For persuasion to operate in bringing about the intended change in policy in the targeted state, the attractiveness of the persuader needs to be acknowledged. This requires some sort of identification with the culture or political values that are embodied in the policies or practices associated with the source of attraction. This approximation between the sender’s attractiveness and the receiver lies in processes of constitution (or partial identification) before the causal effects of persuasion can work. Soft power rests on the knowledge “other” has of the alluring qualities of “self.”³⁸ In Barnett and Duvall’s terminology,

³² We draw here on Barnett and Duvall 2005, 2006. Their conceptualization of power excludes consideration of effects that produce action through mutual agreement or interactions in which one actor persuades another to alter voluntarily and freely her beliefs, interests and actions. Hence in their and our understandings the exercise of power always entails some constraints and incentives.

³³ Nye 1999a, 32-34; 2002, 8-12, 69-75; 1990b; 2004.

³⁴ Nye and Owens 1996, 21.

³⁵ Nye 2004, 8, 11-15.

³⁶ Nye 2004, 3.

³⁷ Nye 2004, 5, 17, 31-32, 137. Nye and Owens 1996, 20-22, 29-34.

³⁸ Bially Mattern 2005, 588.

this is the productive aspect of soft power.³⁹ Peter Morriss refers to this as “power to” rather than “power over.”⁴⁰ Soft power thus can work through persuasion by affecting others directly; and it can also work without persuasion by affecting actors indirectly through the social context in which they operate.

There is no assumption in an acknowledgement that America’s legal system wields soft power that American legal arguments and practices are inherently or naturally superior. The illustration that accompanied one of Nye’s articles makes the point graphically.⁴¹ It depicts a giant eagle ready to grasp its prey—the global village.⁴² The eagle is technologically up-to-date. It wears earphones and watches a computer screen. Its left claw holds many arrows and the magnetic tape linking eagle and machine spells out the slogan of the New World Order: *Per Internet Unum*, in strict analogy to the *Per Vias Unum* slogan that described the network of roads uniting the Roman empire two millennia earlier. A technological revolution, with the United States as the spearhead, is transforming the nature of power, cultural, military and otherwise. In its strong technological version, soft power analysis holds that *E Pluribus Unum* united the American continent and will unite the world. Power softly exercised, differs qualitatively from hard military power; together they create the conditions for the exercise of smart power.⁴³

Materialist conception of power can be sharply critical of soft power analysis. Culture and ideology are ephemeral. Language is mere rhetoric or cheap talk. Since the U.S. towers over all other states in its material capabilities counterbalancing is impossible and, if attempted, will fail, except rhetorically (Wohlforth, 1999, 26, 29, 35). Rhetoric is not a vehicle for conveying meaning. An alternative formulation of a materialist conception of power seeks to subsume soft power analysis. Culture and ideology are attractive only when they are perceived to be associated with material success. Increases in hard power breed self-confidence, even arrogance, and a belief in one’s superiority that greatly enhances attractiveness. Decreases in hard power breed self-doubt, identity crises, and efforts to find in other cultures the keys to success. “Soft power is power only when it rests on a foundation of hard power” writes Samuel Huntington (1996, 92). Because ideas and norms are epiphenomenal, different formulations of a materialist analysis thus have little to contribute to the analysis of legalization.

Soft law is often politically easier to implement than hard law and makes it possible for actors to cope with uncertainty, learn about the effects of agreements over time, and facilitate compromise and mutually beneficial cooperation.⁴⁴ Broadly defined, soft law includes any legal arrangement that is not formally binding, vague as to implementation, or lacks an external mechanism to monitor its implementation or enforcement. In this way, law operates through “indirect symbolic controls—by radiating messages rather than imposing physical coercion.”⁴⁵ Over time, and through repeated interactions among the legal actors involved, such soft law can develop into binding law through state practice and *opinio juris*, the felt sense that an actor is bound to behave a certain way.⁴⁶

Changes in EU regulatory politics illustrate soft law in action. Besides the traditional regulatory politics, which is compelling EU member states and citizens to meet common legal standards in areas such as securities, competition and disability rights,⁴⁷ recent innovations in EU regulatory politics also shows an experimental and pragmatist bent Charles Sabel and Jonathan Zeitlin argue that this shift is due

³⁹ Barnett 2005, 2006.

⁴⁰ Morriss 2002, 32-35, quoted in Lee 2010, fn 25.

⁴¹ Nye and Owen 1996.

⁴² Dufresne 1998.

⁴³ Nye 2004, xiii.

⁴⁴ Abbott and Snidal 2000, 423.

⁴⁵ Galanter 1992, 24.

⁴⁶ Chinkin 2000, 30-31.

⁴⁷ Kelemen 2010.

to European rather than American causes.⁴⁸ They insist that it reflects changes in function rather than structure or institution. In close to 20 policy arenas they review, Sabel and Zeitlin argue that the emerging order of public rule making in the EU features joint elaboration of framework goals. The measures for reaching those goals are subject to joint action by governmental and non-governmental actors in a process of collective puzzling that acts on the premise of “comply or explain.” Lower level units are encouraged by this process to share local knowledge that no longer remains tacit and that encourages faster collective learning. Peer review is a central institution in this experimental and pragmatic approach to standard setting and problem solving. Over time the entire framework of action is regularly reviewed and revised by all participants. Consensus is forever provisional. Informalism is the rule. Key functions like monitoring and reviewing can be accomplished through any number of institutional mechanisms operating in isolation from one another or collectively. This architecture of decision-making resembles, in the terminology of Sabel and Zeitlin, a “directly-deliberative polyarchy.”⁴⁹ It is a machine that learns from diversity and shares important features with state-level policy experimentation in American education or environmental policy.

With its constitutive and regulatory aspects, soft power analysis is of great help in the analysis of persuasion.⁵⁰ What matters in the reasoning process that can be more or less persuasive is a balance of practices rather than a balance of power. Persuasion is a means to build political or personal attraction. In international relations, as Nicole Deitelhoff has shown, if weaker actors succeed in altering the normative and institutional settings of negotiations, as they did in the run-up to the creation of the International Criminal Court (ICC), they can further the chances of persuasion and discourse which redefine actor interests over power balancing and bargaining with fixed interests.⁵¹ Some persuasive practices describe manipulation, propaganda and the spinning of news, as in public diplomacy. Indeed, as Janice Bially Mattern argues, the exercise of soft power can entail a form of verbal warfare in which actors seek to reinforce the position of self over other.⁵² Kazuo Ogura makes the related point when he insists that the party subjected to the exercise of soft power will always experience some element of threat.⁵³ Soft power can be verbally coercive or inherently threatening.⁵⁴ But it does not have to be. More typical of practices common in legalization is normative and evidence-based reasoning or personal or institutional mimicry.

One such instance is the adaptation of and to foreign law through the methods of “self-legalization” adopted in the interest of being accepted as a “modern and civilized state.” In such instances, domestic leaders initiate legal reforms designed to either fend off foreign encroachment or meet external standards. As illustrated by imperial China and Japan, states can introduce domestic legal innovations in order to represent themselves as meeting the requirements of foreign models of sovereign statehood in the international community.⁵⁵ In a related, though less instrumental style of analysis, states can seek to be “legitimacy-enhancing” through their responsiveness to widely or universally accepted legal principles and practices. Domestic law thus can become an important signal to foreign actors of a state’s acceptance

⁴⁸ Sabel and Zeitlin 2010. Idema and Kelemen 2006 engage critically an earlier variant, the open method of coordination (OMC) of the kind of argument that Sabel and Zeitlin are developing. Their basic point is that the OMC is, at best, a sideshow in EU regulatory politics. They have not yet commented on the range of material that Sabel and Zeitlin have worked up during the last several years.

⁴⁹ Sabel and Zeitlin 2007, 9.

⁵⁰ Nye 2004, 27-28.

⁵¹ Deitelhoff 2009.

⁵² Bially-Mattern 2005, 594, 602-610.

⁵³ Ogura 2006.

⁵⁴ The American foreign policy strategy of presenting the world in terms of absolutes, good vs. evil, is an example of such verbal warfare, of what Bially-Mattern 2005, 611, calls the power politics of identity.

⁵⁵ Fairbank and Goldman 2006, 212; Santos and Rodriguez (2005). See also Merry 2003, who describes a similar strategy of legal importation to stave off a colonial takeover of Hawai’i.

of those principles.⁵⁶ Such signals, however, often need to be updated. Legal norms and practices are forever evolving. Once “uncivilized” societies developed a court system resembling that of the “civilized” world, the civilized world often moved on to develop other forms of law.⁵⁷ Recently, for example, as more states from the developing world have joined the International Court of Justice and demonstrated their willingness to rely on it, the Court has become less attractive to some of the advanced, developed states, many of which have been less willing to submit to its jurisdiction and more interested in substituting alternative dispute resolutions (ADR).⁵⁸

In contemporary world politics broad legal developments may also strengthen the spread of soft law. Marc Galanter has identified numerous major trends in legal developments around the Atlantic world that can be summarized with one word: “more”—in terms of laws, lawyers, claims, costs and cost-consciousness of legal institutions, entrepreneurial and innovative redesigns of institutions and procedures, decentralization in the sources of law, contingent and changing legal outcomes, negotiations, openness of the law to the social sciences, and reliance on indirect symbolic controls rather than direct participation in the legal system.⁵⁹ Although Galanter counsels caution, his list is as apposite today as it was two decades ago, and it hardly appears to be restricted only to the U.S., the United Kingdom and Canada, his primary empirical referents. The diffusion of “soft-edged” law is ubiquitous.

Soft power affects not only discrete actors but also the social environments they inhabit. That is, rather than aiming at the possession of specific assets, soft power also affects opinion that shapes the milieu in which actors move.⁶⁰ Persuasion and other soft power practices constitute the invisible face of power that remains concealed if one analyzes only the manifestations of the more readily observable behavioral power. Soft power aligns the preferences of others to one’s own, primarily through processes that alter identities. It works indirectly and is socially diffuse. Asymmetries in power and efficiency are part of this spread of legal norms and practices, as Parts 2 and 3 below illustrate. And we show in Part 4 how constitutive processes and domestic contexts are of critical importance in the adaptation of foreign legal doctrines practices judged to be superior and preferable to local ones as well as how the manner by which U.S. law affects political outcomes abroad can itself profoundly affect American law.

Legal Transplants: Processes, Origins, and Translations

The Americanization of legal doctrines and practices beyond its borders is well captured by transnational legal process analysis.⁶¹ Without denying the importance of other forces such as the more general judicialization of politics which is affecting social relations all over the world in increasingly complex societies, it focuses specifically on the vertical channels by which foreign law is internalized into domestic legal systems. In this view public and private actors—states, corporations, international, and non-governmental organizations and individuals—interact in various arenas to make, interpret, enforce and ultimately internalize international and domestic legal rules and doctrines. Part 4 examines in greater detail specific instances of the spread of such law.

In stressing the importance of interaction, interpretation and internalization, Koh argues that a theory of transnational legal process is: nontraditional in breaking down the distinction between domestic and international realms of action; non-statist in focusing also on non-state actors; dynamic in percolating

⁵⁶ Boyle and Meyer 2002.

⁵⁷ Nader 2002.

⁵⁸ See, for example, Nader and Grande 2002, 581, who review international river disputes involving the Ganges, Jordan, Colorado, Duoro, and Danube rivers.

⁵⁹ Galanter 1992, 24. See also Shapiro 1993.

⁶⁰ Nye 2004, 8, 17; and Wolfers 1962.

⁶¹ Koh 1996; 2003 1501-03; and Dezalay and Garth 1996.

upward and downward and sideways connecting different arenas and types of actors; and normative in allowing for the emergence and eventual internalization of new norms that propel the process in a recursive manner into new directions.⁶² Interaction creates law, and law shapes and guides future interaction. It is the normativity of the interactive transnational legal processes that is central. Identity and interest are both dependent on and reformulated by legal transactions and shaped by the evolution of norms and in a manner that is dialogical.

The theory of transnational legal process is a close cousin of the transnational relations perspective that has become a staple of international relations theory during the last three decades.⁶³ By the late 1970s international relations had moved well beyond the “high politics” of state-to-state interactions captured by traditional realist analysis focusing on issues of national security and war. The empirical evidence suggested a very different ideal type focused on the “low politics” of complex interdependence in which trans-state and trans-national politics complemented or sidelined government diplomacy. Social and economic actors were evidently developing very different sensitivities and vulnerabilities to their interdependence dilemmas. Subsequently this analytical perspective came to incorporate as well transnational social movements.⁶⁴ It now encompasses not only economic questions but also on broader social, legal, and environmental issues touching on human security and well-being understood in the most basic sense.

Alan Watson was the first to evoke the concept of legalization in his analysis of legal transplants.⁶⁵ This term refers to the complex requirements in the recipient and donor countries for a viable diffusion and reception of law and reflects the mutually constitutive relations between transplanted and local law. A successful legal transplant must unavoidably overcome significant obstacles in order to thrive in a new legal system. The relative success of any transplant operation depends on the characteristics of the transplanted law itself and on the foreign law’s ability to graft onto existing legal norms and practices in the recipient body politic.⁶⁶ “Mechanical” transplants differ from “organic” ones in requiring less attention to local conditions and the character of the proposed legal reform.⁶⁷

The civil or common law “family” or “origin” of a transplanted legal rule is one condition which affects the process of legal transplantation. A law will transfer more successfully when the target legal system belongs to the same legal family.⁶⁸ This should come as no surprise since legal family or origin has been found to be an important determinant of a range of important outcomes, including financial development, government ownership of banks, burden of entry regulations, incidence of military conscription, government ownership of the media, lower formalism of judicial procedures, and greater judicial independence. And it is the institutionalization of different legal cultures that accounts for the persistence of legal families over time.⁶⁹ Furthermore, as comparative legal scholarship argues, besides efficiency, social prestige is often a driver of diffusion along different action channels.⁷⁰ Efficiency and prestige drive processes of legal diffusion. The closer states’ legal systems are in terms of cost structure and constitutive rules, the more likely those states are to look to each other for legal innovations.

⁶² Koh 1996, 185-86.

⁶³ Keohane and Nye 2001. Risse-Kappen 1995; and Evangelista, 1999.

⁶⁴ Tarrow 2005; Keck and Sikkink 1998; and Finnemore and Sikkink 1998.

⁶⁵ Watson 1974. For a dissenting view see Kahn-Freund 1974.

⁶⁶ Watson 1976; and Legrand 1997b. See also Merry 2006, who notes that a successful graft requires a “series of people who take one set of ideas and reframe them in different terms for another group and translate grievances and alternative understandings.”

⁶⁷ Kahn-Freund 1974.

⁶⁸ La Porta, Lopez-de-Silanes and Shleifer 2008; Damaska 1997; and Spamann 2009.

⁶⁹ La Porta, Lopez-de-Silanes and Shleifer 2008, 286, 307-08.

⁷⁰ Mattei 1994, 4, 7. BBPK [*International Review of law and Economics. There may be 2 articles by him for 1994*]

Countries with legal systems born from civil law origins, for example, are believed more likely and able to accept and adopt the laws and legal theories of another civil law system than are states with a common law system. This readiness holds for both the colonial period of the imposition of foreign law in the periphery as well as the post-colonial period when established channels of socialization and exchange make more probable the diffusion along legal family lines. It is not the intrinsic differences between legal families but distinct diffusion processes following along family lines that explain the persistence of different legal families in a world marked by legal transplants and translations. (It is noteworthy that the United States is an exception to this rule; Americanization of global law proceeds across legal families). Institutional complementarities, linguistic affinity, professional and educational ties, and belonging to the same sphere of influence in international relations are some of the factors bringing about this outcome. Countries such as Japan which do not match several or all of these traits are borrowing across rather than within legal families.⁷¹ This readiness to import like from like is said to occur in part because the legal culture of the sending state better approximates the extant normative landscape of the receiving state.⁷² Accordingly, laws are said to transfer more readily and frequently when a receiving legal system is derived from the same legal family as that of the sending country.⁷³ Indeed, as David Sklansky observed, “if scholars of comparative law agree on anything, it is the hazards of legal transplants,” most especially between civil and common law systems.⁷⁴

The distinction between common and civil law families yields as a first-cut a simple taxonomy of situations in which we would expect the Americanization of global law to proceed with greater or lesser speed or ease.

TABLE 1: DIFFUSION AND LEGAL FAMILY

EMULATE

BLOCK

⁷¹ Spamann 2009, 1815-22.

⁷² Palmer 2001.

⁷³ For an example, see Barker 2005, 717, who notes that in the area of tax law, “transplants are not only common from a country in one legal family to another, but that they also have been quite successful.”)

⁷⁴ Sklansky 2008, 1678 (quoting Damaska 1997). See also Jackson 2005, who observes a “growing skepticism in much recent comparative scholarship about the effects of ‘transplanting’ processes and procedures from one national and legal culture into another.” Legal anthropologists such as Clifford Geertz (1983, 182) question of whether foreign jurisprudential ideas can ever have any useful application outside of their place of origin. For Geertz, laws are “webs of signification” which enclose individuals. Law is not merely an instrumental means for organizing social mechanics; it is what Geertz (1983, 182) calls a cultural hermeneutics, a “semantics of action” whereby individuals in a community sort out who they are and whom they are among. Or, in the more readily accessible language of Paul Bohannan (1965, 35-36), laws are local customs lifted from daily life and “reinstitutionalized within the legal institution.” In this view law is local knowledge and will remain so, despite the pressures of increasing international transactions. The fundamental weakness in the challenge that Geertz and others pose to legal transplant analysis is this: defining local law is no easier than identifying the causes and character of transnational law. The valuable scholarship of Laura Nader 1990, Francis Snyder 1981, Chanock 2001 and others analyzes the distorting roles many colonial and neocolonial missionaries played in the outright fabrication of “indigenous” and “customary” local law. Much of what was treated by colonial jurists as extant local dispute resolution procedures was instead a political fabrication involving the converging interests of colonial officials and local elites. The autonomous, internal development of legal systems thus is very much the exception, not the rule. As Berkowitz et al. 2003 note, the exceptional cases of autonomous internal development may have had a comparative advantage in the ability to develop new, efficient legal institutions and practices. But few countries were born lucky. In most instances states have inherited their legal order from one of the existing legal families, either through forcible imposition or voluntary imitation. And in that process they have faced obstacles in matching their preexisting legal order with imported legal rules.

WITHIN FAMILY

*Quick/Easy Diffusion**Indeterminate*

ACROSS FAMILIES

*Indeterminate**Slow/Difficult Diffusion*

Primacy, efficiency, prestige, innovative capacity distinguish the global leaders of legal innovations. One test of leadership is the capacity of the products of a legal system (codes, pieces of legislation, legal institutions and scholarly writings) to exert influence within and across legal families. A system can be considered leading when either as a whole or in part, it is discussed, copied or adapted in a larger number of other legal systems than any other one at that particular time.⁷⁵ The role of leader could fall to either a civil or common law system, as it did in the case of France in the early 19th century, Germany in the late 19th century, and the United States since the mid-1960s. As Table 1 illustrates, these distinctions yield two indeterminate outcomes. In all cases, as Ugo Mattei argues, there exists an inverse relation between successful leadership and the degree of positivism and localism of a legal system.⁷⁶ Leading legal ideas that influence others are those that, especially across legal families, help to understand law as a social phenomenon which is not too narrowly limited to the specificities of one given legal system, as the Western tradition is no longer accurately portrayed as being divided “in two hermetically sealed subtraditions.”⁷⁷ Beyond this base-line model we need to rely on more fine-grained modes of reasoning.

The syncretism of all legal systems reinforces the need to look for a more nuanced analysis that seeks to counteract the difficulty of making hard and fast distinctions between types of legal systems.⁷⁸ Legal pluralism prevails. Based on different sources of ultimate validity, different legal systems often coexist in the same social domain.⁷⁹ What was common in the 19th century is almost universal today. In the 19th century it was quite difficult to “subtract the influence of the colonial system in order to unearth the ‘real’ authentic one.”⁸⁰ Today it is rare indeed that a dispute arises anywhere in the world in which a party can rightfully appeal to a self-contained legal system.⁸¹ Profoundly affected by transnational legal processes, laws within a single system typically derive today from various sources and are thoroughly intertwined with one another. Legal syncretism through transnational legal processes has replaced all straightforward distinctions.

Going beyond the black letter law classification of legal systems, legalization processes affect rules that exist in a complex web of complementary and, sometimes, contradictory legal reasoning. How a legal rule actually operates depends largely on the institutional and social context into which it is transplanted. Persuasive argumentation operates very differently in different legal bodies requiring different modes of presentation, as is true, for example, in American and European trials, WTO dispute settlement proceedings, and truth and reconciliation commissions. The social source of authority to which persuasive strategies are directed typically differ. The instrumental logic that is presumed to be taken for granted by Western actors is actually a subject of debate among proponents of the “extreme” and

⁷⁵ Mattei 1994a.

⁷⁶ Mattei 1994b, 195.

⁷⁷ Mattei 1994b, 198.

⁷⁸ Zweigert and Kötz 1998; Lawson 1982; and Malmstrom 1969. René David, for example, identified five legal families—Western, Socialist, Islamic, Hindu, and Chinese. Dropping some important non-Western legal systems, he subsequently recast these five families into four: Romanistic-German, Common Law, and Socialist (and a residual category of “other systems”). The problem of unambiguous classification stems from the fact that there exist very few, if any, unadulterated legal systems.

⁷⁹ Merry 1992.

⁸⁰ Merry 2003.

⁸¹ Law governing the conflict of laws resolves such questions.

“moderate” West living on both sides of the Atlantic. It lacks the sense of being normal for those living in other civilizational contexts, such as China. Norm-governed legal and social institutions require different argumentative strategies. “The similarity of rules,” as Merryman notes, “is in most cases an unreliable indicator of the convergence or divergence of legal systems.”⁸²

Legal transplants in Russia and Eastern Europe after the end of the Cold War and the disintegration of the Soviet Union illustrate just how much transnational legal processes and legal transplants have contributed to the growth of a Western Legal Tradition that incorporates common and civil law and that has created considerable heterogeneity both among and within its two main legal families.⁸³ Many comparative law scholars, William Ewald writes, “tend to conceal the large differences that exist among the various [civil] legal systems on the Continent.”⁸⁴ He continues:

“This blurring of the national boundaries is, I think, in part a consequence of an excessively black-letter approach to comparative law. Indeed, comparative lawyers who talk about “The Civil Law” as a unitary system face a dilemma depending on how they answer the philosophical question, What is law? If, on the one hand, they conceive of law as the substantive black-letter rules of tort and contract (as stated in the civil code) then, by the “convergence thesis,” it is probably harmless to lump the various continental systems together. But for the very same reason, you might as well lump the civil law with the common law; for at this level of generality the differences between Germany and England are no more (or less) interesting than the differences between California and Idaho.”⁸⁵

Furthermore, beyond the failure to note differences within civil and common law systems, there lurks the failure to recognize commonalities between civil and common law systems. Civil law systems incorporate a substantial amount of common law techniques in the form of judges “filling in” gaps, ambiguities, and incomplete aspects of the judicial codes.⁸⁶ In addition, while in common law countries there was not a reception of Roman law as the principal source of law, there are nonetheless elements of Anglo-law that were indirectly affected by the Roman tradition. And the Napoleonic civil law code has had a discernible impact on numerous common law countries.⁸⁷

Ewald thus has proposed a “legal thought” approach to the study of different legal systems that complements an overly simplified classification of legal systems in terms of their origin or family.⁸⁸ Ewald argues that in a common law system the meaning of a law can only be arrived at through the close examination of the judicial opinions cited in support of a court’s holding and the study of those opinions’ justifications, reasoning, and aspirations. In a civil law system, by comparison, lawyers are schooled in deductive methods, with law supplied by abstract rules stated in statutory codes. The legal education and cognitive formations of common and civil law attorneys thus differ. In common law systems students study judicial opinions and practice inductive reasoning, while in civil law systems students apply deductive reasoning to codes and scholarly treatises. Legal studies in civil law countries, then, are classified as a social science, whereas the approach in common law systems more closely resembles social engineering through which the law is seen as a flexible tool for lawyers and judges to address social ills.⁸⁹ Pierre Legrand, a vocal supporter of the importance of the distinctive *mentalité* of civil and common

⁸² Merryman 1981, 385.

⁸³ Ajani 1995, 95.

⁸⁴ Ewald 1995a, 1987.

⁸⁵ Id.

⁸⁶ Eskridge, Jr. 1987, 1503-05; Merryman 1985, 43-47; and David and Brierly 1978, 59-66.

⁸⁷ See, for example, Fairgrieve 2007.

⁸⁸ Ewald 1995a, 1987.

⁸⁹ Merryman 1974, 870. See also Genty 2008.

law systems, overstates a good point when he argues that “there is both a civil-law and a common-law way of thinking about the law....Moreover, such difference is irreducible so that it is not possible for a civilian to think like a common-law lawyer (or for a common-law lawyer to think like a civilian).”⁹⁰ Divergent cognitive orientations, and not just the laws themselves, thus distinguish civil and common law systems and instill in jurists from each legal family with what Hans-Georg Gadamer has described as a distinct “pre-understanding” of law.⁹¹ Mary Ann Glendon and her colleagues concur when they note that the main differences between and among civil and common law traditions lie “more in the area of mental processes, in styles of argumentation, and in the organization and methodology of law, than in positive legal norms.”⁹² Similarly Máximo Langer argues that the difference between the two systems is not to be found in readily coded attributes but lies instead in their “structures of interpretation and meaning,” which are largely socialized through legal education and, subsequently, repeated interactions with the legal community and the courts. Transplanting between different legal families thus must rely on a translation of concepts that are rendered in different languages.⁹³

We can distinguish between at least three types of translation: strict literalism that matches word for word; faithful but autonomous restatement where the translator composes a text that is equally powerful in the target as in the original language; and a substantial recreation, wherein the translator’s purpose is to create a text appealing in the target language.⁹⁴ A true legal translation thus requires a translator serving as linguist, legal scholar, and hermeneut. Due to the absence of equivalent conceptual terminology legal translation is either extremely difficult or impossible. The notion of “habeas corpus”, for example, simply does not exist in many languages, and terms such as “procurador” or “licenciado” lack functional equivalents in English.⁹⁵ Translation problems are compounded by the existence of false legal cognates and the fact that the cognitive relationship “between word and concept is often not identical in . . . different legal languages.”⁹⁶ Indeed, the meaning of a legal term employed in two systems can vary even if the language of the systems is identical. Depending on the legal system in which they apply, different terms operate differently. For example, even though American and British legal systems share many important similarities, legal standards and burdens of proof related to libel, for example, differ substantially.⁹⁷ Legal translators are thus information brokers acting also as cultural intermediaries.⁹⁸ And legal translation is an agent-driven communicative process that is selective. Put metaphorically, a legal system that translates in order to imitate “is a system that makes choices.”⁹⁹

Problems of legal translation have been analyzed, especially in the depository of different legal cultures and divergent legal interpretations that we call the European Union today.¹⁰⁰ It is easily forgotten that in the past the U.S. legal system experienced similar problems associated with the translation of foreign law. Indeed, the very origins of the U.S. legal system challenge the “myth of American legal parochialism,”¹⁰¹ and the notion that Americans are “a special people, in a special land, on a special mission.”¹⁰² At its founding, the United States faced a choice of replicating British law, forming entirely

⁹⁰ Legrand 1999, 64.

⁹¹ Legrand 1997a, 45.

⁹² Glendon, Gordon, and Osakwe 1994, 51.

⁹³ Langer 2004, 10; and Damaska 1997, 839-40.

⁹⁴ Id., 33. Watson 1978, 318-20. DK HAS WRONG PAGES

⁹⁵ Kahaner 2006.

⁹⁶ Geeroms 2002, 203; and Kahaner, 2006.

⁹⁷ Prosser 1992, 342.

⁹⁸ Obenaus 1995, 250.

⁹⁹ Vespaziani 2008, 564, citing Gambaro 1998.

¹⁰⁰ Vespaziani 2008; Kunz 1995, 90; and Toscani 2002.

¹⁰¹ Hoeflich 2002.

¹⁰² Calabresi 2006, 1344.

new laws, or borrowing laws from states other than Britain. The Framers did all of the above. One limitation to outright foreign borrowing, however, was language. European law had been unified by Latin in the Middle Ages. With the rise of modern states came laws written in the vernacular. By the late 18th century, “European” law had become quite variegated. The Framers thus faced an American continent shaped by French, German, Dutch, and Spanish law. The persistent influence of these foreign sources of law is evident in cases decided before the Civil War. As M.H. Hoeflich notes, in court decisions decided before 1860, courts cited Italian jurist Franciscus Roccus at least 43 times, French judge Robert Joseph Pothier 265 times, and French scholar Balthazard-Marie Emerigon 144 times.¹⁰³

The problem of successful legal translation can arise even within a single jurisdictional or cultural context. For example, the simple task of translating English legal language into standard, comprehensible English prose poses considerable difficulties when legal phrases or terms are imprecise or open to interpretation.¹⁰⁴ In addition, the judicial act of constitutional review presents temporal difficulties of translating meaning from one time period into another.¹⁰⁵ As noted by Lawrence Lessig, many judges serve a hermeneutical role by translating founding texts from the background in which they were produced into new, contemporary social contexts. Because the constitutional object worth preserving is a combination of the text plus its context, or meaning, it is possible for a new reading of a constitution to preserve its original meaning.¹⁰⁶ Or as Justice David Souter recently described, “Meaning comes from the capacity to see what is not in some simple, objective sense there on the printed page.”¹⁰⁷

For Maximo Langer legal translation is a useful metaphor that helpfully corrects and usefully complements some of the insights that studies of the “legal transplant” between common and civil law systems yield.¹⁰⁸ The wide-ranging influence of American legal practice on other legal systems, he argues, is not simply akin to a “transplant,” whereby the organ continues to function as it did in the original body. Instead, “translation” makes the outcome less predictable as the actual practice depends to a considerable degree on the receiving country’s legal language and system. For example, often imported legal practice can usefully be “thought of as the ‘text’ that has been translated from one ‘language’—the adversarial system of the United States—to another ‘language’—the inquisitorial systems of [civil law states].”¹⁰⁹ Langer’s case studies include recent reforms in civil law systems toward American-style civil and criminal procedures. These reforms tend to make the judge a more passive actor by strengthening the role of the prosecution and defense in fact-finding and in conducting the proceedings themselves, as achieved through cross-examinations. He concludes that because of the different structures of meaning that developed in the different civil law countries (such as Germany, Italy, Argentina, and France) that have imported these procedures, the importation of the same procedures has affected these states’ legal systems in varying ways. In short legalization processes are thus affected profoundly by linguistic and conceptual translations.¹¹⁰ This is not just a matter of scholarly debate. The U.S government certainly is aware of this point as it seeks to facilitate the export of U.S. legal norms by sponsoring legal translations.¹¹¹ For example, in 1986 the State Department launched the Arabic Book Program, which set about to translate into Arabic various foundational U.S. texts related to international and domestic law, including the Declaration of Independence, the Federalist Papers, the Constitution, and other founding

¹⁰³ Hoeflich, 772.

¹⁰⁴ Smith 1995, 180.

¹⁰⁵ Dorf 1996.

¹⁰⁶ Lessig 1996, 1840.

¹⁰⁷ Souter 2010.

¹⁰⁸ Langer 2004.

¹⁰⁹ Langer 2004, 6.

¹¹⁰ Kahaner 2006.

¹¹¹ Kochan 2008.

documents.¹¹² Such cultural diplomacy efforts weakened in the decade following the Cold War, with budgets and staffs of supporting agencies cut by roughly one-third and with dozens of U.S. libraries abroad closed. In the years since 9/11, however, the awareness of the power of translation on the law of transitional states has not escaped U.S. policymakers, who noted recently that “it was a Frenchman, after all, Alexis de Tocqueville, who wrote the classic work on American diplomacy.”¹¹³ The State Department’s conceptualization of translation as a form of soft power persists. In 2005, its Advisory Committee on Cultural Diplomacy issued a report detailing the “current predicament” of the United States in the wake of scandals such as Abu Ghraib. These scandals, the report noted, caused an erosion of U.S. “soft power,” which is best combated through active translation programs to serve the goal of “espousing, enacting, and spreading our noblest values.”¹¹⁴

In sum, an analysis of transnational legal processes and legal transplants can build on the conventional black-letter law distinction between common and civil law systems as a first cut. It can then add to the importance of differences in the mentalities of each system, as reflected in problems of translation. The difference between legal families lies in the constitutive rules that govern legal actors. These rules are imparted through legal education, repeated interactions with members of the legal profession, court proceedings, and other socializing experiences. The very processes that make legal systems different are being altered by the Americanization of global law. This does not signify their erosion as much as their partial reconfiguration. Legal imports from common law systems can be processed differently by different civil law systems and vice versa, thus recreating new differences between and among civil and common law systems.¹¹⁵

Transnational legal processes are shaped by different actors and mechanisms. Together actors and mechanisms create forms of legal obligations that can enhance or diminish legitimacy, legal values, participation in the creation of legal institutions, reasoned arguments, resonance with past legal practices and current social aspirations, the broader moral fabric of society, and the pull toward or away from compliance. In brief, in transnational legal processes actors and mechanisms refashion existing legal norms and practices.

Actors in the transnational legal process include both exporters or “teachers” operating in the context of the production of law, as well as importers or “students” engaged in receiving law.¹¹⁶ And the relationship among these actors is reciprocal. Lawyers, remade by the emerging global order, are also actively trying to remake it.¹¹⁷ Trubek et al. distinguish between practitioners, law appliers, guardians of doctrine, educators, and moral regulators.¹¹⁸ In more flowery conceptual language John Braithwaite and Peter Drahos distinguish between diffusion missionaries and mercenaries on the export side and model

¹¹² Id.

¹¹³ U.S. State Department, *Cultural Diplomacy: The Linchpin of Public Diplomacy*, Sept. 2005, available at: <http://www.state.gov/documents/organization/54374.pdf>.

¹¹⁴ Id. There exist other nongovernmental translation efforts motivated by similar notions of soft power and persuasion, including the Global American Institute (led by Middle East scholar Juan Cole), available at: <http://www.globam.org/>. Such nongovernmental translation projects have even emerged abroad, including the Dar Emar translation project, which is led by a Syrian, available at: <http://www.daremar.org/>. That organization’s so-called Project Etana has the stated mission of providing “comprehensive and in-depth exposure to American values and legal system” so as to “stimulate thinking along similar lines in the Arab World, a place where constitutional supremacy, respects for basic individual rights (including freedom of assembly and expression, due process and privacy matters), bicameralism and federalism are sorely lacking and needed.”

¹¹⁵ Ajani 1995, 95.

¹¹⁶ Levi-Faur 2005, 457. Finnemore 1996. Gheciu 2005.

¹¹⁷ Trubek, Dezalay, Buchanan, and Davis 1994, 411.

¹¹⁸ Trubek, Dezalay, Buchanan, and Davis 1994, 416-17.

mongers, misers, and modernizers on the import side.¹¹⁹ More prosaically, important actors in the Americanization of global law include professional lawyers, legislators, regulators, judges, professors, and students.¹²⁰ It is through their various activities—including writing briefs, litigating, judging, writing opinions, publishing, attending conferences, teaching, and studying—that they shape the Americanization of law. Lawyers in their many different social roles are typically an elite and tend to favor imports from foreign legal systems with great prestige over radical domestic innovations.¹²¹ Law professors specializing in constitutional, commercial and trade law have been particularly influential in the Americanization of law.¹²² It is difficult to overestimate the profound contribution such professors make in the spread of American norms and practices by teaching foreign students attending American law schools. Trained in American law, these students, whose numbers have increased significantly in recent years,¹²³ return home and as intellectual leaders and policymakers often act in the roles of missionary and entrepreneur. They come to the United States because “they feel the leadership [of Western law],”¹²⁴ and the introduction of their newfound knowledge to their home countries serves to undermine the “mode of production” of law in those states.¹²⁵ As Trubek et al. describe, once top students are drawn to the United States to supplement their legal education, they are “pulled out of the orbit” of their domestic legal culture and “into the sphere of influence of the large multinational firms.” This gravitational pull to the United States serves to lower the prestige of the legal traditions of their home countries and replaces existing networks of intellectual production with a U.S.-dominated transnational network of legal actors.¹²⁶

The process of the Americanization of law depends on a number of institutional mechanisms, such as law firms, professional associations, law schools, standing conferences, and transnational tribunals. The construction of institutions for dispute resolution through arbitration and mediation offers a good illustration of the institutionalization of American practices. Although modern international commercial arbitration was born in continental Europe, primarily at the Paris-based International Commercial Court, the practice experienced strong American influence in the 1970s when the first teams of U.S. lawyers arrived to represent their clients in extensive petroleum arbitrations. They brought with them, Helmer notes, “the familiar [American] procedural techniques, court standards of minimum contacts between the arbitrators and the parties...and other practices foreign to traditional international arbitration.”¹²⁷ The Americans treated arbitration as a type of litigation, only in a slightly varied form. Dezalay and Garth thus analyze the revamping of the institutions of international commercial law between 1970 and 1990, away from a compromise-oriented, justice-dominated, European academic-staffed forum to a U.S.-style, formalized, offshore litigation forum that favors the adversarial training of U.S.-trained litigators.¹²⁸ Members of the profession competed over the definition of terms and the spoils of victory. In the end, power and efficiency gains were distributed asymmetrically, amounting to a victory for offshore litigation-prone American lawyers over compromise-oriented European academics. U.S. law schools attended by growing numbers of foreign talent are similarly important hosts of debate and

¹¹⁹ Braithwaite and Drahos, 2000.

¹²⁰ Morag-Levine 2003. Dezalay and Garth 2002. Slaughter 2004.

¹²¹ Ewald 1995b, 499.

¹²² Wiegand 1991, 238, 246.

¹²³ American Bar Association, Post J.D. Programs, available at <http://www.abanet.org/legaled/postjdcprograms/postjdc.html#2foreign>.

¹²⁴ Mattei 1994b, 207.

¹²⁵ Trubek, Dezalay, Buchanan, and Davis 1994, 407, 455.

¹²⁶ Trubek, Dezalay, Buchanan, and Davis 1993-1995, 407, 455.

¹²⁷ Helmer 2003, 47.

¹²⁸ Dezalay and Garth 1996, 298-99. Karamanian 2003. Seidenberg 2010.

incubators of new ideas and strategies for U.S. dominance in the global marketplace.¹²⁹ This debate, though, increasingly occurs within the context of a narrowly defined, U.S.-centric pedagogy. Indeed, in the 2007-08 academic year, a mere fifteen of the 200 schools accredited by the ABA produced one out of every two law professors in the United States. Just two schools—Harvard and Yale—produced more than twenty percent of law professors in the same year.¹³⁰ U.S. domination in global legal education, it follows, will again result in an asymmetric distribution of normative power.

Conceptual and epistemic mechanisms that inhere in the law itself are a third mechanism. This includes the Law and Economics school of thought, new contractual legal arrangements accompanying American business practices, and the rights revolution and the associated practices used to realize those new rights. A coherent body of theory, Law and Economics seeks the mainspring of legal change, including the Americanization of global law, in the efficiency differential between different legal norms and practices.¹³¹ One of the main propositions informing this framework holds that legal change is a function of relative prices or different levels of wealth.¹³² Under this framework, leading scholars such as Ronald Coase, Richard Posner, and Guido Calabresi maintain that laws are—or at least should be—the outcome of a consideration of cost-benefit analysis and Pareto-optimality. Put simply, laws are evaluated according to whether they are wealth maximizing or, at the very least, wealth enhancing.¹³³ Whatever the intellectual merits of the law and economics school may be, the attraction of the field among many European scholars is, as Mattei describes, “paving the way to scholarly Americanization.”¹³⁴ This Americanization is furthered not only by intellectual attraction, but also language and the high salience of U.S. culture. Posner, describing the growth of the law and economics movement in Europe, notes that the merits of the theory have been greatly popularized by “emergence of English as the language of the educated class throughout the world” and the fact that “it is no longer possible for European lawyers, judges, and especially legal academics to ignore the influential currents of thought in American law.”¹³⁵ This dominance thereby enhances global awareness of a legal theory that is derived largely from the unique position of American courts that possess a legislative function unfamiliar to European judiciaries. As Posner explains, this powerful position requires judges to think as legislators, matching means to ends and taking into account costs and benefits.¹³⁶

Although American law is not considered scientific, as Roman law was, or clearly superior to other mature legal systems, for example in Europe, Wolfgang Wiegand argues that the dynamism of American business has nonetheless enhanced the perception of certain American laws as a tools to aid the construction of a legal environment conducive to economic growth.¹³⁷ Under such beliefs, specific legal relationships first developed in the United States such as leasing, factoring and franchising have made their way to Europe in the years following World War II. Given its economic advantages, leasing became part of European contractual law despite considerable dogmatic legal difficulties posed by traditional

¹²⁹ It is in a similar sense that Justice Sandra Day O’Connor noted with respect to law school admissions policies in the landmark affirmative action case *Grutter v. Bollinger* 539 U.S. 306 (2003) that “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”

¹³⁰ Gordon 2009, 149.

¹³¹ Mattei 1994a.

¹³² Rizzo 1980, 189-90.

¹³³ See, for example, Posner 2003; Calabresi 1960, 499; and Coase, 1960.

¹³⁴ Mattei 2003, 411-12.

¹³⁵ Posner 1997, 5.

¹³⁶ For a classic American case illustrating this judicial role, see the famous opinion of Justice Learned Hand in *T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), which found the owners of a tugboat negligent for not equipping the boat with radio equipment, even though it was not customary in the industry to do so.

¹³⁷ Wiegand 1991.

continental conceptions of lease derived from the Roman tradition. The American concept of trusteeship, by contrast, which promised smaller efficiency gains, did not establish itself as easily or widely. Other areas of law associated with the size and efficiency of the American economy such as corporate and banking law made greater inroads into European law. Finally, there is the growing importance of protective norms of all kinds that are observable not only in constitutional law but also in many other areas of law. These norms have appeared in fields of law as varied as the protection of minority shareholders, the prohibition of insider trading, and various legal protections of individuals, including torts, products liability, and medical malpractice liability. In this way, America in the twentieth century took the lead in developing individual protection norms on a broad front and subsequently in exporting those legal norms and practices.¹³⁸

The new world of more lawyers, litigation, law, which Marc Galanter calls the new legalism, reflects a profound blurring of the boundaries of the legal world.¹³⁹ This is illustrated by the increasing international reception of American-style alternative dispute resolution measures as reflected in international commercial arbitration and other forms of mediation or arbitration (Dezalay and Garth 1995 fussing about the forum PK hard copy). Legal authority is evidently becoming more diffuse. And law is becoming more voluminous, complex and uncertain. “Negotiation has been embraced as part of the legal realm; politics is no longer something alien, and the ‘thereness’ of the law is in some doubt” (Galanter 1992, 22). This, broadly speaking, is the result of the conceptual shift attending the Americanization of law.

Finally there is a series of broader contextual mechanisms in which the Americanization of global law occurs. American primacy along a number of different dimensions and the spread of English as *lingua franca* come to mind. Foreign students flocking to American law schools are attracted not only by the law or American research universities as institutions unrivalled in the world. They attend also because of America’s aura of leading on intellectual, artistic and economic matters.¹⁴⁰ Legal systems receiving foreign law show what Alan Watson has called “transplant bias.”¹⁴¹ This concept denotes an unthinking receptivity to ready acceptance of foreign law because of the general prestige, linguistic accessibility, and the training and experience of local lawyers. Academic writers are probably most susceptible to the sway of grand foreign theories, whereas those following legal precedents are probably most resistant. Judges borrowing foreign rules will carefully weigh the pros and cons. Academics are more likely to be swept away by the logic of an argument.

In any process analysis actors and institutional mechanisms help us describe or explain how or why initial conditions in a given context generate a specific outcome. Besides empirical observations and the search for general laws an analysis of actors and mechanisms occupies a distinctive position.¹⁴² Our analysis of mechanisms makes three explicit choices. First, in contrast to materialist approaches, we insist that mechanisms do not have to be observable phenomena. They can inhabit conceptual or semiotic systems, as in legal translation theory. Second, we assume that there exists no a priori level of generality of analysis; mechanisms can exist in specific, even singular, spatial or temporal contexts. Finally, we hold no a priori view in the controversy over methodological individualism or holism. Not holding to any a priori view, we see no reason to choose sides in this debate. We assume instead that on questions of legalization both individual actors and collective mechanisms can combine to produce outcomes such as the Americanization of global law.

¹³⁸ Galanter 1992. Kelemen 2010.

¹³⁹ Galanter 1992, 17-22.

¹⁴⁰ Mattei 1994b, 207.

¹⁴¹ Watson 1978, 327.

¹⁴² Sil and Katzenstein 2010.

Conclusion. We analyze here the Americanization of global law with two optics. One optic focuses on states, treaties and compliances or on corporations, contracts and firm strategies. That is, it highlights the role of actors. We follow this tradition in Parts 2 and 3 below. This analysis highlights functional processes with unitary actors and their clearly defined interests, regulatory effects of law, and best practice conceived as a one-way street. The analysis in Part 2 points to the striking ineffectiveness of the U.S. government's rule of law programs compared to both the legal expansion of U.S. corporations and the more effective legalization strategies of NGOs and international organizations. Part 4 shifts to the second optic and highlights processes that reveal the constitutive effects of legalization conceived of as two-way streets, and actors that evolve novel practices with unintended consequences. In exploring some of the major aspects of the Americanization of global law, this paper thus draws on both rationalist and sociological insights.

Part 2: In the Shadow of the State: Political Programs and the Americanization of Law

We argue here that during the last half century the process of exporting American legal norms and practices has proceeded in the shadow of the state, pushed forward energetically by NGOs and international organizations. In sharp contrast, direct efforts of the U.S. government to actively export the "Rule of Law" have been met by a resounding failure. Thomas Carothers's famous study of failed democratization efforts typifies the general consensus in the literature.¹⁴³ The consensus that these programs fail, however, runs contrary to many of the observations of legal scholars that do see a process of "Americanization" with respect to certain discrete legal practices and norms. This contradiction, we argue, suggests that the observed shift towards American practices is taking place in the shadow of the state. That is to say, trends such as the expanding number of foreign LLM students in the U.S.,¹⁴⁴ the increasing number of American law firms with offices and practices abroad,¹⁴⁵ the American-training of lawyers at multilateral institutions, the exposure to American-style discovery, and the long arm of certain U.S. laws, as in the area of anti-trust, are an important source of legal reform in the international system. Multiple actors, indirect action channels and diffuse influence characterize the process of legalization more accurately than a focus on the state as the sole actor, through direct action channels and targeted influence.

In the 1950s and 1960s, the US government was strongly committed to export American law and specifically "the Rule of Law," as it sought to assist various countries in the process of nation-building. American policy centered on the direct export of American legal theory and its entire legal structure. Few of the political actors in this movement had any training in comparative or international law. Today both legal scholars and the practitioners who participated in it consider it to have been a failure.¹⁴⁶ Their efforts to export U.S. law, these authors note, were carelessly crafted around the export of U.S. common law legal theory to states that had a civil law origin. Few actors in this failed effort had any training in comparative or international law, and this inexperience was evident in the effort's ineffectiveness.¹⁴⁷

It is actually extremely difficult to define the precise meaning of the concept of U.S. legal export. The term connotes a single actor and a unity of purpose which simply does not match a much more complicated political reality. To be sure the United States Agency for International Development

¹⁴³ Carothers 1999.

¹⁴⁴ American Bar Association, Legal Education Statistics, available at: <http://www.abanet.org/legaled/statistics/stats.html>.

¹⁴⁵ Each of the top fifty U.S. law firms has established an average of nearly eight foreign law offices. Data compiled by author according to Vault rankings.

¹⁴⁶ Galanter and Trubek 1974; Merryman 1977; and Larson-Rabin 2007.

¹⁴⁷ Larson-Rabin 2007.

(USAID), the United States Information Agency (USIA), the State Department, the Administrative Conference of the United States (ACUS), the National Endowment of Democracy, and the Committee on International Judicial Relations of the Judicial Conference of the United States directly or indirectly support many programs all over the world that seek to strengthen the rule of law. But the web of relationships between funders, intermediary organizations, end-point providers on the export side, and various entities on the import side is extremely complex. Institutional fragmentation and a lack of coordination are hallmark of these programmatic efforts.¹⁴⁸

Furthermore, problems of how to define the very concepts of “U.S. legal advice” and “U.S. legal models” both over- and understate the range of U.S. activities. Much of the legal assistance and advice is in fact not focused on legal approaches or solutions that are distinctly American but often stresses universal or international standards. Indeed in Eastern Europe U.S. providers of USAID-supported programs often emphasize Western European rather than U.S. models and have included Europeans on advisory panels. U.S. academic experts working for U.S. funded programs are openly critical of U.S. models on issues such as criminal procedure, economic and social rights, and antitrust regulations. And direct grants to organizations in recipient countries have invited legal development and reform efforts that look to non-U.S. models. At the same time these programs also understate the range of U.S. activities since the U.S. is pushing legal reforms it finds acceptable through multilateral institutions that shape international standards.¹⁴⁹

There exists a veritable cottage industry highlighting the failures of purposeful Rule of Law programs.¹⁵⁰ These works range in their criticism from cataloging their failures in the different countries in which they are applied, to criticizing them as vehicles for the spread of American imperialism.¹⁵¹ A common critique is that, despite clearly distinguishable periods in the Law and Development movement since the 1950s, the approaches used by the U.S. government and others are, as Thomas Carothers notes, “almost everywhere...strikingly similar.”¹⁵² USAID’s model, for instance, not surprisingly derives from the American experience and focuses primarily on constitutional development, as that “is probably the form of democracy assistance best known to Americans.”¹⁵³ Larson-Rabin comes to a similar conclusion: “There was an assumption that U.S. law and legal institutions could or should be exported to developing countries in the 1960s. In the current period, however, there continues to be a tendency toward the same assumption.”¹⁵⁴ The continued commitment to the U.S. common-law model, which has persisted even in the shadow of a long-running debate about the relative merits of civil and common law systems, runs counter to the lesson derived by two eminent scholar-participants in the first Law and Development period, David Trubeck and Marc Galanter.¹⁵⁵ Their highly influential work concluded that any such broad commitment to a particular legal system fatally ignores empirical realities of local contexts and domestic power structures that affect the success or failure of legal reforms.

These criticisms speak to occasionally politically overly ambitious attempts of exporting the U.S. legal doctrines and associated set of practices.¹⁵⁶ As Stephen Toope notes, most aid agencies employ the term as their stated mission, yet “[t]here is no simple, all-inclusive, definition of the rule of law any more

¹⁴⁸ deLisle 1999, 185-87.

¹⁴⁹ deLisle 1999, 201-03.

¹⁵⁰ Holmes 1999, 68; Jensen and Heller 2003; and Carothers 1999.

¹⁵¹ Mattei 1994.

¹⁵² Carothers 1999.

¹⁵³ Carothers 1999, 160.

¹⁵⁴ Larson-Rabin 2007, 212.

¹⁵⁵ See, for example, Trubeck and Galanter 1974.

¹⁵⁶ They do not necessarily contradict the fact that specific U.S. legal practices—a single rule of procedure or a particular constitutional holding—have diffused very successfully. MOVE THIS FOOTNOTE?

than there is an inclusively supported definition of ‘law.’”¹⁵⁷ The many attempts to provide such a definition reveal starkly the weaknesses of such a basket term. Carothers, for example, attempts to define what he refers to as the “Rule of Law Assistance Standard Menu,” which includes “reforming institutions,” “[r]ewriting laws,” “[u]pgrading the legal profession through support for stronger bar associations and law schools,” and “[i]ncreasing legal access and advocacy.”¹⁵⁸ Since no consensus definition of Rule of Law exists, the failure of such programs is hardly a surprise.

American legal reform efforts abroad have also been spear-headed by a large number of nongovernmental organizations operating under the auspices of or in the shadow of the state. They include hallmarks of the American polity such as the Ford and Rockefeller Foundations, the Peace Corps, the Asia Foundation, the American Society of International Law, the International Legal Center, the Public Interest Law Initiative, the Open Society, the German Marshall Fund, and the Fulbright Commission.¹⁵⁹ Often the appearance of private initiative conceals the heavy involvement of the American state, normally through funding the overwhelming proportion of such programs or through the tax-exempt status that well-established foundations enjoy in the United States. The role of the U.S. legal exporter within these organizations ranges from delivering completed drafts of legislation or constitutions to foreign states, to merely commenting on drafts drawn up locally.¹⁶⁰ One of the largest agents of legal reform has been a project of the American Bar Association (ABA) directed at Eastern European states and the successor states of former Soviet Union. The ABA’s Central European and Eurasia Institute (CEELI), maintains a list of thousands of U.S. volunteers willing to comment on drafts in particular subject areas. CEELI stands as the largest voluntary association of lawyers in the U.S. and has provided technical assistance to nearly every country in the region and maintains over twenty liaison offices.¹⁶¹ According to CEELI, this association of volunteers in just its first five years provided pro bono services equaling over \$50 million from thousands of U.S. lawyers, and \$180 million in its first ten years.¹⁶²

In addition to professional organizations and private foundations, U.S. law schools have also served as an important source in the education and funding of U.S. law abroad. The role of these law schools extends beyond the training of foreign lawyers in LLM programs (there were 1,969 foreign nationals accredited as students at U.S. law schools in 2008)¹⁶³ to include also the sponsoring of increasing numbers of visits by U.S. lawyers and professors to schools overseas. CEELI oversaw the creation of over 100 “sister” relationships between law schools in Central Europe and Eurasia and the United States. These efforts, though, are not funded without governmental support. USAID, for example, subcontracts much of its work. Indeed, CEELI is in large part funded by the U.S. government for as much as nearly 80 per cent of its costs. One scholar conducted a survey of U.S.-based clinical law teachers consulting internationally between 1981 and 2003. Not surprisingly, much of the funding for these programs came from governmental sources.¹⁶⁴

¹⁵⁷ Toope 2003.

¹⁵⁸ Carothers 1999.

¹⁵⁹ Maisel 2008, 468.

¹⁶⁰ Reitz 2003.

¹⁶¹ Id.

¹⁶² Id., 452.

¹⁶³ Data collected from the American Bar Association, Legal Education Statistics, available at: <http://www.abanet.org/legaled/statistics/stats.html>.

¹⁶⁴ Maisel 2008, 506.

TABLE 1: SOURCES OF FUNDING FOR U.S. CLINICAL LAW FACULTY LEGAL EDUCATION PROGRAMS ABROAD

	<i>USAID</i>	<i>Fulbright</i>	<i>U.S. Info. Serv.</i>	<i>ABA/CEELI</i>	<i>Ford Found.</i>	<i>Other</i> ¹⁶⁴
<i>Africa</i>	7	4	11	6	1	8
<i>Asia</i>	1	10	0	2	4	34

In addition to government funding of these quasi-private legal education efforts, it is worth also mentioning the role U.S. government actors play in these programs. Several U.S. Supreme Court justices themselves stand as notable participants. Justice Antony Kennedy, for example, has regularly taught a summer program for law students at the Salzburg seminar in Austria. This program was created by three Harvard Law School graduates who believed Europe needed a place for the study of American ideals. This effort, which came to be known as the “Marshall Plan of the Mind,”¹⁶⁵ is hosted by the Salzburg seminar, itself a child of the Cold War. And former Justice Sandra Day O’Connor was actively involved in the creation of the ABA’s CEELI initiatives.

Since the end of the Cold War there has been a surge in American-led efforts to promote lawful and democratic regimes in post-Communist, less-developed and post-conflict states.¹⁶⁶ These efforts have been led not by the American state but by American and American-trained actors in NGOs and increasingly important international organizations. The pace and funding of these efforts has increased dramatically since the early 1990s.¹⁶⁷ For example, compiled just after the Soviet collapse, one directory of U.S.-led initiatives to support constitutionalism and Rule of Law programs in Eastern Europe included over 200 pages of entries.¹⁶⁸ Despite otherwise contracting foreign assistance, by 2000 the U.S. government was spending more than \$700 million on democracy promotion. The now emerging paradigm holds that the judiciary is linked closely to poverty reduction. Law and lawyers thus lie at the heart of economic development.¹⁶⁹ This movement seeks to capture the post-Washington consensus shift illustrated by Amartya Sen in a speech to the World Bank in 2000.¹⁷⁰ Sen argued that multiple aspects of development, including law, should be pursued in tandem, noting that if each “were not simultaneously addressed and considered together for analysis and action, they may each end up ‘hanging separately.’”¹⁷¹ His argument triggered an important shift in the thinking of the World Bank. Thereafter, the World Bank quickly took on the task of legal reform. Then president James D. Wolfensohn issued his “Comprehensive Development Framework,” whereby, as Leah Larson-Rabin describes, “international organizations began to view law as a key tool to protect and foster those human rights linked to development, rather than as a framework [designed merely] to prevent any interference in the markets.”¹⁷²

In this new phase of American interest in exporting its legal norms and practices, the evidence suggests a picture of a more “complex, varied, and fragmented” array of actors that is not traceable to any single point of agency.¹⁷³ Hiram Chodosh, for example, identifies different modes of action for exporting models of civil justice reform. Support for Rule of Law programs comes from U.S. aid or assistance to countries engaged in legal reform. This support is drawn primarily from USAID, but also the State Department.¹⁷⁴ USAID has led comprehensive export efforts by, among other things, bolstering the role of the judiciary in foreign states. This takes the form of increasing the salaries of judges, prosecutors and public defenders; increasing the transparency of the judicial process; and minimizing delay of judicial

<i>Cent. Amer.</i>	5	2	0	0	0	5
<i>Cent. & East. Europe</i>	5	5	1	18	3	32
<i>South Amer.</i>	1	1	0	0	1	13

¹⁶⁵ Toobin 2008, 183.

¹⁶⁶ Carothers 1999.

¹⁶⁷ Brooks 2003, 2275.

¹⁶⁸ deLisle 1999, 184, n.3.

¹⁶⁹ Trubek and Santos 2006.

¹⁷⁰ Sen 2000.

¹⁷¹ Id. at 1.

¹⁷² Larson-Rabin 2007.

¹⁷³ deLisle 1999.

¹⁷⁴ Chodosh 2002, 351.

proceedings.¹⁷⁵ Other policy instruments employed by a variety of agencies of the U.S. government, Chodosh notes, include: U.S.-supported exchange of legal opinion leaders; public grants and tax credits for the work of private corporations, foundations, and nongovernmental organizations that campaign for or are dedicated to civil justice reform abroad; and financial support through international financial institutions, such as the World Bank and the International Monetary Fund, conditional on the implementation of specific legal reforms.¹⁷⁶

More noteworthy is the export of U.S. legal principles through international organizations. While legal systems need not always follow in the footsteps of marching armies, there are still forceful, state-led efforts to affect the practice and adoption of law abroad. Indeed, Emma Phillips maintains that World Bank policy, as evident in the World Bank's Doing Business Reports, reflects nothing less than a "War on Civil Law."¹⁷⁷ Conducted mainly by World Bank lawyers, this war is fueled by the belief that civil law traditions cripple developing economies.¹⁷⁸ The authors of the World Bank publication derive this belief from their empirical finding that legal origin serves as one of the most important statistical variables explaining differing levels of regulatory intervention. "This scholarship," she argues, "takes as its central thesis that a country's legal system is a significant influence on the nature of its economic and political institutions and therefore on its economic performance, or good governance."¹⁷⁹

In the post-Washington Consensus era of international developmental assistance, admittedly there has been a notable shift in discourse and policy away from a focus on market growth toward a focus on market failures and regulation. Lawyers have assumed an important place in multilateral development agencies and banks, both as highly-placed decision-makers and as consultants.¹⁸⁰ Though situated in a wide variety of institutions and hailing from a large number of countries, these lawyers are overwhelmingly influenced by the American Law and Economics movement, which largely favors common law. As with the pro-common-law guidance documents of USAID, the UN's own Basic Principles on the Independence of the Judiciary reflect a very similar commitment to this particular theoretical approach.¹⁸¹

The apparent shift away from U.S.-centric legal development is in many cases only skin deep. The lawyers on the staffs of most multilateral developmental institutions are overwhelmingly socialized in the American legal experience. Of the forty-nine lawyers participating in the World Bank's legal associate program between 2004 and 2008, almost all acquired an advanced law degree from U.S. institutions. Even though only one of the associates is an American citizen (a dual citizen from Peru), more than half of the World Bank's legal associates received degrees from just five U.S. schools: Yale, Harvard, Columbia, NYU, and U. of Chicago. Moreover, only one of the forty-nine studied outside of the Anglo-American tradition; four of the five that were educated outside the U.S. were educated in either the UK or Canada.¹⁸²

¹⁷⁵ Steven Hendrix 2002-2003, 277, chronicles USAID efforts in Bolivia, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, in addition to broader regional programs.

¹⁷⁶ Chodosh 2002.

¹⁷⁷ Phillips 2007.

¹⁷⁸ World Bank, Doing Business 2007: How to Reform; Doing Business 2005: Removing Obstacles to Growth; and Doing Business 2004: Understanding Regulations, available at: <http://www.doingbusiness.org/Downloads/>.

¹⁷⁹ Id.

¹⁸⁰ Jensen and Heller, 2003.

¹⁸¹ Phillips 2007.

¹⁸² Legal Associates Program, The World Bank, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:20720418~menuPK:6245762~pagePK:210058~piPK:210062~theSitePK:445634,00.html>.

The legal scholarship of the World Bank also reflects a preference for scholarship emanating from the U.S. academe. Of the twenty-two contributors to a recent series of legal essays published by the World Bank, seventeen were educated in the Anglo-American tradition.¹⁸³ Such a finding of American-dominated legal education is important. As Phillips notes, “the production and reproduction of structures of meaning occurs primarily through the socialization of legal actors. Legal education is, of course, a primary means by which legal actors internalize a particular understanding of the shape and purpose of ‘the law.’”¹⁸⁴

The attractiveness of the United States as a destination for foreign law students is due to the exceptionalism of the United States offering primary legal education as a graduate degree, which serves the goal of enhancing the global marketability of U.S.-trained lawyers.¹⁸⁵ Such an instrumental explanation, though plausible, does not undermine the claim that the education these lawyers receive facilitates the diffusion of U.S. legal norms. Given the billions of dollars leveraged by the Bank directed at judicial reform, it is telling that the ascendancy of common law is most apparent in the developing states served by the World Bank—even though many of the American-trained lawyers at the Bank come from civil law systems.¹⁸⁶ Furthermore, in addition to the lawyers at institutions such as the World Bank, many national leaders in developing states receiving World Bank assistance also come to the United States for advanced legal degrees. In many instances they pursue an LLM and then return to their home countries. These foreign-trained lawyers then implement the ideas acquired in the United States and soon thereafter find “approval from international donors whose own recipe for judicial modernization” involve similar legal reforms.¹⁸⁷ Furthermore in developed countries a LLM degree has come to be regarded as a necessity for foreign lawyers wishing to participate in the Anglo-American-dominated international legal services market.¹⁸⁸ In global financial centers such as Frankfurt, Germany, where many of the top law firms have merged or established affiliations with Anglo-American mega-law firms, career opportunities for lawyers who have not studied in the United States or the England are limited.¹⁸⁹ Indeed U.S. legal discourse is so pervasive that on many occasions lawyers from outside the Anglo-American tradition have difficulty doing business with one another unless both have attained advanced law degrees from U.S. institutions.¹⁹⁰ As Flood notes, “Young lawyers from large firms outside the Anglo-American nexus find it essential to take an LLM degree at a major American or English law school, otherwise they will not be conversant with global legal techniques.”¹⁹¹

Part 3: In the Shadow of the State: Corporate Expansion and the Americanization of Law

Enhancing efficiency is a persuasive argument to explain legal change. Efficiency concerns and the reduction of transaction costs can occur when a government or corporation adapts laws or legal procedures tried out in other jurisdictions. Such adaptations could simply be rational responses to specific legal problems.¹⁹² In this way, growing commerce and the increasing demand for international transactions motivates actors to adopt common legal rules, institutions, and procedures. But often other political, professional and individual forces are at play, social prestige and narrow self-interest among

¹⁸³ World Bank Legal Review: Law and Justice for Development 2003.

¹⁸⁴ Phillips 2007, 923.

¹⁸⁵ *Id.*, 2007.

¹⁸⁶ *Id.*, 916.

¹⁸⁷ Phillips 2007.

¹⁸⁸ Silver 2002.

¹⁸⁹ *Id.* at 1040.

¹⁹⁰ *Id.* at 1040.

¹⁹¹ Flood and Sosa 2008, 15.

¹⁹² Mattei 1994; Rizzo 1980; Caterina, 2006, 161.

them. To be in the vanguard of legal thinking is prestigious even though the vanguard may be foreign. And if the professional training was acquired in a foreign jurisdiction, individual career aspirations will push in the same direction. The central role that, in recent decades, American legal writing and American law schools have played worldwide has greatly enhanced the Americanization of legal processes.

Furthermore, operating in the shadow of the state, corporations are also dynamic engines propelling the export of American legal practices and norms. The political foundations of that expansion were provided by the American strategy of neoliberalism that fueled the era of globalization, especially in financial markets. During this era, economists began to dominate both the study and practice of law and development. The advocates of a Law and Economics model held that states should forgo efforts to create a “first-class judiciary or an extensive system of civil liberties” in favor of rigid rules devoted to contract and property rights.¹⁹³ In that political and ideological context the organizational structure of the American corporation, as well as the legal system of which it is a part, were dynamic engines of legal change in world politics.

The rise of the global law firm has been a synonym with the rise of American legal practice.¹⁹⁴ Indeed, in 2006, 41 of the top 50 global law firms were American.¹⁹⁵ Between 1988 and 2006, moreover, the outflow of FDI in U.S. legal services increased more than eighty-fold, from \$6 million to \$502 million.¹⁹⁶ It is beyond doubt that American law firms have a distinct organizational model (e.g. the Cravath partnership or tournament model), distinct merger and takeover strategies, and a distinctive tenacity in the patient acquisition of foreign lawyers through partnerships abroad. While roughly half of the American lawyers in private practice are sole practitioners, and only 14 per cent work in firms of more than 100 lawyers,¹⁹⁷ the generally local character of American law practice is no longer free from the influences of the globalization of law. No matter the size, a firm’s client base and competition now come from all over the world. Whatever the reasons, and they are manifold and complex, U.S. legal service firms have expanded enormously in terms of overall size and overseas presence.

The structure and the practice of these firms has had a profound effect in the era of financial globalization.¹⁹⁸ As the global pool of lawyers increased, so too did the size of law firms. As long as America leads the global economy, Nancy Kaszak argues, so too will “global legal principles become Americanized.” Furthermore, until the Enron scandal led to new government regulations, the expansion of global law firms also led to a sharp increase in the global presence of American “professional service” firms such as Accenture.

New York was the birthplace of the modern American law firm.¹⁹⁹ The founder of this model, Cravath, believed that young legal associates should witness senior partners handling complex problems and breaking them down into component parts for the associates to analyze. Law firm partners were endowed with capital interest in the firm. The most efficient way to exploit their capital was to hire associates who served to expand the work base. The American law firm thus contains its own engine of growth apart from the underlying business cycle. Law firms contain their own engines of growth because partners are endowed with capital interests in the work of the firm.²⁰⁰ Widening ranks of non-equity partnership and permanent ‘off track’ attorneys have in recent years complemented this basic

¹⁹³ Posner 1998, 9.

¹⁹⁴ Faulconbridge, Beaverstock, Muzio, and Taylor 2008; John Flood 1989, 572, notes the “striking resemblance emerging between contemporary British professional institutions and those in the United States.”

¹⁹⁵ See The Lawyer Global 100, available at: <http://www.thelawyer.com/global100/>.

¹⁹⁶ Faulconbridge et al. 2008, 457.

¹⁹⁷ Terry 2008.

¹⁹⁸ Kaszak 2001.

¹⁹⁹ Flood 2007.

²⁰⁰ Galanter and Palay 1990; and Galanter and Henderson 2008.

organizational model. Confronting new problems due to their sheer size and geographic dispersion, global law firms are also experimenting with organizational innovations. Whatever its eventual limitations, during the last century American law firms have spread quickly as the legal profession internationalized hand in hand with the expansion of the United States.

Corporate growth rates, however, are too varied to be explained by any one organizational model.²⁰¹ Many firms, for instance, grow through mergers. While some mergers are marriages of equals, others are essentially takeovers. One important impetus for growth was Britain's 1986 "Big Bang" deregulation in financial services. From this emerged Clifford Chance, the U.K.'s largest law firm. Yet another large firm, Baker & McKinzie, took a more gradual approach—acquiring lawyers in target countries through partnerships over the course of 50 years. Finally, some global firms developed not because of a global strategy or demand, but for other reasons. Skadden Arps, for example, was in its early years largely Jewish because of discrimination in the legal industry and consigned to what other firms considered marginal legal work, such as mergers and acquisitions. Once this sector expanded, so too did Skadden Arps. International office networks, formal network relations, multidisciplinary partnerships and ad hoc affiliations have all proved their competitive viability.

In terms of both size and overseas presence, U.S. legal services experienced a remarkable growth during the 1990s.²⁰² American transnational lawyering moved to the center of the global economy. Despite some organizational differences, U.S. (and U.K.) firms dominate due in part to their common law orientation. Civil law emphasizes formal rationality, coherence, and predictability, and maintains a greater independence from the economic pressures of the business community. By contrast, common law practitioners emphasize ad hoc, historically contingent decisions of case law. They are more flexible to interpretations in favor of their clients' interests. By and large, common law lawyers are more entrepreneurial and business oriented than their civil law counterparts. This is not to deny notable differences within the Anglo-American tradition that distinguish the structure U.K. and U.S. firms, for example, in their compensation schemes. British firms' forays into the U.S. legal market have stumbled in part because the U.K. "lockstep" system of remuneration which bases salary and bonus on a lawyer's years of service rather than corporate profits. This payment structure contrasts with the U.S.-style "eat what you kill," profits-based scheme. After Clifford Chance's merger with an American firm in 2000, many top American attorneys left the firm because the lockstep approach clashed with the compensation practices and norms of American law firms. Despite these differences Anglo-American legal firms dominate global markets. The top 16 law firms, all from the U.K. or U.S., are present in more than 100 cities worldwide. And the most represented cities are primarily financial centers, capital cities, and, notably, Eastern European countries that privatized their economies in the 1990s and therefore were in need of the new legal services now offered on a global scale.

The global success of Anglo-American law firms not only reflects market demand, but also local regulation. American and British firms have lobbied in countries as different as France and India for legislative changes to deregulate the ability of foreign lawyers to practice in local jurisdictions.²⁰³ Many major cities of less-developed states remain under-provisioned by global law firms. Not so in wealthy markets where the increasing U.S. and U.K. dominance of corporate and mergers & acquisitions legal work is highly visible.²⁰⁴ In the China/Hong Kong market, for example, only three of the top twenty-eight ranked corporate firms are local. More specifically, within capital markets none of the top fifteen legal firms in China are domestically owned.²⁰⁵ In Japan, none of the top eighteen ranked corporate firms

²⁰¹ Flood 2007.

²⁰² Faulconbridge et al. 2008; and Flood 2008.

²⁰³ Faulconbridge 2008.

²⁰⁴ Sokol 2007.

²⁰⁵ Id. at 10.

performing mergers and acquisitions are domestic.²⁰⁶ A similar weakness in local legal knowledge is also widespread in Europe, especially in Germany “where only five local firms make the top twenty corporate/M&A practices, one of ten in capital market debt practices, and one of nine among capital market equity practices.”²⁰⁷ While the situation in France is less skewed against domestic firms, U.K. firms are besieged by U.S.-based competitors. “Among medium resourced deals, only nine of twenty top U.K. practices are London-based. U.S.-based firms take up the remainder of the spots.”²⁰⁸ Moreover, the U.K. debt capital markets practice are similarly dominated by foreign firms. In sharp contrast, the United States has experienced no foreign legal encroachment, with all twenty-seven of the top-ranked corporate/M&A firms and all fifteen capital markets firms U.S.-based.²⁰⁹

A large number of mergers of unprecedented scale have expanded the geographic reach of global law firms and created a rift between and among different types of legal firms.²¹⁰ For basic legal services, such as insurance, companies are turning to in-house counsel or to the lowest price for competent work. This trend is facilitated by the advent of extensive electronic legal databases such as Lexis-Nexis and Westlaw that has commoditized low-value-added legal work. By contrast, for high-value-added legal services, companies are more likely to look for the most prestigious firms in a particular subpractice of the relevant law. This division of labor creates a growing gulf in the average profits per partner between the top 25 law firms and all others, with only top firms specializing in M&A and capital-markets practices that command premium rates. The difference is illustrated in the full-service legal firm Baker & McKenzie, which is spread broadly across the globe with 67 offices in 39 countries, and Wachtell, Lipton, Rosen, & Katz, one of the world’s most prestigious and profitable firms, which has only one office in midtown Manhattan.

The result of these developments has been that at crucial switch points of the global economy the stability that economic actors require is now provided not by the state but by the transnational work of American global law firms.²¹¹ They are lowering transaction costs by providing internationally uniform contract provisions, arbitration tribunals, and other private governance solutions to common problems. As John Flood explains, “if international actors cooperate with lawyers to realize a transaction or to solve a conflict, the stabilization of expectations can occur only at the level of the role of the lawyer and not at the level of the legal system They rely on the assumption that the lawyer who can make use of the international structures of his law firm will be able to provide adequate legal or non-legal solutions for any type of conflict that can arise out of the transaction.”²¹² International business law is heavily Americanized for other reasons. It requires mastery of the English language, ability to draft American contracts, knowledge of arbitration, and passage of the New York bar.²¹³

The apparent diffusion of the Cravath model thus rests on of the foundations provided by a liberalized global economy that advantages the more complex legal services that large American firms can provide.²¹⁴ Domestic interests and structures of power are central in the evolution of and political struggle over the development of domestic law.²¹⁵ Legal systems often import rules that favor the interests of some groups or elites over others,²¹⁶ and so any legal system of law may therefore reflect the power

²⁰⁶ Id.

²⁰⁷ Id.

²⁰⁸ Id. at 11.

²⁰⁹ Id. at 11.

²¹⁰ Becker, Herman, Samuelson, and Webb 2001.

²¹¹ Flood 2008.

²¹² Flood and Sosa 2008, 5.

²¹³ Flood 2002.

²¹⁴ Martin 2007, 171.

²¹⁵ Dezalay and Garth 2002.

²¹⁶ Starr and Collier 1989.

structures within which it was formed.²¹⁷ In the U.K., Germany, and Japan, the shift to more Cravath-like firms occurred after the deregulation of financial markets and before the deregulation of the legal market. The spread of the Cravathist organizational model—large, nationally oriented, multi-purpose, commercially-oriented law firms—offers particular institutional advantages that derive from an advantageous structure of the global political economy. By now even large European firms, which tend to resist the American lawyering model, employ stable legal solutions by offering services that follow the well-known principles and widely accepted practices of Anglo-American law.²¹⁸

Daniel Kelemen has offered a compelling general account of the spread of America's adversarial legal style to Europe, specifically the enhanced transparency and increased access by private actors to the judicial system.²¹⁹ Kelemen identifies specific traits of America's adversarial legal style that are increasingly spreading throughout the EU. Detailed rules, extensive transparency requirements, adversarial procedures for dispute resolution, costly lawsuits involving many lawyers, and frequent judicial interventions in administrative affairs are replacing the informal, cooperative and opaque regulatory style at both national and EU levels. The list of possible causes of the spread of American legal style is long: growing globalization of markets, growing distrust in bureaucrats, more judicial activism including judicial review, and the global spread of U.S. law firms and legal education. While Kelemen and Sibbitt underline the importance of the global spread of American law firms, the expansion of EU rights, the empowerment of national and EU courts, and increased access to the judiciary for private parties, pride of place in their analysis goes to two general factors reshaping domestic politics—economic liberalization and political fragmentation.²²⁰ Both create functional pressures and political incentives that have profound effects on domestic structures of policy making and that undermine the informalism that has traditionally characterized European regulatory politics. It is structural shifts toward liberalization and fragmentation rather than policy diffusion that is driving the change in legal style. Diffusion is, at best, a secondary cause furthered by the organizational model and legal practice of American law firm acting, together with others, as both transmission belt and catalyst of legal change in Europe.²²¹

We should, however, not overstate the ability great powers have in imposing laws abroad. The effects of domestic structures of power and political practice are persistent and constrain full convergence on the American model in the European Union (EU) as Robert Kagan argues.²²² Focusing on the United States rather than Europe, Kagan agrees with Kelemen that deep economic and political forces have intensified adversarial legalism. Allowing for variations in the meaning of broad concepts in different jurisdictions, his long list of specifics can be summarized reasonably well under Kelemen's summary concepts of economic liberalization and political fragmentation. Furthermore, Kagan agrees with Kelemen that all of the factors that he has identified as operating in the United States can also be found in Europe. But he puts much more store in the strength and resilience of legal traditions and government structures that oppose the Americanization of European law." Some seeds of adversarial legalism are taking root in some patches of Europe. But they encounter a soil that is far less welcoming."²²³ We should not, Kagan argues, underestimate the tenacity of existing institutional arrangements and practices. Processes of Americanization of law are both important in their substance and delimited in their scope and impact. The American 'way of law' thus will not transform Europe.²²⁴

²¹⁷ Merry 2003; and Dezalay and Garth 2002.

²¹⁸ Flood 2008, 24.

²¹⁹ Kelemen 2010. Kelemen and Sibbitt 2004, 2005.

²²⁰ Kelemen and Sibbitt 2004, 111-115. Kelemen 2006, 103.

²²¹ Kelemen and Sibbitt 2005, 466-68.

²²² Kagan 1997, 2008.

²²³ Kagan 1999, 180.

²²⁴ Kagan 2001.

Across the common and civil law divide, in the words of Richard Able, “interaction among legal cultures...in a common forum encourages the emergence of a common style.”²²⁵ U.S. notions of law firm organization have had a profound impact on Europe and Canada, especially in the areas of corporate and business transactions law where U.S. firms are the ‘international standard setters’ with respect to size, foreign expansion, and aggressive marketing.²²⁶ Anglo-American firms in general, Susan Bisom-Rapp notes, dominate the global legal field. Domestic, international, multinational and transnational firms are all deeply affected by American lawyering. Despite strong corporate and national differences in the way the legal profession is structured, transnational encounters do transform global legal actors over time. American “legal invaders” actively promote and meet variable national resistance to the American conception of law as the “lingua franca for business.”²²⁷ Although U.S. mega-law firms that have merged or developed associations with a U.K. counterpart have experienced some difficulties in bridging the gulf between their legal work ethic with that of their English colleagues, and also between themselves and legal practices on the European continent, American-style ‘mega-lawyering’ is now a cultural feature common on both sides of the Atlantic.²²⁸ Foreign lawyers, once exposed to U.S. style law, will actively engage, promulgate, and implement transnational strategies in their practices thus seeking to overcome local legal differences and practices.

Part 4. Civil Procedure, Constitutional Review and the Americanization of Global Law

The attempts of the U.S. government to directly export the rule of law have been a failure. Thomas Carothers’s study of failed democratization efforts typifies the general consensus in the literature that these attempts have fallen far short of their ambitions.²²⁹ In contrast, NGOs and international organizations, operating in the shadow or at the behest of the American state, have been remarkably successful in spreading American legal practices and norms by more indirect means. Furthermore, through the combined fortunes of an efficient organizational model of the law firm and a common law tradition that favors entrepreneurial activities of lawyers, U.S. corporate lawyers have also proved a powerful force in the spread of American law.²³⁰ In the shadow of the American state and in global markets one can readily see a spread of American legal practices and norms.

Led by nonstate actors such as attorneys, legal transplant and translation processes are slow-moving, incremental processes that can easily elude the attention of students of international relations, even though they can lead to significant political transformations.²³¹ In such processes timing matters and large consequences may flow from relatively small or contingent events. Distinctive of the legal domain is the fact that in contrast to many other aspects of political and economic life, increasing returns do not seem to move legal systems to gravitate down the path of one institutional logic. Over time, civil and common law systems continue to transplant and translate partially.²³² Historically, a genealogy of European legal institutions, for example, shows the overlay of Roman law over local law varying with diminishing impact the further East the jurisdiction.²³³ In the contemporary context of Americanization of global law, West European and East Asian jurisdictions display similar processes of legal syncretism

²²⁵ Quoted in Bisom-Rapp 2004, 261-62.

²²⁶ *Id.*

²²⁷ Bisom-Rapp 2004, 300.

²²⁸ *Id.*, 301.

²²⁹ See Part 1 above.

²³⁰ See Part 2 above.

²³¹ Pierson 2000. Streeck and Thelen 2005. Mahoney and Thelen 2009.

²³² Watson 1976. Legrand 1997b. Sources cited in footnote 78.

²³³ Krotz 2001.

rather than unyielding doctrinal coherence. The fact that laws create collective action problems does not necessarily mean that legal rules obey the imperative of increasing returns.²³⁴ The Americanization of global law thus produces many important legal changes in different jurisdictions that fall far short of an outright and uniform replication of American legal norms and practices.

In recent decades, overt imitation and unobtrusive persuasion have led to an observable shift towards American legal norms and practices. The expanding number of foreign LLM students in the U.S., increasing numbers of American law firms with offices and practices abroad (each of the top fifty U.S. law firms have established an average of nearly eight foreign law offices), the American-training of lawyers at multilateral institutions, the exposure to American-style discovery in transnational litigation, and the long arm of certain U.S. laws,²³⁵ all signal the pervasiveness of American-initiated legal reforms in the international system. The admiration for and copying of German procedural law evident in the late 19th and early 20th century has given way in recent decades to the adoption of American legal procedures.

In addition, foreign courts, as revealed in their citation practices, have to varying degrees looked to American court decisions and legal scholarship, a rough indicator of the perceived salience and relevance of American law and jurisprudence. On balance, the evidence suggests that the perceived salience of American judicial opinion has increased in most, though not all, foreign jurisdictions and that while U.S. policymakers have fiercely debated the relevance of foreign judicial opinion in U.S. Constitutional interpretation, foreign opinions are nonetheless increasingly appearing in Supreme Court decisions and in the briefs submitted to the Court.

The global shift toward American law and legal practice, however, has not been a unilinear process. As David Leheny and Sida Liu argue, legal reforms are, and have always been, elastic discursive traditions, the result of political battles reflecting the goals of intellectuals, politicians, bureaucrats and lawyers.²³⁶ Local cultures and global legal norms are not fated to converge on a single developmental trajectory modeled on the American system. Rather, local cultures and global norms make available discursive tools that justify different legal strategies, including maintaining, adapting, or redefining legal norms and practices. Japan's creation of 74 new graduate law schools in 2004, for example, has drawn political battle lines between the legal profession and the state, which continues to defend the state-administered Bar Examination. The outcome in this tug-of-war is far from certain.²³⁷ This is but one illustration of the political struggles that emerge from the contested relation between law and virtue as competing and complementary values for the organization of society.²³⁸ Other struggles that accompany legal transfers can occur in the self-regulatory discursive practices beyond the confines of the state.²³⁹

²³⁴ Pierson 2000, 258.

²³⁵ Antitrust law, for example, is one area in which foreign jurisdictions are regularly confronted with U.S. law. Current U.S. Supreme Court jurisprudence allows the Department of Justice, in many circumstances, to exercise authority under the Sherman Act and for U.S. courts to recognize jurisdiction over U.S. unfair competition claims related to activities outside the borders of the United States so long as the anticompetitive activity has direct and reasonably foreseeable effects on U.S. commerce or consumers. See *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n*, 549 F.2d 597 (9th Cir. 1976); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). Other laws that affect directly or indirectly the conduct of foreign actors include securities fraud enforcement actions pursued by the Securities and Exchange Commission and claims brought under the Foreign Corrupt Practices Act, which can require of foreign government actors certain conduct when dealing with U.S. businesses. See deLisle 1999, 209. FOLLOW UP TANYA PUTNAM'S *IO* ARTICLE AND FORTHCOMING BOOK.

²³⁶ Leheny and Liu 2010.

²³⁷ Ho 2010.

²³⁸ In 2003.

²³⁹ Gillespie 2008.

Much of the variability in the reception of U.S.-led legalization can be explained by the legal family of the receiving state. As illustrated in Table 1 above, the family origin of a legal system affects the likelihood of its import of a particular foreign legal practice. Legalization across legal families is a slow, iterative process that involves the repeated interactions among legal actors. Legalization within a legal family, by contrast, due to similarities in legal thought and language, can occur more quickly and easily. As J. Mark Ramseyer explains: “Legal scholars in the former French colonies cite French scholars rather than German or English. Legislators in the former French colonies copy French statutes rather than German or English. Judges in the former French colonies mimic French judges rather than German or English.”²⁴⁰ The reason for why countries stay within their legal families could be as simple as the fact that firms in these countries trade most frequently with other countries from the same tradition, and so the maintenance of similar laws reduces transaction costs.²⁴¹ Other plausible explanations point to the relevance of methodologically holistic approaches that understand legal reform not as a means of rational utility maximization but rather as a process of emulation of procedures deemed legitimate by esteemed legal practitioners.

The following sections examine empirical episodes of U.S.-led legalization while taking into account the importance of legal family. To examine the spread of U.S. procedural techniques, we turn to civil law jurisdictions. Civil law systems present a useful setting to examine processes of legalization because, as Mirjan Damaska has noted, legal families possess important “differences in procedural ecology,” making transplantation between common law and civil law especially difficult.²⁴² It follows that any perceived Americanization reflects powerful mechanisms of diffusion. To examine the spread of U.S. Constitutional thought, by contrast, we turn more broadly to systems derived in full or in part from the common law family. While any legal transplant or translation is less difficult among these states, it still provides a valuable look into the controversial processes involved in legalization, as constitutional law is said to serve a “constitutive function”²⁴³ in a nation, and so foreign encroachments upon it reveal important aspects of legalization in action.

The Diffusion of Civil Procedural Law: U.S.-Style Class Action Suits and Pre-Trial Discovery

Much of the variability in the diffusion of American legal practices can be explained in part by the legal family of the receiving state. As illustrated in table 1 above, the family origin of a system affects the probabilities of whether it is likely to import a particular foreign legal practice.

Procedural law refers broadly to the rules that prescribe the steps an individual must take to have a right or duty judicially enforced. Substantive law, by contrast, refers to that law which creates, defines and regulates those rights and duties.²⁴⁴ Different procedures are what distinguish otherwise very similar polities. Indeed, the differences between legal systems “are most visible in the area of procedure.”²⁴⁵ The procedural rules by which actors raise substantive rights claims, rather than the substantive rights themselves, are the most basic features that distinguish legal cultures.²⁴⁶ Henry Hart and Albert Sacks note that “[t]hese institutionalized procedures and the constitutive arrangements governing them are obviously more fundamental than the substantive arrangements in the structure of society...since they are at once the source of the substantive arrangements and the indispensable means of making them work

²⁴⁰ Ramseyer 2009, 1705.

²⁴¹ *Id.*, fn. 11.

²⁴² Damaska 1997, 840.

²⁴³ Young 2007.

²⁴⁴ Black’s Law Dictionary (2008).

²⁴⁵ Helmer 2003.

²⁴⁶ Damaska 1991.

effectively.”²⁴⁷ Many of the substantive rights held by citizens in both civil and common law states may be similar, and yet the legal means by which citizens seek to realize those rights vary greatly between the two systems. As Merryman observed, “[s]ubstantive rules often appear similar but they are brought to bear in such a strikingly different manner that contrary results in otherwise similar cases are a constant possibility.”²⁴⁸ For example, the right to be free from tortious injury or improper deprivation of property may be similar in France and the United States, but there is considerable difference in the manner by which an individual can remedy such a loss.²⁴⁹ Thus, the greater variation between states in the realm procedural law, and the far smaller size of procedural codes compared to substantive codes, allows for more precise observations of changes in legalization over time. And what holds for the differences between common and civil law in general, a priori holds true for syncretist legal systems that draw on both types of law and thus also differ from both in different and interesting ways.

The persistent differences between civil and common law systems stem in part from the fact that procedural systems preceded present day substantive law. As Zweigert and Kötz explain, Roman civil law and medieval common law traditions were each dominated by their *procedural* thinking. In both systems of law, rules of *substantive* law emerged later.²⁵⁰ Procedural norms are thus chronologically prior to the substantive elements of law. It follows that procedural norms are likewise analytically prior to substantive law because substantive rules cannot be understood outside of the procedural context in which they are applied. While many of the substantive rights held by citizens in different legal systems may be identical, the legal means by which citizens seek to realize those rights can vary greatly. As John Henry Merryman observed, the substantive rules of different countries often appear alike, but they become operative under such strikingly different procedural rules that contrary results in otherwise similar cases frequently occur.²⁵¹ It follows that legal procedure is the purest and “perhaps the defining” expression of a legal tradition and so procedural rather than substantive law is an especially appropriate domain to analyze the Americanization of global law.²⁵²

The study of the spread of procedural law has not resulted in a consensus. Joachim Zekoll,²⁵³ K.D. Kerameus,²⁵⁴ and others observe a notable trend toward convergence of national civil procedures, at least within the European Union. J.A. Jolowicz, by contrast, notes that while many countries have joined the move toward procedural reforms, they have done so “without benefit of serious comparative study, which has led to further divergence between them.”²⁵⁵ Nonetheless, legal diffusion can be seen in a broad range of legal practices. We offer here for illustrative purposes a few examples of legal diffusion from the United States to civil law states. The Americanization of law is so pervasive that even some of the most derided aspects of U.S. practice—even the excesses of “U.S.-style discovery and distended briefs”—have

²⁴⁷ Hart and Sacks 1994.

²⁴⁸ Merryman, Clark, and Haley 1994.

²⁴⁹ Balas, La Porta, Lopez-de-Silanes, and Shleifer 2008.

²⁵⁰ Zweigert and Kötz 1998.

²⁵¹ Merryman 1994, 4. For example, the right to be free from tortious injury or improper deprivation of property may be similar in France and the United States, but there is considerable difference in the manner by which an individual can remedy such a loss.

²⁵² Balas, La Porta, Lopez-de-Silanes, and Shleifer 2008.

²⁵³ Zekoll 2006.

²⁵⁴ Kerameus 1997.

²⁵⁵ Jolowicz 2004. See also Damaska 1991, who observes a widening gap between American and other jurisdictions’ procedural practices. The extensive empirical work of La Porta and others similarly finds that national procedures have diverged over the past decades. La Porta’s work, however, examines changes only in procedures involving the eviction of nonpaying tenants and the collection of a bounced check. Such disputes typically do not involve foreign actors and so are largely set apart from the inter- and transnational pressures we analyze below.

cropped up in the least likely of settings.²⁵⁶ Among civil law states in particular such as Japan, the process of legalization has been incremental and prolonged.

Japan's openness to the piecemeal adoption of American civil procedure practices has deep historical roots. Eager to revise the so-called unequal treaties, the 1890 Japanese Law of Civil Procedure was almost a literal translation of the German code of 1877 which was subsequently revised in 1926 before a new law was introduced after 1945 which was heavily influenced by the more adversarial U.S. system. The new Code of Civil Procedure, adopted in 1996, takes many cues from its American counterpart. These reforms serve to shorten the proceedings by narrowing the legal issues, altering the discovery process, and limiting appeals.²⁵⁷ As Kelemen and Sibbitt note, adversarial legal procedures characteristic of the United States are spreading in Japan for the same reasons they are spreading in Europe: the transformation of politics due to economic liberalization and political fragmentation, as well as the sizable presence of "American lawyers, legal practices, and forms of law firm organization."²⁵⁸ This American presence "introduces a competition dynamic that pressures local law firms to reorganize along the lines of American law firms" and furthers the spread of U.S.-style legalization. It is worth noting an additional step in this civil procedural samizdat: the procedural code developed in Japan through extensive foreign borrowing has become the model for Cambodia's Bill of Civil Procedure and, as in many aspects of law, holds considerable sway among Chinese legal reformers.²⁵⁹

The diffusion of U.S.-style legal practices is illustrated most dramatically in the global spread of two procedural devices: class action litigation and expanded pre-trial discovery. With the former a model of American legal efficiency, and the latter "almost universally regard[ed]...as excessive" in both common law countries²⁶⁰ and civil law countries alike,²⁶¹ these two practices together represent an easy and a hard case for the Americanization of legal practices around the world. Not long ago, these two distinctive procedural tools were roundly criticized as not only alien, but also as the manifestation of everything wrong with the American legal system. In other systems, discovery rules imposed no procedural duty on a litigant to help an adversary develop a case. Nor could individuals similarly harmed aggregate their claims in the form of a class action suit. Despite their erstwhile unpopularity, however, reforms resembling these rules have appeared in various legal systems.

²⁵⁶ See, for example, Helmer 2003. See also Deguchi and Storme 2008, who note the influence of Federal Rule of Civil Procedure 23, which provides for class actions, in Brazil.

²⁵⁷ Matsumoto 2008.

²⁵⁸ 2002; 2004.

²⁵⁹ Japanese legal scholarship ranks highest in terms of foreign legal material translated into Chinese. Like Japan, China also looked to Germany for the development of its civil procedure. But it did so in a more fragmented fashion. Prior to the importation of foreign legal practices, China's traditional procedural rules allowed for disputes to carry on, even after decisions were rendered by bureaucrats, until both parties indicated consent with the decision. In an effort to introduce greater degrees of certainty in their legal system and enhance China's reputation in the face of foreign encroachment, Guomindang officials applied Japan's strategy of importing aspects of German civil procedure to replace local rules. Areas under communist party control, however, experienced different rules that served the purpose of the revolutionary ideology. Indeed, once victorious in the civil war, the Chinese Communist Party abolished all laws, including civil procedure. Much like Cambodia and China imported German civil procedure through Japan, Korea's Rules of Civil and Criminal Procedures, enacted in 1908, were a modification of the Japanese version of German codes. After liberation, little changed. In 1959, Korea adopted its Code of Civil Procedure, which was at its core a revision of the old codification of Japanese law (which was based on the German system in 1877). Korea now imports laws from a far expanded market for legal rules. In 2004, a U.S.-style class action system was adopted with only minor revisions. Moreover, Korea has adopted a cross-examination system even though it is largely a continental civil litigation system.

²⁶⁰ Lord Advocate, Petitioner, Extra Division, 1998 SC 87 (Oct. 10, 1997) (UK).

²⁶¹ Hazard, Jr. 1998, 1022.

Germany, for example, recently introduced § 142 ZPO, a provision that invites U.S.-style pre-trial discovery. Moreover, while Germany has erected laws which refuse to recognize judgments against German companies in U.S.-style class action suits,²⁶² it has nonetheless allowed for certain procedures to facilitate group litigation.²⁶³ Changes such as this have produced so great a substantial shift toward the Anglo-American system that some German legal scholars debate whether the older German approach has been completely abolished or just greatly altered.²⁶⁴ This trend favoring certain U.S. procedural rules has even reached China, where various courts have tried to establish more comprehensive pre-trial exchanges of evidence.²⁶⁵ China's turn to economic liberalization in the late 1970s made foreign legal practices acceptable (and attractive) once again. The civil procedural rules introduced in 1982, for example, the first law on civil litigation since 1949, were largely an adoption of the German model of civil litigation law. The number of acceptable sources of foreign law quickly expanded beyond Germany, however, and there soon followed a boom in the study of foreign legal systems, including Anglo-American law. Some laws were even drawn directly from their American counterpart. Article 55 of the code of civil procedure, for example, provides for "a representative in cases with an undetermined number of parties" for litigation with numerous parties or group litigants—i.e. a form of class action.²⁶⁶ This reform moved China into the ranks of the few countries outside the United States that allow for such suits. Indeed, at the time only a handful of states—almost all common law states—had formal class action devices.²⁶⁷ In addition, the Supreme People's Court issued new civil litigation rules in 2001 attempting to enhance the productivity of pre-trial procedures and more firmly set time limits to produce evidence. There have even emerged "exchange of evidence" guidelines derived from U.S. discovery procedures. As Wang Yaxin of Tsinghua usefully explains, even if he overstates the point, this system "comes from pretrial discovery in American civil litigation" and suggests that "the procedural rules of Chinese civil litigation have recently come to the point of totally adopting the mindset of...Western-style litigation," most especially of American civil litigation.²⁶⁸

U.S.-Style Class Action Suits. Class action is often described as "a unique American legal institution."²⁶⁹ The class action is "a lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group."²⁷⁰ Class representatives, serving as "private attorneys-general," sue on behalf of all those similarly situated, i.e. all those similarly harmed by the defendant. The final judgment of the court binds all members of the class irrespective of their participation in the suit or their awareness that the suit was brought, so long as they had fair notice and did not request exclusion from the class. Federal Rule of Civil Procedure 23, which governs this type of suit in federal courts, allows for sizable financial claims to be brought by class members no matter how large the class and no matter how small the value of each individual class member's claim.²⁷¹

For much of their history, class action suits have been unique to U.S. civil procedure and widely thought to be incompatible with civil law systems, even to the point of being "inconceivable" in the mind

²⁶² Zivilproze ordnung [ZPO] Dec. 4, 2008, Bundesgesetz [BGB] 1, § 328(1).

²⁶³ Koch 2001.

²⁶⁴ The Reception and Transmission of Law in the Global Society 2008, 257.

²⁶⁵ Zhang and Zwier 2003; Wang 2008, 166.

²⁶⁶ Note: this provision may have proved to be an example of a failed legal transplant. There are scant cases where this Article is applied.

²⁶⁷ Liebman 1998.

²⁶⁸ Wang 2008, 166.

²⁶⁹ Cappalli and Consolo 1992, 218.

²⁷⁰ Black's Law Dictionary (8th ed. 2008).

²⁷¹ As early as 1940, the U.S. Supreme Court affirmed these suits as satisfying the requisites of due process so long as the procedures employed adequately protected the interests of absentee class members. See *Hansbury v. Lee*, 311 U.S. 32 (1940).

of a civil law jurist.²⁷² Since courts are not free to allow new varieties of suits without legislative approval in civil law systems, this is true, however, only insofar as no statutory provision for class suits exists in the codes of civil law countries. Yet some observers went as far as to assert that, “Europe neither needs nor wants U.S.-style class action litigation.”²⁷³ This incompatibility, civil law scholars argued, stemmed from the ideational foundation that law is applied through logical, abstract legal principles and concepts rather than common-law ends-based devices. As Richard B. Cappalli explains, “[t]he study of law in continental Europe is quite unlike [the common law’s] pragmatic, ‘problem solving’ focus; it is dominated by dogmatics, i.e., a focus on legal abstractions and the inter-relationship of juridical concepts.”²⁷⁴ The fundamental principle of the civil law system that stood as the greatest obstacle to class action litigation, is the principle of the “subjective right” (*droit subjectif*, *subjektives Recht*, *diritto soggettivo*, *derecho subjetivo*).²⁷⁵ Group litigation thus fundamentally challenged deeply rooted ideational precepts of the Kantian liberal-individualist tradition. If one applies this strict logic of Kantian civil law reasoning, it follows that the representation and pursuit of group rights cannot coexist alongside the traditional individual right model.

Recent experience, though, proves that in this area of law the American model can survive transplantation.²⁷⁶ As recently as 1992, legal scholars asserted that no comparable procedures existed outside the common law.²⁷⁷ One lone exception at that time was Brazil, which introduced procedural reforms allowing for class actions in 1985 after being introduced to the concept by Italian scholars of U.S. law in the 1970s.²⁷⁸ Soon after Brazil’s experiment, a “flirtation” with the procedure spread through other corners of the world. Various comparable procedural reforms have come to serve similar functions, including the so-called “associational action” adopted in many European civil law systems. Such reforms have succeeded despite officials in those states rejecting outright the adoption of U.S.-style litigation.²⁷⁹ Other states that have introduced class action litigation include Australia, England, Canada, and Sweden.²⁸⁰

A predominant explanation for the trend toward the U.S.-style class action is the efficiency of mass justice. Without such a provision, an individual litigant, who may have suffered at great cost from the long-term exposure to dangerous chemicals negligently handled by a company, faces the difficult task of finding a lawyer to represent him. Few lawyers would undertake the litigation costs associated with the single claim given the limited amount of damages that will be recovered by the single victim.²⁸¹ Common explanations for China’s openness to foreign elements in its legal system thus stress efficiency concerns, noting the rapid rise in civil disputes involving assets and the transfer of goods and capital. In just the first ten years after economic reform began, for example, the number of civil cases jumped from 300,000 to 2,500,000. For a less costly means of easing this burden officials grew attracted to an adversarial system that placed the onus of proof on the parties themselves rather than on the court. According to Wang Yaxin, these demands led to an appreciation and desire for a more Anglo-American trial structure. Another compelling explanation is the gradual exposure to such suits overtime. In recent years, many foreign legal actors have been involved in U.S.-based class action cases. A recent example includes the

²⁷² Cappalli 1992, 264.

²⁷³ Hodges 2001.

²⁷⁴ Cappalli and Consolo 1992, 263.

²⁷⁵ Gidi 2003, 312.

²⁷⁶ Antonio Gidi 2003, 402, calls class actions a major trend of universal dimensions.

²⁷⁷ Cappalli and Consolo 1992, 218.

²⁷⁸ *Id.*, 324, 326. Gidi notes that the idea did not initially gain momentum in Italy and was roundly dismissed as “an eccentric fancy of ‘left-wing’ scholars.” Gidi speculates that the practice gained support in Brazil because of the recent escape end of military dictatorship and the openness to new ways of expanding access to justice.

²⁷⁹ Baumgartner 2007, 309.

²⁸⁰ *Id.*

²⁸¹ Cappalli and Consolo 1992, 220.

massive shareholder suit against British Petroleum for the oil spill in the Gulf of Mexico filed in the Eastern District of Louisiana on June 8, 2010. Attorneys representing those shareholders claim that as many as sixty-one percent of BP investors reside in dozens of countries outside the United States.

Pre-Trial Discovery. The expressed global distaste for U.S.-style group litigation has not been as pronounced as the widespread disapproval of American pre-trial discovery practices. The clearest expression of this disapproval has been in the form of blocking statutes that create penalties for cooperating with U.S.-style discovery procedures. These statutes, which apply generally but are directed toward countering American litigation, typically carry a penal sanction for the disclosure, copying, inspection, or removal of documents for the purposes of aiding pretrial evidence gathering in foreign states. In 1947, Canada introduced the first such statute in response to a New York federal court order of a Canadian subsidiary of a New York corporation to produce certain documents.²⁸² Countries facing similar requests responded with comparable statutory obstructions to prevent the encroachment of U.S. litigation practices. When the U.S. Department of Justice investigated suspected oil cartelization in the 1950s, for example, Great Britain, the Netherlands, France, and Italy all issued similar orders prohibiting the removal of documents for the purposes of foreign litigation.²⁸³ Such blocking statutes soon spread to Germany, Norway, Belgium and Sweden as U.S. litigators came looking for documents related to the anticompetitive practices of international shipping companies.

Foreign disapproval was bound to continue after the U.S. Supreme Court's 1987 decision in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, where the court definitively ruled that the international Hague Evidence Convention was neither the exclusive means nor the first resort by which U.S. litigators could pursue evidence in the hands of foreign parties.²⁸⁴ In addition to erecting their own blocking statutes, many parties to the Hague Evidence Convention ratified the convention with the reservation that their courts will not enforce pretrial discovery requests for documents. Despite this unified front against U.S.-style litigation, there has since been an erosion of opposition to the U.S. style of discovery.²⁸⁵

To illustrate how rapidly resistance has abated in recent years, it is instructive to turn to the so-called best practices of present-day global civil procedure embodied in the combined intellectual efforts of the American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT).²⁸⁶ Over the course of nearly a decade, these two groups assembled leading practitioners and scholars of civil procedure from various jurisdictions to draft a consensus view on what might serve as a model code of civil procedure. The principles and rules ultimately agreed upon reflect how far foreign legal practices have come to resemble some of America's formerly less admired procedural attributes.

First, it is worth noting that although almost two-thirds of the group's international advisors hail from civil law systems, and from countries as varied as Bermuda, Japan, Scotland and Russia, the authors nonetheless praise the fact that civil procedures around the world are increasingly deviating from the tradition of holding multiple short hearing sessions for the receipt of evidence and are approaching instead the common law practice of single-episode trials. As they note, "[v]iewed functionally, these two approaches increasingly resemble each other. The civil-law systems have tended to consolidate the interchanges between court and parties into fewer and more encompassing hearings." A comment to Rule 22.4, moreover, explicitly notes that the authors favor such a "unitary final hearing," which in turn requires a preliminary phase much like the U.S. system of discovery in order to prepare for a

²⁸² Restatement of the Law Third Foreign Relations Law of the United States, § 442, note 4.

²⁸³ *Id.*

²⁸⁴ 482 U.S. 522 (1987).

²⁸⁵ Parker 2008.

²⁸⁶ ALI/UNIDROIT Principles of Transnational Civil Procedure 2006.

“concentrated presentation” of the evidence. Rule 29 codifies this shift, requiring, “so far as practicable,” that the final hearing be concentrated in a way consistent with the common-law “trial” model.

Such a giant step toward U.S. practices was far from inevitable. The American practice of pretrial discovery developed in the shadow of the jury system, also largely an American phenomenon. As Antonio Gidi describes, the system of procedural rules that developed in the context of American jury systems is both unique and complex:

Jury trial and concentrated final hearing...require extensive pre-trial preparation in order to avoid surprise and delay at trial. The structural division of proceedings into pre-trial and trial phases allowed development of a system of discovery, which, in turn, justified the relaxation of the rules of pleading. At the same time, generous discovery allows strict application of rules of preclusion.²⁸⁷

It is also instructive to note what the group identified as the least attractive parts of the U.S. system. In most civil law countries either a disputing party has a substantive right to a particular document in another’s possession, or the court exercises its authority to require the production of such evidence once its existence and relevance are made apparent. In the United States, by contrast, the Federal Rules of Civil Procedure insist on the disclosure of any material that “appears *reasonably calculated* to lead to the discovery of admissible evidence.” This broad scope is the key aspect of the sweeping demands of U.S. pre-trial civil procedure about which the authors expressed dislike.

In the shadow of its criticism, however, the commentary to the rules articulate the group’s desire for a “middle” ground, citing an English colonial decision concerning the discoverability of evidence, *Peruvian Guano*. In that case, which rings very familiar to U.S. practitioners, the court held that litigants have an obligation to disclose every document that “relates to the matters in question in the action, which not only would be evidence upon which any issue, but also which, it is *reasonable to suppose*, contains information which may—not which must—either directly or indirectly enable the party...to advance his own case or to damage the case of his adversary.”²⁸⁸ [sic] The authors of the *Principles of Transnational Civil Procedure* call instead for the disclosure of “documents...which, it is *not unreasonable to suppose*,...contain information which may, either directly or indirectly enable the party...either to advance his own case or to damage the case of his adversary.” The gulf between the U.S. standard of “reasonably calculated” and the ALI/UNIDROIT standard of “not unreasonable to suppose” is hardly as great as the authors suggest. Nor does it appear to find the sought-after middle ground between common law and civil law pretrial procedures.

A related step toward American-style evidence gathering included in the *Principles of Transnational Civil Procedure* is a provision that a party can request documents directly from the other party rather than going through a judge. An additional step towards U.S.-style discovery procedures includes certain rights to depositions, which are, as they concede, “regarded as improper in many civil-law systems.” Driving the point home that the UNIDROIT rules call for a model of discovery far closer to the U.S. model than that practiced on the continent, the authors note explicitly that discovery in civil law systems is “more restricted” or, as they concede, “nonexistent.”

Constitutional Review and the Citation Practices of Courts

The Americanization of global law is also evident in the drafting of entirely new national Bills of Rights. Most recently, states adopting new constitutions such as the Philippines, New Zealand, and South

²⁸⁷ Gidi 2003, 316-17.

²⁸⁸ *Compagnie Financiere du Pacifique v. Peruvian Guano Company*, (1882) 11 QBD 55 (CA).

Africa. After the end of the Cold War and the collapse of the Soviet Union, newly independent states in Central and Eastern Europe, have also borrowed explicitly from the United States.²⁸⁹

One example is the European model of constitutional review which is converging toward the American model.²⁹⁰ France, which was the last European constitutional system to cling to the European model of exclusively *a priori* review, is the latest state to experiment with American-style constitutional review.²⁹¹ In 2008, President Sarkozy introduced a constitutional reform based on the research of an elite *comité des sages*. The most revolutionary provision in the bill, Article 61-1, introduces for the first time in France *a posteriori* constitutional review that allows the French Constitutional Council to review legislation after its promulgation. Derivative of the work of Czech jurist Hans Kelsen, whose own work was distilled from his appreciation for the American constitutional system, the reform overturns traditional French Jacobian constitutionalism that emphasized the dominance of the legislature. Contrary to Rousseau's long-standing influence, which maintains that the supreme law should come from the legislative organ—the manifestation of the social compact—and expressed through legal abstractions, the new reforms empower the French Constitutional Council to rule on the constitutionality of laws passed by the legislature.²⁹² It had been the case that the Constitutional Council reviewed legislation only prior to its passage, and was then unable to invalidate laws once in force. France has since furthered the process of U.S.-led legalization by taking on U.S.-trained court clerks (the only such court clerks at any French supreme court) to instruct French judicial officials as to what solutions to constitutional problems an American judge might employ.²⁹³ Europe's recent shift toward U.S.-style constitutional review are not unique. In the past few decades, Canada, Ghana, and Malawi have similarly adopted the American model of judicial review.²⁹⁴

Despite evidence of local opposition to U.S.-inspired constitutionalism, the United States nonetheless supplies considerable amounts of legal doctrine and scholarship in the contemporary global market for constitutional law.²⁹⁵ Laws that resemble U.S. constitutional jurisprudence are controversial because, as Pierre Bourdieu explained, to genuinely experience the “force of law,” individuals must first accept the underlying reasoning and judicial precedent which structure a legal decision.²⁹⁶ The global

²⁸⁹ Smith 2006. Smith also notes many references to U.S. law across broad swaths of the globe, including Australia (Plaintiff S157/2002 v. The Commonwealth (2003) 211 C.L.R. 476); New Zealand (Hosking v. Runtig (2004) 1 N.Z.L.R. 1 (H.C.)); England (R v. Mental Health Review Tribunal (2005)); Ireland (K.C. v. K.J. (2004) 1 I.R. 224); France (Chappaz c/ Aussedat, Cour de cassation, Premiere chambre civile); Argentina (Salgado c/Gobierno de la Ciudad de Buenos Aires (2001) [826/01]); Malaysia (Pet Far Eastern v. Tay Young Haut (1999) 5 M.L.J. 558); Singapore (Sebel Furniture Ltd. v. Tiong Hin Engineering (1999) 2 S.L.R. 662).

²⁹⁰ Id.

²⁹¹ Fabbrini 2008.

²⁹² Article 61-1 reads: “When, in the course of a controversy before a judicial court, it is claimed that a statutory disposition infringes over the rights and liberties that the Constitution safeguards, the Constitutional Council may be requested to judge on the issue by referral of the Conseil d’Etat or of the Cour de Cassation, which shall decide in a timely manner.”

²⁹³ Cornell Law School Initiates Clerkship with French Supreme Court, available at:

<http://www.lawschool.cornell.edu/newsstory.cfm?pageid=104045>.

²⁹⁴ Gardbaum 2008.

²⁹⁵ For examples of this supply see, for example, Helmer 2003; Deguchi and Storme 2008; Chodosh 2002; Brooks 2275; deLisle 1999; Hendrix 2003.

²⁹⁶ Bourdieu 1986, 807. Nicely illustrating the controversial nature of citations to foreign law, activists in both the United States and the People's Republic of China have proposed formal prohibitions on references to foreign law. See “Setting a Precedent,” Beijing Review (Jan. 4, 2007) (citing suggestions from China's then top legislator, Wu Bangguo); and American Justice for American Citizens Act, H.R. 1658, 109th Cong. § 3 (2005); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. §201 (2005); S. Res. 92, 109th Cong. (2005); H.R. Res. 97, 109th Cong. (2005); American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004); Constitution

supply of U.S. constitutional law is marketed and delivered, with varying degrees of success, through various sources: wealthy law schools that train approximately two thousand foreign lawyers annually;²⁹⁷ well-funded Rule of Law programs that assist less-developed countries in the adoption of U.S.-style legal practices;²⁹⁸ as well as hundreds of overseas law offices performing complex litigation.²⁹⁹

Adam Liptak recently noted a decline in the legal standing of the United States in the world.³⁰⁰ Citing an analysis by economist Russell Smyth, he observed that in many foreign jurisdictions citations of U.S. Supreme Court opinions had declined, pointing to at least four separate causes of the alleged decline: the rise of constitutional courts abroad, which leads to a decreased reliance on U.S. example; the fact that most of those courts are more liberal than the Rehnquist and Roberts courts, and thus less likely to cite them; the diminished reputation of the United States in the world; and the explicit opposition by U.S. justices to the citation of foreign law, which results in a reciprocal snubbing of U.S. decisions by foreign justices.

The following section examines this claim to see if foreign common law courts are proving more or less successful than their civil law counterparts in preventing the spread of U.S. law in the international system. The turn to common law states for this section reflects in part a limitation in the data due to institutional differences between the two legal families. Most importantly, there exists a clear imbalance between civil and common law states with respect to the amount of judicial opinions they make publicly available. Applying the doctrine of *stare decisis*, which requires courts facing a similar set of facts to apply the legal principle established in prior decisions, common law courts issue judicial opinions that are legally binding even for non-parties. Civil law countries, by contrast typically do not endow judicial decisions with such power. As such, Anglophonic common law states are more likely to make final judgments available to the public and amenable to citation analysis.

A quick look at decisions published between 1998 and 2008 in ten suggest that, with the exception of South Africa, the claims of a decline in the salience of U.S. law are overstated (See Figure 1). More specifically, within-family diffusion of U.S. law and legal scholarship remains stable despite claims that U.S. leadership is on the decline. Figure 1 offers a more thorough attempt to examine the claim that the influence of American legal influence is waning. Using extensive online databases of foreign case law, we conducted multiple searches for citations to U.S. law by foreign courts. Firstly, we searched for citations to both federal and state cases rather than just Supreme Court rulings. Foreign jurisdictions have on many occasions cited to U.S. law from both federal district courts and state courts. A search of only citations to U.S. Supreme Court cases is thus unlikely to reveal the overall impact of U.S. law in the international system. We conducted this search in such a way that is more likely to catch citations to U.S. cases from dockets beyond the U.S. Supreme Court itself. We searched for cases that referred to rulings from courts such as the 9th Circuit Court of Appeals and the Southern District of New York, as well as cases from the three most populous U.S. states and Delaware, a state influential for its jurisprudence on business organizations. In addition, we searched foreign judicial opinions for references to the U.S. legal journals, legal scholars, and legal treatises most commonly cited by U.S. courts. While not binding U.S. law, citations to such scholarship provides a useful indicator of how closely foreign judicial officials follow developments in U.S. law and legal scholarship.

Restoration Act of 2004, H.R. 3799, 108th Cong. (2004); H. Res. 568, 108th Cong. (2004); H. Res. 468, 108th Cong. (2003).

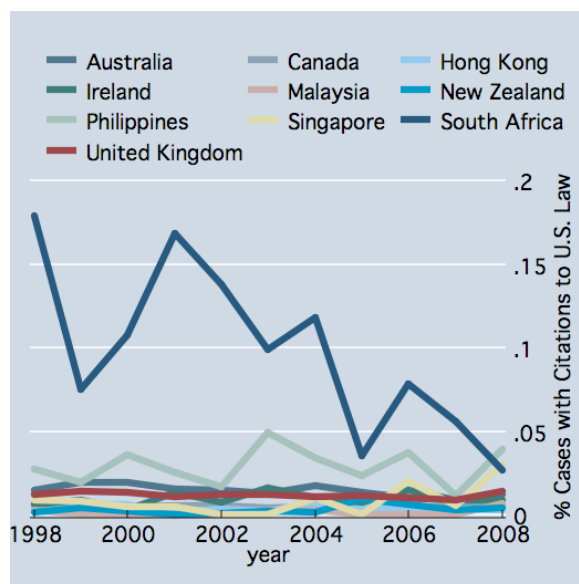
²⁹⁷ American Bar Association, Legal Education Statistics, available at: <http://www.abanet.org/legaled/statistics/stats.html>.

²⁹⁸ Carothers 1999; Trubek and Santos 2006.

²⁹⁹ Each of the top fifty U.S. law firms has established an average of approximately eight foreign law offices. Data compiled by author according to Vault rankings. See Vault Guide to the Top 100 Law Firms 2008.

³⁰⁰ Liptak 2008. For a similar view, see Smyth 2008, available at: http://works.bepress.com/russell_smyth/1/.

FIGURE 1

PROPORTION OF FOREIGN OPINIONS CITING U.S. LAW AND LEGAL SCHOLARSHIP

This search is admittedly not sufficiently refined to constitute an accurate, comprehensive study of legalization in and of itself, but it provides a useful heuristic of a general trend that shifts the burden of proof to those arguing that the influence of American law is on the decline. Contrary to their findings, the results suggest that citations to U.S. law and legal scholarship in at least nine common law countries are roughly the same now as they were in 1998. While Liptak and others have looked at Canadian Supreme Court citations of U.S. Supreme Court decisions and found the rate of citations to U.S. law to have fallen by half, a broader search of cases at all levels of the Canadian judiciary suggest that the rate of citation has remained relatively steady at roughly one in every two hundred cases.

Though hardly definitive or rigorous, as a first step these searches provide a useful heuristic. The results for 1998-2008 show citations to U.S. law, in all its forms, remained the basically steady. Only South Africa, which had during the mid 1990s relied extensively on U.S. law to help interpret its new constitution, records a clear decline. This finding alone, however, does not tell us much about the attitude among South African justices toward foreign law or legal doctrines. In South Africa's common law structure, once a foreign legal norm is imported into South African case law, much as they were in the early years of its new constitution, subsequent rulings need only cite the foreign law by way of the South Africa case that imported it. Thus, the influence of a foreign legal norm persists, but its presence is more difficult to detect. If the other countries examined in figure 1 are any indicator, it follows that the salience of U.S. law in South African courts will lessen, but stabilize over time.

While citations to U.S. law appeared to have remained steady in the past ten years, the parallel process of U.S. citations to foreign legal opinions has in recent years become a highly politicized topic. The Constitution itself is silent as to the appropriate method of comparative constitutional interpretation, but the practice has nonetheless prompted Congressional efforts to ban the practice and to impeach U.S. Supreme Court justices for doing so. The controversy surrounding comparative constitutional interpretation appeared recently in the confirmation hearings of Justices John Roberts and Samuel Alito, during which both faced questions about the use of foreign law in constitutional matters.³⁰¹ As Mark C.

³⁰¹ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary, 109th Cong. (2005); Confirmation Hearing on the Nomination of Samuel A.

Rahdert explains, both justices declared their objections to the practice.³⁰² Justice Roberts, for example, complained that the practice circumvents the democratic process by relying on a decision of foreign judges not appointed by any accountable president and improperly allows judge's to select from only those foreign decisions favorable to their own personal policy preferences, while ignoring others.³⁰³ Justice Alito agreed, offering a more American-exceptionalist explanation: "I think we can do very well with our own Constitution and our own judicial precedents and our own traditions."³⁰⁴ Justice Sonya Sotomayor raised a cautious defense of the practice, noting first that "[f]oreign law cannot be used as a holding or precedent, or to bind or influence the outcome of a legal decision interpreting the Constitution or U.S. law." She later observed, though, that "in my experience, when I've seen other judges cite to foreign law, they're not using it to drive the conclusion. They're using it just to point something out about a comparison between American and foreign law."

The persistent questioning of the soon-to-be justices on the matter of foreign law in Supreme Court decisions is largely a response to recent decisions of the Supreme Court and from public statements of the justices. In the months prior to the ruling of the U.S. Supreme Court in *Roper v. Simmons*, which stands as one of the Court's most prominent discussion of foreign precedent, Justices Breyer and Scalia, before a live audience at American University, participated in a public conversation about comparative constitutional interpretation.³⁰⁵ Justice Breyer's expressed support for the use of foreign sources, he explained, is rooted partly on the mere practicality of analogizing and reasoning from systems that share similar constitutional structures and problems.³⁰⁶ Justice Scalia's approach, by contrast, revealed his commitment to originalist constitutional interpretation: "If you told the framers of the Constitution that we're to be just like Europe, they would have been appalled."³⁰⁷

The theoretical split in favor (Breyer, Ginsburg, Kennedy, Stevens, and the now-retired Souter) and critical (Alito, Roberts, Scalia, Thomas) of the use of foreign law was echoed in the *Roper* decision, written by Justice Kennedy, in which the ruling on the Eighth Amendment's prohibition on cruel and unusual punishment relied in part on a comparative analysis of foreign laws related to the execution of juvenile offenders.³⁰⁸

The public debate between Justices Breyer and Scalia in the build-up to the *Roper* decision occurred in the wake of two other controversial decisions that relied on or engaged with foreign law, *Atkins v. Virginia* (addressing international opinion on the issue of capital punishment of mentally retarded offenders) and *Lawrence v. Texas* (citing European Court of Human Rights decisions against anti-sodomy legislation), and in the midst of Congressional efforts to pass legislation explicitly forbidding the use of foreign law in constitutional decision of the Supreme Court.³⁰⁹ These Congressional efforts,

Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary, 109th Cong. (2006) [Both on e-file with author].

³⁰² Rahdert 2007, 558.

³⁰³ Confirmation Hearing on the Nomination of John G. Roberts.

³⁰⁴ Confirmation Hearing on the Nomination of Samuel A. Alito.

³⁰⁵ Scalia and Breyer 2005.

³⁰⁶ *Id.*

³⁰⁷ *Id.* For similar viewpoints, see *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) declaring that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding"; *Printz v. United States*, 521 U.S. 898, 921 n.11, noting that "comparative analysis [is] inappropriate to the task of interpreting a constitution."); Barnett 1999; and Hargan 2003.

³⁰⁸ See *Roper v. Simmons*, 543 U.S. 551 (2005); and Waldron 2005.

³⁰⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003). Rahdert 2007 cites to several other cases that looked abroad for law, including: *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988), which noted the views of Western nations on death penalty for juveniles; *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982), which took note of other countries that abolished the doctrine of felony murder; *Coker v. Georgia*, 433 U.S.

such as the “American Justice for American Citizens Act,” sought to forbid “the Supreme Court of the United States [or] any lower Federal court. . . , in the purported exercise of judicial power to interpret and apply the Constitution of the United States, [from] employ[ing] the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.”³¹⁰

As the language of the Act suggests, the use of foreign law in judicial opinions is not limited to U.S. Supreme Court Justices. The national debate over the appropriateness of foreign sources of law likewise bleeds further down into lower courts.³¹¹ This political controversy is replicated in the field of scholarship, with some scholars arguing strongly in support of and against the Supreme Court’s practice of citing foreign scholarship.³¹²

Rahdert identifies several factors that explain the rise in the use of comparative constitutional analysis in the courts.³¹³ Externally, he finds 1.) an increase in comparative constitutional material available to U.S. judges due to the rise in judicial review in other nations; 2.) a convergence in the types of constitutional issues faced by courts around the world, particularly in the field of human rights, in other nations; 3.) a rise in the professionalism of the foreign legal community; and 4.) advances in information technology. Internally, Rahdert notes that many judges now enjoy regular contacts and established professional relationships with their judicial counterparts from other nations.³¹⁴ Anne-Marie Slaughter stands out among the few contemporary IR scholars attempting to understand the observable diffusion of constitutional and human rights law across national boundaries. The sharing of public constitutional jurisprudence that she observes is a relatively modern phenomenon in the history of legal diffusion, which until recently tended to include only private law.³¹⁵ This “globalized judicial discourse”³¹⁶ among judges increasingly possesses a “cosmopolitan character,” with comparative jurisprudence assuming a central

584, 596 n.10 (1977), which referred to a United Nations' survey pertaining to the death penalty in rape cases); *Trop v. Dulles*, 356 U.S. 89, 102-03 (1958), which emphasized the opinion of the international community on denationalization as a form of punishment.

³¹⁰ American Justice for American Citizens Act, H.R. 1658, 109th Cong. § 3 (2005).

³¹¹ A useful introduction to this debate among lower federal court judges is the “Debate Before the Federalist Society National Lawyer’s Conference,” where several circuit and district court judges discussed the practice. See *Debate Before the Federalist Society National Lawyer’s Conference* (Nov. 15, 2003). For additional opinions of judges below the U.S. Supreme Court, see *United States v. Then*, 56 F.3d 464, 466-69 (2d Cir. 1995), which argued in the Second Circuit that for rational basis review, U.S. courts should examine how foreign jurisdictions have managed similar situations; Posner 2003; O’Scannlain 2005.

³¹² For an example of scholars of foreign citation, see Jackson 2005, 119-20, arguing that because judges have impressions of other countries’ constitutional law, and these impressions may influence their judicial decisions, it is critical that these judges overtly state in their opinions what it is they believe to be true of other countries; Slaughter 2005, noting that with the free passage of information and persons, it is impossible for judges to render decisions without considering other legal systems; Tushnet 2006, 309-12, describing the debate over comparative constitutionalism as a “cultural war,” and countering those that maintain foreign citations are counter-democratic on grounds that the judges are democratically appointed. For a contrary view, see Alford 2004, arguing that constitutional comparativism violates the Supremacy Clause; Calabresi 2004, arguing that comparative constitutionalism, while appropriate for policy-making, is less relevant for constitutional interpretation; Childress 2003, arguing that citation of foreign law in judicial opinions serves to “usurp the law from its organic ground: the American people.”

³¹³ Rahdert 2007, 572-75.

³¹⁴ Rahdert 2007, 574. For additional accounts of U.S. judges oversees, see Slaughter 2004, 96, noting the participation of Justices O’Connor, Breyer, Ginsburg, Kennedy, and Rehnquist in international exchange programs.

³¹⁵ Watson 1974, 8.

³¹⁶ Hirschl 2005, 128.

place in constitutional adjudication in various countries, including the United States.³¹⁷ Through this discursive engagement, U.S. judges are exposed to new interpretations of prior U.S. case law that in turn returns to U.S. shores in the form of comparative constitutional interpretation. In this way, U.S. Supreme Court decisions such as *Lawrence*, which expand the notion of privacy and the types of activities it includes, reflect the boomerang-like return of early U.S. jurisprudence on the privacy rights of married couples. These cases, which influenced foreign decisions expanding the privacy rights of homosexual couples such as the European Court of Human Rights decision *Dudgeon v. United Kingdom*,³¹⁸ draw analogies from comparable U.S. law and then in turn influence subsequent U.S. decisions. As Vicki Jackson and Mark Tushnet noted more generally, “some aspects of international human rights law have developed initially by flowing up from domestic legal systems into the international arena and then down to domestic legal systems, sometimes even those systems that were sources for the international human rights norms in the first place.”³¹⁹ Put more simply, the two-way street in comparative constitutionalism is a busy one, with unexpected twists, turns, and even u-turns.

Conclusion

In sum, the controversy surrounding the citation of foreign law in U.S. jurisprudence points to the conflicting sources of tension generated in the United States and abroad by the process of legalization in world politics. This tension is generated by various actors and various mechanisms. Different actors involved in the Americanization of law include *inter alia* practicing lawyers, legislators, regulators, judges, arbitrators, professors, and students. Different mechanisms, both observable and unobservable, include institutions such as law firms, bar associations, law schools, international conferences, transnational tribunals, as well as conceptual and epistemological mechanisms that include American schools of legal doctrine supported by the growth of English as a legal *lingua franca* and America as a perceived leader in intellectual, artistic, and cultural matters. Actors, interacting through these mechanisms, generate new forms of legal practice that enhance or diminish the legitimacy of other forms.

The spread of American law has emerged in part through the participation of non-U.S. legal actors in American-based LL.M. programs and transnational judicial conferences. Socialized in these settings, participants return home with a sense of judicial comity and a revised constitutive understanding of the purpose and role of law and of courts. They become often intellectual leaders, serving as conduits of new legal knowledge and constitutional jurisprudence. Through this process there has been a proliferation of “written constitutions dividing government powers and guaranteeing individual rights, [and] the spread of constitutional courts and judicial review,”³²⁰ as illustrated by recent constitutional reforms in France. In addition to expanding the familiarity of overseas legal actors with American-style constitutional review, these interactions have likewise increased global familiarity with U.S. constitutional jurisprudence. As illustrated by the continued salience of U.S. law and legal scholarship in the judicial opinions of at least nine foreign courts, American legal doctrine and discourse remains a powerful source of ideas. In this way, the emergent “globalized judicial discourse”³²¹ among legal actors often leads to Americanized outcomes, with American legal practices and doctrines often serving as the anchoring point of reference in the discursive exchange.³²²

In this new world of more American-trained lawyers and American-based litigation, the boundaries of the legal world are increasingly blurred. Greater numbers of American-trained attorneys

³¹⁷ Choudhry 1999, 820.

³¹⁸ *Dudgeon v. United Kingdom* 4 Eur. H.R. Rep. 149 165 (1981).

³¹⁹ Jackson and Tushnet 2002, xiv.

³²⁰ Shapiro 1993, 48.

³²¹ Hirschl 2005, 128.

³²² Choudhry 1999, 820.

participating in transnational litigation and arbitration have meant a wider application of (and, in some cases, an appreciation for) American-style legal practices, including aggressive adversarial tactics like cross-examination, innumerable exhibits, broad evidentiary rules, and costly pre-trial discovery. The growing familiarity with American-style civil procedure is evident even in the civil-law-dominated model transnational rules of civil procedure published by UNIDROIT. These rules, which introduce discovery procedures more familiar to American-trained attorneys, shift the ideal type of judicial hearing closer to the American-style single-episode trial. More specifically, it does not appear the drafters of those rules found the sought-after middle ground between American- and continental-style practices.

The empirical episodes above reveal a similar shift toward American-style practices in other controversial domains, including class action litigation. This Anglo-American innovation, lauded in the U.S. as an efficient tool to achieve justice on a mass scale but treated by many civil law jurists as a violation of an individual's right to decide when and how to pursue his or her legal claims, has made considerable inroads abroad. Attracted by the device's useful ability to aggregate claims and increasingly familiar with its operation through the growing number of class action suits reaching across national borders, class actions in various forms of group litigation have appeared in several civil codes abroad. This diffusion has occurred even as the tool encroaches upon traditional civil law notions of subjective rights. Moreover, the diffusion of the practice cannot be explained by efficiency alone. Scholars of law and economics have long debated the merits of such suits in cost-benefit terms, with many asserting that such "entrepreneurial litigation" suffers from significant agency costs, poorly distributed incentives, and collusion between defendants and the lawyers driving the litigation.³²³ Instead, institutional mechanisms involved in the Americanization of law such as the American legal education of foreign attorneys, transnational litigation, and the involvement of foreign attorneys in U.S. law firms abroad have all played a supporting role in the diffusion, however incremental, of America's controversial rule 23.

The transnational spread of American law is also reflected in the citation practices of foreign courts which are paying increasing attention not only to the rulings of the U.S. Supreme Court but also to relevant federal district and state courts. Over the last decade or so the rate of citation has remained steady at about one citation in every two hundred cases. The citation of foreign legal opinion in the United States has become a highly charged political topic as conservative legal theorists and judges, insisting on the exceptionalism of the United States Constitution have criticized the practice of referring to foreign legal opinion in any form or shape.

Part 5: Conclusion

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³²³ Gilles 2005; and Coffee, Jr. 1995.

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