



# Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law

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RETURNING WITH INTEREST:  
OBSERVATIONS ON SOME PUTATIVE BENEFITS OF  
STUDYING COMPARATIVE CONSTITUTIONAL LAW

*Mark Tushnet*

Borrowing has rightfully been called "one of the grand old topics of comparative law."<sup>1</sup> In the United States, however, there is far more interest in *exporting* or *lending* than there is in *borrowing*. The upsurge of interest in comparative constitutional law among U.S. constitutional scholars may be the result of the breakup of the Soviet Union, and the rapid and widespread transformation of non-democratic regimes into proto-democratic or democratic nation-states. A by-product of the rapidity with which the change occurred was the proliferation of efforts by U.S. constitutionalists to instruct people elsewhere on what a well-designed constitution should look like.<sup>2</sup> But, if U.S. constitutionalists were happy to go along with efforts to export U.S. constitutionalism, they have been less enthusiastic about *importing* constitutional ideas from others.<sup>3</sup> Expanding on the metaphors of *borrowing* and *lending*, U.S. constitutional scholars might expect that their loans would be returned with interest, in the forms of new constitutional arrangements that could provide additional benefits to the U.S. constitutional system. The U.S. Supreme Court noted twice at the end of the 1996 Term that other apparently well-functioning constitutional systems do things differently from the U.S. system, only to dismiss those experiences as irrelevant to U.S. constitutional law.<sup>4</sup> I will now briefly discuss those cases.

In *Printz v. United States*, the Court held that Congress lacked the

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<sup>1</sup> John H. Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT'L & COMP. L. 41, 48 (1997) (questioning the portability of basic legal institutions across cultures).

<sup>2</sup> Those efforts by U.S. constitutionalists to instruct others bring to mind an early spate of interest in the exportation of "western" legal norms in the 1950's and 1960's, when those norms were said to be essential preconditions for economic development. For a retrospective and skeptical look at that effort, see David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062, 1063 (1974) (suggesting that legal developmental assistance may not be contributing to freedom, equality, participation, and shared rationality).

<sup>3</sup> And, perhaps, to take advantage of the opportunities for travel, cultural learning, and tourism associated with those efforts. See *id.* at 1067.

<sup>4</sup> See *Printz v. United States*, 117 S. Ct. 2365 (1997); *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

power to require state law enforcement officials to conduct background checks on prospective gun purchasers.<sup>5</sup> Such a requirement, the Court held, was inconsistent with the principles of dual sovereignty embodied in the U.S. constitutional system.<sup>6</sup> Justice Breyer, dissenting, argued that experience in other federal systems demonstrated that the Court's notion of sovereignty was not an essential part of federalism.<sup>7</sup> According to Justice Breyer, when interpreting our Constitution, judges could appropriately draw on constitutional experiences elsewhere, which could serve to "cast an empirical light on the consequences of different solutions to a common legal problem."<sup>8</sup> Justice Scalia addressed this concern, stating that experience in other systems might properly bear on *designing* a constitution, but not on *interpreting* the one we already have.<sup>9</sup>

In *Raines v. Byrd*, the recent line item veto case, Chief Justice Rehnquist ended his discussion of whether legislators had standing to challenge the constitutionality of the Line Item Veto Act with the observation that "[t]here would be nothing irrational about a system which granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. But it is obviously not the regime that has obtained under our Constitution to date."<sup>10</sup> Support for Rehnquist's dismissal of constitutional borrowing, however, is not unanimous among members of the Court. In addition to Justice Breyer's clear support of borrowing in *Printz*, Justice Souter's concurring opinion in *Raines* noted that the question of whether the legislators had suffered an injury of the sort that would authorize standing in accordance with the Court's prior decisions was "fairly debatable."<sup>11</sup> Such controversial domestic issues might be resolved by considering foreign constitutional experience, as Justice Breyer did in *Printz*. If legislator standing appears to have operated reasonably well in other constitutional systems, one might think that allowing it within the bounds of our own established constitutional

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<sup>5</sup> See *Printz*, 117 S. Ct. at 2384.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* at 2404.

<sup>8</sup> *Id.* at 2405.

<sup>9</sup> See *id.* at 2377 n.11. The positions taken by Justices Scalia and Breyer are different, but the real difference does not reside in the distinction Justice Scalia drew between *interpreting* and *writing* a constitution. Justice Breyer argued that the Supreme Court should examine the standard sources for constitutional interpretation when trying to decide whether a federal statute is constitutional. If those sources run out, the Court is faced with a question of constitutional policy, and its judgment on that question may properly be informed by constitutional experience elsewhere. Justice Breyer saw *Printz* as a case in which the standard sources had indeed run out. Justice Scalia disagreed only with that latter claim. He might also disagree with the propriety of the Court *making* constitutional policy, as his insistence on avoiding balancing in *Printz* suggests. For an extended discussion of the latter point, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998).

<sup>10</sup> *Raines*, 117 S. Ct. at 2322 (citations omitted).

<sup>11</sup> See *id.* at 2323 (Souter, J., concurring in the judgment).

doctrine would not simply consist of "nothing irrational,"<sup>12</sup> as the Chief Justice claimed, but instead would be positively desirable as a means of improving the operation of the U.S. constitutional system.

These discussions of recent comparative constitutional experience introduce one of my themes in this Essay; namely, the difficulty of determining when a borrowing or importation is successful, and how to approach or analyze that success. The Essay sketches issues associated with constitutional borrowing or lending, which are familiar within the field of comparative law, and discusses three problems associated with reciprocal learning from foreign constitutional experiences.<sup>13</sup> After identifying some difficulties associated with defining successful learning, the Essay takes up the complex issue of determining the relevant units of comparison. Finally, it examines one prominent approach to (or defense of) learning from foreign experience. I call the approach the functionalist approach, and argue that it may founder on problems associated with identifying functions and the institutions that perform them in different legal systems.

The overview I present may say little or nothing new to scholars of comparative law, but may nonetheless be useful to U.S. constitutionalists who have taken advantage of new opportunities for constitutional comparison, and who may know much about constitutionalism but relatively little about comparative law. I believe the issue of borrowing or lending is best focused by thinking about the claim that comparative study is helpful because it may dispel a parochial scholar's sense of "false necessity," or the belief that the arrangements that are familiar to the parochial scholar are necessary to secure whatever it is that the scholar considers valuable in a particular system. My comments may be taken as reflections on an issue that arises from this claim: Why should we think that the parochial scholar misunderstands the circumstances as *false* necessities, rather than, for example, arrangements that are essential within the social system in which the constitutional regime is set?

1. *Defining success.* What criteria might we use to determine when one constitutional system's borrowing, lending, or importing is "successful?" According to Professor Jonathan Miller's recent study, Argentine constitutionalists engaged in an extensive debate in the mid-nineteenth century, leading to the adoption of the U.S. constitutional model for Argentina.<sup>14</sup> He shows that the model's influence was so

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<sup>12</sup> *Id.* at 2322.

<sup>13</sup> I use the term "learning" to refer to a process in which one person or system makes a reasoned judgment that it would be helpful to take into its own operation some institution, rule, or doctrine used elsewhere. This distinguishes my concerns about reciprocal learning from concerns about broader processes such as influence, which need not be, with my usage, as conscious as learning.

<sup>14</sup> See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483 (1997) (recounting the history of the Argentine constitutional convention).

strong that Argentine courts “would overrule reasonable interpretations of the Argentine Constitution solely because the precedent involved was contrary to their increasing understanding of U.S. practice.”<sup>15</sup> Was the U.S. model successfully imported into Argentina?

Professor Miller says yes: “One of the lessons to be learned is that copying a foreign constitution can work.”<sup>16</sup> This statement may seem surprising in context, for it follows a paragraph noting that “[m]ost elections until . . . 1916 were fraudulent,” that five “[m]ajor revolts” occurred between 1874 and 1905, and that “[f]ederalism, extensively provided for in the Constitution, never became a reality.”<sup>17</sup> If “working” means something like *establishing a reasonably stable social order resembling that in the system from which the constitution was copied*, it is hard to understand how Argentina’s copying worked.<sup>18</sup>

Professor Miller, however, offers a different, and more provocative, definition of success. In his view, copying works when it fulfills the intentions of those doing it:

[N]ineteenth century Argentine constitutionalism was a failure if analyzed in terms of social and economic equality, the democratic nature of its elections, or the implementation of all aspects of its written text. It was an enormous success, however, in terms of what its designers wished to accomplish — to encourage immigration and to stimulate economic growth.<sup>19</sup>

Focusing on framers’ intentions raises some intriguing questions. Consider first what simple enactment of a constitution might accomplish. Professor H.W.O. Okoth-Ogendo describes an “African political paradox”: the widespread adoption of apparently meaningless constitutions in Africa.<sup>20</sup> According to Professor Okoth-Ogendo, African constitutions are primarily declarative.<sup>21</sup> They assert — to rulers, to the ruled, and to the international community — that the nation is sovereign, self-governing according to principles that are organically connected to the nation itself.<sup>22</sup> These assertions matter, I suppose, because the audiences believe that sovereignty is important in the modern world. Yet even here there remains a problem: What if the

<sup>15</sup> *Id.* at 1491.

<sup>16</sup> *Id.* at 1487.

<sup>17</sup> *Id.* at 1486-87.

<sup>18</sup> Miller himself concedes that, measured in conventional terms, the Argentine constitution has not been entirely successful: “Assuming that an important part of constitutionalism involves the establishment of rules that provide sufficient security to all politically significant groups in society so that they join the system rather than engage in armed revolt, Argentine constitutionalism was only a partial success.” *Id.* at 1534.

<sup>19</sup> *Id.* at 1492.

<sup>20</sup> H.W.O. OKOTH-OGENDO, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65 (Douglas Greenberg et al. eds., 1993).

<sup>21</sup> *See id.* at 67.

<sup>22</sup> *See id.* at 68.

assertion of sovereignty in this sense is belied by actual experience?<sup>23</sup>

How can we understand these problematic "successes"? I think the answer lies in a combination of intentions, to which Professors Miller and Okoth-Ogendo direct our attention, and audience. The authors of the Argentine and African Constitutions intended to accomplish something—immigration and economic growth in Argentina,<sup>24</sup> and sovereignty in Africa.<sup>25</sup> They were successful because the audiences that mattered were satisfied by what was actually accomplished. Professor Miller's study of Argentina suggests that the Constitution provided enough stability for immigrants and investors, and that the political corruption he documents may have itself provided the needed stability for growth.<sup>26</sup> At the same time, however, the Constitution provided little stability to those in society, including workers, who engaged in repeated revolts.<sup>27</sup>

Other difficulties arise, however, if the criteria for successful borrowing, importation, or lending of constitutional ideas rest on understanding framers' intentions and identifying relevant audiences. For example, intentions may not be transparent, and what they "really" are may become clear only after a fair amount of time. I have little doubt that an ingenious analyst could almost always come up with a clever account of intentions and audiences that demonstrated how *any* constitutional provision that hung in for long enough was successful.

Finally, a borrowing might be called successful if it contributed to the achievement of governmental legitimacy, or to the attainment of liberal democratic rule, as both Professors Miller and Okoth-Ogendo suggest.<sup>28</sup> As I will argue later, causal claims of this sort are quite hard to establish.<sup>29</sup> In addition, and perhaps more troubling, it is unclear how these criteria for successful borrowing or importation would help one study or learn from *comparative* constitutional law. The first step in the analysis would be to specify a range of constitutional systems compatible with the philosophical presuppositions of liberal

<sup>23</sup> A similar difficulty arises in connection with a slightly different version of constitution-as-declaration. International lending bodies typically require that borrowers satisfy some modest rule-of-law requirements, and constitutions in the proper form might be used to demonstrate sufficient compliance with those requirements to allow transactions to go forward. But again a disjuncture between the nominal constitution and the rule-of-law reality may occur.

<sup>24</sup> See Miller, *supra* note 14, at 1492.

<sup>25</sup> See OKOTH-OGENDO, *supra* note 20, at 67.

<sup>26</sup> See Miller, *supra* note 14, at 1534-1541.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 1485 ("Remarkably, Argentina offers an example not only of the adoption of a foreign constitutional model, but of the foreign model quickly becoming an article of faith, thereby increasing the legitimacy of the Argentine political life."); OKOTH-OGENDO, *supra* note 20, at 67 ("[T]he constitution [in African countries] is an act without which the polity can have no legitimate or sovereign existence . . .").

<sup>29</sup> See *infra* notes 39-47 and accompanying text (discussing the difficulty of distinguishing between consequences resulting from the borrowing of constitutional provisions and those resulting from other factors).

democracy.<sup>30</sup> The next step would be to specify the empirical preconditions for the realization of a constitutional system within the specified range.<sup>31</sup> This is indeed a comparative exercise, but it appears more like an exercise in comparative politics than in comparative constitutional law. Perhaps, however, a scheme might develop along these lines: There are several possible constitutional arrangements consistent with any specified empirical precondition, and borrowing or importing one such arrangement will most likely succeed, while borrowing or importing an arrangement inconsistent with that precondition will not.<sup>32</sup> One might question the value of the enterprise defined in this way, primarily because it seems that one could reach the same conclusion more directly.

2. *The unit of comparison:* Both the criteria for evaluating successful importations or borrowings and the likelihood of success may differ depending on whether one considers the importation or borrowing of an entire constitutional system, as in the Argentine example, or the importation or borrowing of a particular constitutional innovation, as in the legislator standing example. This distinction, however, must be deployed carefully. A particular provision may be intimately connected to other provisions, sometimes in obvious ways, and sometimes in less obvious ways. For example, legislator standing is rather clearly connected to provisions that authorize judicial review at the instance of private parties who suffer traditional injuries. One classic analysis of U.S. standing law argued against expanding the concept of injury, claiming that doing so would lead to a world in which "the halls of Congress and of the state legislatures would become with regularity only Act I of any contest to enact legislation . . . Act II would, with the usual brief interlude, follow in the courts."<sup>33</sup> In areas other than legislator standing, however, concepts of injury *have* expanded in the United States, and the interlude between enactment and challenge has generally become briefer and briefer.<sup>34</sup> Legislator standing now fits more comfortably into the United States' modern system of judicial review than it would have before the expansion of the concept of injury.

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<sup>30</sup> The range might be large, as it is with respect to basic institutional arrangements (such as the process by which laws are enacted), or small, as it is with respect to fundamental human rights (such as those acknowledged in international human rights documents).

<sup>31</sup> See, e.g., Robert A. Dahl, *Why All Democratic Countries Have Mixed Economies*, in DEMOCRATIC COMMUNITY: NOMOS XXXV 259 (John W. Chapman & Ian Shapiro eds., 1993) (arguing that democracy is incompatible with both command economies and strictly free market economies).

<sup>32</sup> Unless, of course, the borrowed or imported arrangement is consistent with some other empirical precondition and its use does not impair the ability of the constitutional system as a whole to satisfy the entire set of empirical preconditions.

<sup>33</sup> Ernest I. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 15-16 (1963).

<sup>34</sup> This is sometimes attributable to legislators themselves, who authorize expedited appeals. See, e.g., *United States v. Eichman*, 496 U.S. 310, 313 (1990) (reviewing dismissal of flag burning charge pursuant to statutory provision requiring expedited consideration).

There is also, however, a more subtle connection between legislator standing and the rest of the constitutional system. In separation-of-powers constitutional systems, legislators bargain with each other and with the executive, with an eye to the next election.<sup>35</sup> In parliamentary systems, legislators who are members of the minority seek to erode public support for the majority party or coalition, with an eye to the next election.<sup>36</sup> Systems of judicial review affect the bargaining or electoral structure within which legislators act,<sup>37</sup> while legislator standing gives legislators in the minority a new bargaining chip. In the absence of legislator standing these legislators can only hope that someone with traditional standing will invoke judicial review. With standing, legislators can guarantee that they will invoke judicial review if they are unsatisfied with legislation the majority enacts. The difference between an Act II that is certain, and an Act II that is only probable, affects bargaining positions within the legislature and, therefore, affects the legislation that actually emerges from the legislative process as a whole. There are undoubtedly even more subtle interactions between legislator standing and the legislative process, but these examples are sufficient to make a point that will play an important part in what follows: one probably must distinguish among the borrowing or importation of entire constitutional regimes at one extreme, discrete constitutional provisions at the other, and modules or complexes of interconnected constitutional provisions in between.<sup>38</sup>

The question of the unit of comparison inevitably leads to other difficulties, which are most obvious when one considers constitutional systems as a whole. As Robert Dahl has suggested, there are simply a finite number of competing models available that reflect large-scale constitutional borrowing arrangements.<sup>39</sup> A constitutional system can have plurality elections or proportional representation, a presidential or parliamentary system, a federal or a centralized system, judicial review or no judicial review.<sup>40</sup> Once these choices are mixed and matched, a comparative analysis will be dealing with rela-

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<sup>35</sup> See William N. Eskridge, Jr., *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 935 (1989) (identifying the principle aim of statutes as memorializing the bargaining of election-minded legislators).

<sup>36</sup> See Dominique Leydet, *Pluralism and the Crisis of Parliamentary Democracy*, 10 CAN. J.L. & JURIS. 49, 58 (1997) (explaining the power that parliamentary minorities wield over majorities).

<sup>37</sup> See Robert K. Rasmussen, *Coalition Formation and the Presumption of Reviewability: A Response to Rodriguez*, 45 VAND. L. REV. 779, 786 (1992) (acknowledging that existence of judicial review may affect deals struck among bargainers).

<sup>38</sup> I suggest later in this Essay that it is uncertain whether there are any constitutional provisions that are truly discrete, or – probably more accurately – whether there are any modules that are reasonably small. See *infra* note 84 and accompanying text.

<sup>39</sup> See Robert A. Dahl, *Thinking About Democratic Constitutions: Conclusions from Democratic Experience*, in NOMOS XXXVIII: POLITICAL ORDER 175, 185 (Ian Shapiro & Russell Hardin eds., 1996).

<sup>40</sup> See *id.* at 183-86 (listing ten basic structural choices).



tively small "n's," with the consequence that it will be difficult to determine whether any results one observes occur because of the institutional characteristics of the constitutional provisions borrowed, their interaction with other constitutional arrangements (which may eliminate the possibility of productive comparison), or the historical peculiarities of the systems in which those provisions are located.<sup>41</sup> For example, Dahl points out that "[a]mong the twenty-two older democratic countries, only six are strictly federal. In all six countries, federalism is the result of special historical circumstances."<sup>42</sup> Inferring anything about federalism from the experiences of those countries would be unjustified. Perhaps the only relevant constitutional experiences are those that have so large an overlap that we might fairly say that constitutional systems have arrived at a consensus on the question. A good example might be the nearly universal rejection of the U.S. practice in which constitutional judges with a large degree of responsibility have life tenure.<sup>43</sup>

Dahl is also aware of another difficulty created by his use of the phrase "strictly federal." He points out that proportional representation systems vary significantly in the details of their operation, as do all the other major structural features of constitutional democracy.<sup>44</sup> The details can range from mundane but consequential matters to more dramatic choices. For example, an issue that arose in Germany's consolidation was the threshold for winning representation in parliament.<sup>45</sup> The required percentage might be considered a mere technical detail, and yet, it seems likely to be of great consequence. An inherently more sensational decision has been the use of a list sys-

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<sup>41</sup> See, e.g., *THE FAILURE OF PRESIDENTIAL DEMOCRACY* (Juan L. Linz & Arturo Valenzuela eds., 1994). The essays include Linz's argument that the structural characteristics of a U.S.-style presidential system make the system more likely to fail than a parliamentary one, either because of electoral paralysis or because of replacement by a military or other non-democratic regime. Linz's essay, and the others, often shifts between generalizations and qualifications based on the specific characteristics of individual regimes.

<sup>42</sup> Dahl, *supra* note 39, at 183.

<sup>43</sup> For a short discussion of the problems associated with life tenure, see L.A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMM. 195 (1995). The standard of consensus must be used with caution, however. For example, there appears to be an international consensus that restrictions on so-called hate speech are generally consistent with free speech principles. See also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2346-48 (1989) (arguing that the legal sanctions against racist speech imposed by most of the common law countries do not violate free speech values). Thus, one might reasonably think that the suspicion of such restrictions reflected in U.S. constitutional law expresses something distinctive about the United States's raucous, impolite civic culture. See also, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (holding that city ordinance prohibiting display of symbols that arouse "anger, alarm, or resentment" on the basis of race, religion, color, creed, or gender violates the First Amendment).

<sup>44</sup> See Dahl, *supra* note 39, at 188-89 ("Systems of proportional representation are capable of almost infinite variation.")

<sup>45</sup> See PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 66-70 (1997) ("Struggles over the election law . . . naturally increased tensions within the fragile GDR (German Democratic Republic) coalition.")

tem rather than the single, transferable vote system used in the Irish Republic and favored by most scholars of the subject.<sup>46</sup> Dahl concludes that, because "[e]ach of the major constitutional alternatives is subject to such great variation" that "every country's constitutional arrangements are unique."<sup>47</sup> This surely makes it difficult to determine when a constitutional structure or provision can be effectively borrowed or imported.

3. *Functionalism*: With this difficulty in the background, I turn to the question of false necessity. One broad though clearly overstated claim is associated with Montesquieu and Hegel. They argued that a constitutional system is so deeply enmeshed within a society's social, economic, and political systems that only the constitutional regime that has arisen organically from within the society will be accepted by the society. For Montesquieu, "[l]aws . . . should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another."<sup>48</sup> Or, as Hegel put it, a constitution is "the work of centuries, . . . the consciousness of rationality so far as that consciousness is developed in a particular nation."<sup>49</sup>

These formulations, of course, do not necessarily *rule out* the possibility of successful borrowings. Montesquieu, for example, sees successful borrowing as merely *unlikely*, not *impossible*.<sup>50</sup> Hegel's formulation raises a potentially more interesting issue: it suggests that the effort to impose a constitutional regime from outside, as might have occurred in post-1945 Japan,<sup>51</sup> will be problematic. Consider, however, the decisions made by constitutional drafters in eastern Europe, who examined foreign constitutional experiences and chose those provisions that, consistent with the Hegelian vision, were most suitable for their nations.<sup>52</sup> Although particular provisions might be *copied* from other constitutional systems, they would then be organically *adopted* from within.<sup>53</sup>

<sup>46</sup> See Dahl, *supra* note 39, at 192.

<sup>47</sup> *Id.* at 188.

<sup>48</sup> CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Anne M. Cohler et al. trans. & eds., 1989).

<sup>49</sup> GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF RIGHT* 286-87 (T.M. Knox trans., Oxford Univ. Press 1967).

<sup>50</sup> See MONTESQUIEU, *supra* note 48, at 8.

<sup>51</sup> See Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. (forthcoming 1999) (discussing the complexities of Japan's constitutional regime).

<sup>52</sup> See, e.g., QUINT, *supra* note 45, at 28 (explaining how the GDR, in drafting a new constitution before unification, examined the Basic Law of the West German Constitutional Court as well as the constitutions of countries such as Spain and Nicaragua.). Cf. S. AFR. CONST. of 1996, ch. 2, § 39(1)(c) ("When interpreting the Bill of Rights, a court . . . may consider foreign law.").

<sup>53</sup> The distinction between organic adoption and external imposition is, of course, not as sharp as the presentation in the text suggests. For example, how should one characterize a provision adopted because drafters believe that the provision will assure international agencies like the International Monetary Fund that the new regime is an appropriate participant in interna-

A strong organicist position, in contrast, would argue that all constitutional borrowings are bound to fail. "Failure" can mean either that the borrowing will actually impede the accomplishment of some goals desired by those who borrow the provision, or, to use a botanical metaphor, that the borrowing will "not take." Borrowings that do not take are failures because they become irrelevant in the system into which they have been inserted.

The claim of irrelevancy can take many forms. One form might be that societies have "needs" that their constitutional systems satisfy without regard to any particular constitutional provision. A borrowed provision that fails to satisfy a society's needs will be ignored. One that actively interferes with accomplishing a need will be domesticated: constitutional interpreters will work out ways in which the provision can be made to conform to the system's needs. The result may be rather dramatic contrasts between the way in which a provision works in the system from which it is borrowed and the way it works in the system into which it is imported.<sup>54</sup>

Other versions of the irrelevancy claim can be associated with the scholarship of Professor Alan Watson.<sup>55</sup> Working primarily with comparative private law, Watson has persuasively argued that civil law solutions to pervasive private law problems have been successfully borrowed for centuries.<sup>56</sup> Watson's preferred account of this phenomenon can be fit into the "irrelevancy" category. Watson's argument is that law is an internally directed system, driven primarily by lawyers' needs for a certain kind of coherence in the categories they use.<sup>57</sup> Borrowing is common because lawyers find the conceptual solutions to the common problems they face in other systems.<sup>58</sup> Borrowing succeeds in one sense, because it satisfies the internal demands of the law, or of lawyers, yet it is irrelevant in another sense, because it has nothing to do with the overall operation of the political, economic, or social system within which the legal system is located.

Professor Ewald quotes a "striking passage" which he says asserts

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tional arrangements? The provision's organicist defenders might say that the constitution's drafters wanted – from within – to participate in the international arrangements, and therefore that the particular provision itself arose from within. The provision's critics might see it as a concession coerced by outside agencies.

<sup>54</sup> I believe that there is a general sense among scholars that Japan's post-1945 constitution has been thoroughly domesticated in this sense, although it is a special case because of the constitution's origins as an imposition on those who quickly attained or returned to power.

<sup>55</sup> See William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 498 (1995) (describing various interpretations of Watson's work).

<sup>56</sup> See *id.* ("[L]egal borrowings have been the 'most fertile' source of legal change in the Western world.") (footnote omitted).

<sup>57</sup> See *id.* at 499 ("[I]n altering the law [lawyers] seek either to play down the extent of the change, or to borrow a rule from some foreign legal system . . .")

<sup>58</sup> See, e.g., ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* 97 (1991) (dealing primarily with borrowing from Roman civil law).

Watson's strongest claim.<sup>59</sup> Actually, the quotation suggests its limited applicability:

The lesson of history, in fact, is that over *most of the field of law, and especially of private law*, in *most* political and economic circumstances, political rulers need have no interest in determining what the rules of law are or should be . . . . Rulers and their immediate underlings can be, and *often* have been and are, indifferent to the nature of the legal rules in operation.<sup>60</sup>

As with Montesquieu, the claim is qualified. More importantly for present purposes, however, Watson stresses that his claim is strongest with respect to private law. As Professor Ewald argues, the claim might well be false as to public law.<sup>61</sup> Constitutions of whatever sort, whether liberal democratic or otherwise, create the institutions through which political rulers hold power and define the relationships among political rulers in different institutions. Constitutions may specify limits on the powers of particular political rulers or of the government as a whole. Political rulers may have little interest in the civil law rules allocating losses between private parties in contractual disputes, yet these rulers are likely to have some interest in the public law rules allocating power among them.<sup>62</sup> If this is so, political rulers are unlikely to leave the creation of those rules to the professional judgment of lawyers attempting to work out a system that satisfies the lawyers' demands for coherence.

In some instances, claims about this sort of irrelevance may have merit. Again, however, the analysis is complicated by the fact that there are relatively few cases from which we can draw an inference. Consider, for example, the question of the constitutionality of affirmative action programs. Experience in the United States, the European Union, and India suggests that a constitution containing only a general requirement of equal treatment will impede the adoption of affirmative action programs.<sup>63</sup> The reason may be that lawyers

<sup>59</sup> See Ewald, *supra* note 55, at 501.

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> See Ewald, *supra* note 55, at 503 ("Nor . . . can he claim that European *public* law is insulated from political, economic, and social forces. That conclusion is most likely false . . .").

<sup>62</sup> Of course, there may be constitutional provisions that are "fillers," or details that require specification if the constitution is to establish a government. The "fillers" could be specified in many ways, because the choice among specifications has little impact on the power relations which most concern political rulers. I have called these provisions aspects of the "thick" constitution. See MARK TUSHNET, *THE CONSTITUTION OUTSIDE THE COURTS* (forthcoming 1999) (manuscript at ch. 1, on file with author). It is important to note, however, that sometimes these details actually do have effects on the relations among power-holders.

<sup>63</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to race-based federal affirmative action programs in the United States); *Kalanke v. Freie Hansestadt Bremen*, 1 C.M.L.R. 175 (1996) (applying restrictions on affirmative action programs favoring women in Germany); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 696-97 (1996) (discussing the invalidation of affirmative action programs in India that preference college admissions on the basis of race and caste).

have a professionalized understanding of the concept of equality, with which the idea of compensatory discrimination is in tension.<sup>64</sup> They may deploy that understanding against affirmative action programs unless the constitution they are interpreting expressly authorizes such programs.<sup>65</sup>

Canadian constitutionalists have pointed to another feature of the constitutionalized protection of individual rights. As they see it, constitutional systems inevitably balance the rights they establish against other social interests.<sup>66</sup> They recommend, therefore, that those responsible for interpreting constitutions do their best to draft provisions that balance the individual's rights against other social interests.<sup>67</sup> For example, Section 1 of the Canadian Charter asserts the unconstitutionality of restrictions on rights unless the restrictions can be "demonstrably justified in a free and democratic society." While the language of the Canadian Charter differs from that of the U.S. Constitution, it is difficult to see how Canadian constitutionalists could assert that a provision such as Canadian Charter's Section 1 provides more guidance than the unstructured balancing inquiries sometimes undertaken in U.S. constitutional law.<sup>68</sup> Thus, this balancing approach may lie on the borderline between the interpretive approaches generated by lawyers' professionalism and those generated by regime requirements. It seems likely that lawyers who are typically trained to resolve conflicts will be inclined to think that balancing competing interests is the most rational way of resolving problems.<sup>69</sup> Even more likely, these lawyers will be inclined to think that political rulers will not tolerate a constitutional system that directs decision-makers to ignore the social interests that the rulers seek to advance through legislation.

Essentially, Watson argues that borrowings may be internally successful within the legal system but externally irrelevant to the political or economic system because political rulers often do not care about the content of the borrowed rules in civil law. When political rulers

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<sup>64</sup> See, e.g., GERALD A. BEAUDOIN & ED RATUSHNY, *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 598 (1989) ("[A] program would be suspect if the criteria for inclusion . . . were inconsistent with the goal of ameliorating disadvantage.").

<sup>65</sup> See, e.g., CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(2); see also BEAUDOIN & RATUSHNY, *supra* note 64, at 596-97 (discussing the purpose of Section 15(2)).

<sup>66</sup> See, e.g., BEAUDOIN & RATUSHNY, *supra* note 64, at 597-98 ("[S]ection 15 will sometimes require consideration of competing equality interests.").

<sup>67</sup> See *id.* at 153 ("The decision-maker must be careful to appreciate and to express the conflicting and competing values and interests involved.").

<sup>68</sup> See *id.* ("There are differences between the United States Bill of Rights and the Canadian Charter of Rights and Freedoms but concerning the need to compare the relative importance of competing public values as explained, they reach the same dilemma and solve it in the same way.").

<sup>69</sup> See Mark Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1517 (1985) (discussing one critique of balancing which "focuses on the people who do the balancing" - judges, who are "all lawyers").

do care, however, borrowings will succeed only to the extent that they satisfy the political rulers' interests. Determining when borrowings succeed requires a detailed study of the political and economic order into which the constitutional provision will be inserted.<sup>70</sup>

A functional account of the borrowing phenomenon is inconsistent with the strongest formulations of Watson's arguments.<sup>71</sup> In this account, private law problems arise from human interactions that occur everywhere. There may be a relatively small number of legal solutions to those problems that will satisfy people regardless of their cultural predispositions. For example, citizens may understand a wide range of interactions as being economic in nature, thus generating problems that are best solved by rules that produce economically efficient outcomes.<sup>72</sup> Further, it might be that for each problem there are only a handful of rules that do produce such results. Finally, borrowing a successful rule from a foreign system may be easier than trying to come up with a new one that might not even work as well. On this account, borrowing is successful, but, in an important way, irrelevant. The success flows not from the rule but from the rule's functional suitability.<sup>73</sup>

I used an economic example to demonstrate functionalism, but one can make claims about functionalism in more purely political settings. Even so, difficulties attend functionalist comparisons. At the most general level there is the difficulty of identifying functions in a way that goes beyond platitudes. It may be said that every political, social, and economic system has the function of securing the conditions for its own reproduction. Perhaps one can search for institutions that seem to serve this function in different systems, but it is unclear whether this search will be productive.<sup>74</sup>

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<sup>70</sup> This seems similar to the public law version of what Ewald calls Watson's "weak insulation thesis." See Ewald, *supra* note 55, at 501, 504 (describing "a subtle and intricate interrelationship that must be studied case-by-case").

<sup>71</sup> See *id.* at 501 (describing Watson's "strong insulation thesis").

<sup>72</sup> My formulation refers to participants' understandings. A thorough evolutionary account could eliminate such a reference by arguing that only those rules that support economically efficient outcomes will survive: actors governed by other rules will simply lose out in economic competition.

<sup>73</sup> Watson's approach may be consistent with functionalist claims if those claims are sufficiently confined. As I understand Ewald's account, Watson does reject functionalist claims at the broadest level, in that he denies that any particular civil law rule (or, perhaps, set of rules) is required to satisfy the requirements of any particular political, social, or economic order. According to Ewald, Watson only argues against the claim that there is a good functionalist account for *every* rule. As I read Ewald's interpretation of Watson, however, Watson does not deny that there may be good functionalist accounts available for *some* rules. See Ewald, *supra* note 55, at 502-03.

<sup>74</sup> The functionalist approach, which flourished in U.S. sociology in the 1950s, has been severely criticized for imposing functionalist categories on systems whose most important characteristics may be that they can develop their own categories of understanding from within. These difficulties may be less significant for comparative constitutionalism than they are for sociology. Consider: can a system re-import a transformed constitutional institution from another system to which it also had been exported? That question will be answered, if at all, by

Even within the functionalist approach there is the difficulty of identifying the relevant units of comparison. Functionalist analysis asks us to identify some function that is being performed in two or more systems. Applied to constitutional institutions, it then asks us to identify the institutions that perform that function. There is no reason to think that the two institutions we identify will correspond in any useful way to legal categories.

Here is a speculative example of the problem, which illustrates the contours of functional analysis. Suppose that liberal democratic systems must have institutions that secure the cultural conditions for the perpetuation of democracy. One might find that in some constitutional systems these institutions are primarily the institutions of civil society. In other systems, where such institutions are perhaps weaker, they are the institutions of public education.

A more concrete example of the problems associated with the functionalist approach is provided in the literature on consolidating the democratic transition in central and eastern Europe.<sup>75</sup> Most analysts appear to think that the formerly communist nations of these locales face two related problems: establishing a regime in which the rule of law is routinely honored,<sup>76</sup> and creating the conditions for popular participation in governance. I believe it is widely thought that accomplishing the first goal requires enacting a firm rather than a flexible constitution and having some form of judicial review. Stephen Holmes and Cass Sunstein have theorized, however, that combining a fairly inflexible – that is, not easily amendable – constitution with judicial review may discourage popular participation in governance.<sup>77</sup> The theory maintains that people may find their political initiatives defeated by the court's invocation of a constitution that they cannot readily get around, and may thus become discouraged about participating in the political process.

The Holmes-Sunstein argument is, in one sense, a vindication of functionalism. It specifies a particular set of institutions – easy

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the first system, and those who address it will necessarily use their own categories, whether or not these categories are functional. The interpretivist critique of functionalism posits that those within the second system may be mistaken in thinking that the exported institution actually performed the function for which they are importing it in the system in which it was received, because that function might have been irrelevant to the first system, or might have been performed by some other institution. On the other hand, the interpretation is nonetheless being performed from within one system, and if its decision-makers use functionalist analysis, then the interpretivist critique may not have much force.

<sup>75</sup> See, e.g., A.E. Dick Howard, *Constitution-Making in Central and Eastern Europe*, 28 *SUFFOLK U. L. REV.* 5, 15-16 (describing the difficulties of constitution-making).

<sup>76</sup> What counts as honoring the rule of law might be controversial, but such is beyond the scope of this essay.

<sup>77</sup> See Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 275, 302-3 (Sanford Levinson ed., 1995) ("If the government cannot govern, if it cannot pass its reform program, for example, public pressure will mount to throw the hampering constitution off and govern extraconstitutionally.").

amendment coupled with judicial review – that these new democracies need to perform required functions.<sup>78</sup> In another sense, however, it also raises questions about functionalist comparative analysis. For it might be that the “amendment-judicial review” package serves the functions in these democracies that the institutions of civil society serve in others. And if that is so, it seems clear that, while there is plenty to be learned from other aspects of comparative constitutional law, there are significant obstacles to gleaning useful information from the study of borrowing, importing, and lending that must be recognized.

This concern aside, in light of the Holmes-Sunstein claim (that the nature of the constitutional arrangements are modular),<sup>79</sup> my summary is incomplete. An additional element that must be incorporated into the module for a full functional analysis is the functional hypothesis that constitutional systems require mechanisms for adapting the constitution to external changes. Constitutional amendment and judicial review, for example, are two prominent mechanisms of adaptation.<sup>80</sup> Judicial review is most useful as an adaptation mechanism when judges use a more functionalist, as opposed to a formalist, form of analysis.<sup>81</sup> If the judges interpreting a constitution use a formalist method of analysis, the constitutional system may be rendered stagnant, unless the constitution can be easily amended. Conversely, provisions making constitutional amendment difficult might be satisfactory if the interpreting judges use a functionalist approach. This element is important in a system in which there is a difficult amendment process and the interpreting judges use a formalist approach. In such a system, adaptation is still possible if it is relatively easy to remove the judges.<sup>82</sup> The final element to be considered is the removal of judges. The adaptation-mechanism module thus includes

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<sup>78</sup> See *id.* at 295 (urging a “general presumption in favor of flexible amending procedures dominated by the established powers . . .”). The example of easy amendment and judicial review also illustrates the modular nature of institutional packages. To adequately evaluate judicial review, we must also consider the ease or difficulty of amending a constitution. Is there another module that might be substituted for the Holmes-Sunstein recommendation? One possibility is to have a constitution that is difficult to amend and a constitutional court that flexibly interprets the constitution’s formal rigidity. This is discussed in a different context later in this Essay. See *infra* note 84 and accompanying text.

<sup>79</sup> See *id.* at 289, 293, 296-99 (referring to the planning or construction of constitutions on the basis of standard patterns).

<sup>80</sup> For a discussion of why judicial review should be regarded as an adaptation mechanism, see Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) 26; (B) 26; (C) 27; (D) 27; *Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 21-22 (Sanford Levinson ed., 1995) (discussing whether Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), interpreted or amended the Constitution).

<sup>81</sup> See Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488, 489 (1987) (noting the Supreme Court’s vacillation between using a formalist and functionalist approach to separation of powers issues).

<sup>82</sup> Or, of course, if it is relatively easy to amend the amending process.



amendment provisions, judicial review, the general interpretive approach taken by the judges on a constitutional court, and the tenure provision for judges.<sup>83</sup>

The strategy of examining modules of constitutional provisions provides interesting, manageable choices among alternatives. This strategy also seems to be a helpful middle ground between comparing constitutional regimes in the large and comparing very particularized constitutional provisions, neither of which alone seems likely to illuminate the question of borrowing, or indeed much of anything at all.

Even so, there is a problem with this approach, in that the search for modules is arguably futile. For example, the adaptation-mechanism module starts with the amendment procedures, expands to include judicial review, expands again to include the judges' interpretive approaches and yet again to include the tenure provisions. This expansion suggests that a full-scale analysis will end up with the adaptation-mechanism module being represented, with some accuracy, by the whole constitutional regime.<sup>84</sup>

The worry of the expanding modules is put aside, however, to return with a functionalist examination of Justice Scalia's distinction between using comparative constitutional law for purposes of constitutional design and using it for constitutional interpretation.<sup>85</sup> As noted, there may be a near consensus among constitutional systems that "U.S. - style" judicial review is best performed by judges who are appointed for long, non-renewable, but determinate terms.<sup>86</sup> Although this may be helpful when *designing new* constitutions, re-importing that insight might not seem possible as an exercise when *interpreting* the U.S. Constitution as it currently exists.<sup>87</sup>

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<sup>83</sup> For a discussion of the relation between interpretive approaches and judicial review, see Mark Tushnet, *Living With a Bill of Rights*, in UNDERSTANDING HUMAN RIGHTS 3, 15-16 (Conor Gearty & Adam Tomkins eds., 1996).

<sup>84</sup> After examining tenure provisions, the module will expand yet again to include an examination of procedures, and expand again to examine how those who appoint judges are selected, and so on until the module consists of the entire constitution.

<sup>85</sup> See *Printz*, 117 S. Ct. at 2377 n.11 (stating that comparative analysis, though relevant to the task of *writing* a constitution, is inappropriate to the task of *interpreting* a constitution).

<sup>86</sup> See *supra* note 43 and accompanying text (discussing life tenure).

<sup>87</sup> In fact, legislatively imposed, determinate terms for federal judges are arguably inconsistent with the main purpose of constitutional limits on the powers of the three branches of government. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 300 (1973) (noting that the purpose of term limits is to "fence in" the legislative branch). Berger's investigation of the impeachment clause illustrates that federal judges hold their offices during good behavior and can be removed from office by impeachment for certain kinds of misconduct. See *id.* at 178. Impeachment is a *legislative* method of removal, which the Constitution makes cumbersome to ensure that judges will not be removed for narrow political reasons that might be brought to bear against unpopular individual judges. Berger argues that the existence of this legislative method of removal does not preclude Congress from establishing a *judicial* method of removal for "misbehavior," a category distinct from the one identified by the impeachment clause. See *id.* at 175, 179-80. This "judicial removal" arguably does not threaten separation of powers because it does not allow politically unpopular judges to be targeted for

Conversely, because of the separation of powers implications, an examination of legislator standing may be useful.<sup>83</sup> The examination raises the functional claim that stable constitutional systems require mechanisms to promptly resolve constitutional questions raised by statutes enacted to respond to significant changes in the social, economic, or political structures. Without rapid response mechanisms, the problems the statutory innovations were intended to address may persist, and thereby undermine societal stability, and possibly the constitutional system itself. Political rulers, who are threatened by instability, will design mechanisms to resolve the uncertainty.

One common response by dissenting legislators is to seek judicial review, at their instance. The constitutional systems in Germany and France provide examples of different mechanisms by which they can do so. In contrast, the constitutional status of legislator standing in the United States is uncertain, the Supreme Court having rejected it in the first line-item veto case.<sup>89</sup> Given that Chief Justice Rehnquist agreed that “[t]here would be nothing irrational about a system”<sup>90</sup> with legislator standing, can a functionalist show how the experience with legislator standing in Germany and France might affect how U.S. constitutional law should deal with legislator standing?

The French and German systems of constitutional review do differ from the U.S. system, of course, and perhaps in ways that affect the utility of legislator standing. Initially designed “as an additional mechanism to ensure a strong executive by keeping Parliament within its constitutional role,”<sup>91</sup> the French *Conseil constitutionnel* has evolved into a more general constitutional court.<sup>92</sup> After the parliament completes its law-making processes, the Council may rule on a law’s constitutionality, if asked to do so by the president, the heads of the two houses of parliament, the Prime Minister, and – most important here – sixty members of either house. This last provision makes it possible for members of the political opposition to challenge laws enacted by the parliamentary majority. Review at the instance of minority legislators has become the nearly exclusive form of review since it was instituted in 1974.<sup>93</sup> According to political scientist Alec Stone,

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removal by legislators. Finally, determinate terms specified by Congress might similarly be said to pose little threat to judicial independence, as no one particular judge can be removed by a Congress determined to gain political control of the courts.

<sup>83</sup> See, e.g., *Raines*, 117 S. Ct. at 2323-25 (Souter, J., concurring) (observing that the question of whether a legislator has standing involves separation of powers concerns).

<sup>89</sup> See *id.* at 2312.

<sup>90</sup> *Id.* at 2322.

<sup>91</sup> JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 19-20 (1992).

<sup>92</sup> The Council retains some of the characteristics associated with its origin, and with traditional suspension in France of “government by judges.” Council members are nominated by the president and the heads of the two branches of parliament. They serve nonrenewable nine year terms.

<sup>93</sup> See BELL, *supra* note 91, at 32; see also ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 4 (1992) (asserting that

the Council has reviewed every major statute enacted after 1980.<sup>94</sup>

Germany's system of judicial review rests on the legal theory of Austrian constitutionalist Hans Kelsen, who argued that constitutional review required a distinct type of legal judgment that could best be exercised by a specialist Constitutional Court.<sup>95</sup> The Constitutional Court has the power to review legislation in two ways. In "concrete review," it can hear constitutional challenges brought by citizens adversely affected by statutes. Additionally, it has the power of "abstract review." One division of the Constitutional Court will hear challenges to enacted legislation brought to it by the Chancellor, by state governments, or on petition by one-third of the members of the national legislature's lower house, within one month of the law's enactment. This latter provision allows the political opposition to mount constitutional challenges to laws they are unable to defeat legislatively.<sup>96</sup> Constitutional review resulting from legislator standing is rare in Germany. From 1981 to 1987, there were 23 cases of abstract review in Germany, a figure which includes both legislator standing cases as well as cases brought by state governments. Contrast this relatively low number with the 92 cases in France over the same period, where legislator standing is nearly the exclusive source of review.<sup>97</sup>

A functionalist might evaluate the French and German experiences with legislator standing favorably. I can do little more than rely on my general sense of the literature on German and French constitutional law to offer a rough judgment about how constitutional review has operated in those systems. With that caveat, I suggest that both the French Constitutional Council and the German Constitutional Court have been countermajoritarian to some extent, but that historically, they have been neither dramatically more nor less coun-

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review is the exclusive tool of the opposition). Review can only occur before a law is promulgated by the President; there is no way the constitutionality can be tested in concrete cases after it has been applied.

<sup>94</sup> See Alec Stone, *In the Shadow of the Constitutional Council: The "Juridicisation" of the French Legislative Process*, W. EUR. POL. 16 (Apr. 1989). The year 1980 is significant because Francois Mitterand became President in 1981, but his government had to work with a Council whose members had been appointed by Gaullist officials. More generally, the Council has countermajoritarian effects, not only in invalidating legislation as a whole, which it rarely does, but also in excising some statutory provisions as unconstitutional. Even more importantly, the Council is countermajoritarian by inducing legislators to structure their proposals with an eye to what the Council will do. See Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 265-75 (1995). It should be noted, however, that the French legal academic Lewis Favoreu regards the Council as playing an essentially neutral judicial role throughout its history. See STONE, *supra* note 93, at 212-15.

<sup>95</sup> Judges serve twelve-year non-renewable terms on the Constitutional Court. They are chosen through a complex process in which both political and legal credentials play an important role.

<sup>96</sup> According to Stone, Germany's political culture induces compromise before statutes are enacted, with the result that 90% of all statutes are enacted without a dissenting vote. See STONE, *supra* note 93, at 239.

<sup>97</sup> See *id.* at 237.

termajoritarian than the United States Supreme Court. The significant structural differences among the institutions, that is, seem not to have made large differences in the way they act in their democratic political systems.<sup>98</sup> In addition, the availability of routine and immediate judicial review at the instance of those who lost in the legislature does not appear to have had major effect on the public stature of either the Council or the Constitutional Court. At the same time, however, a functionalist might point out that the routinization of making constitutional review at the losers' instance, might have larger effects, especially in inducing anticipatory compromises, than would a more focused system of legislator standing.

Drawing on the German experience, a functionalist might attempt to develop institutional substitutes for the aspects of German political culture that reduce the incidents of abstract review. As I suggest below, one such substitute would be to make review available only after the legislature makes a particularized decision about the value of review with respect to specific pieces of legislation. These considerations might lead a functionalist to conclude that legislator standing in France and Germany provided many of the benefits of prompt judicial evaluation of innovations without producing the harms that the Court in *Raines* feared, notwithstanding that legislator standing might be redesigned to reduce some different risks posed by its routine use.

With this in the background, we can turn to the first line-item veto case. The Line Item Veto Act provided that "[a]ny Member of Congress or any individual adversely affected . . . may bring an action . . ." to challenge the Act's constitutionality.<sup>99</sup> When several legislators who opposed the Act brought such a challenge, the Supreme Court applied its standards for determining when a person is adversely affected by legislation, and concluded that the legislators had not suffered an injury of the sort that would allow the courts to decide their claims on the merits.<sup>100</sup> According to Chief Justice Rehnquist, these standards were developed to "keep[] the Judiciary's power within its proper constitutional sphere . . ."<sup>101</sup> Given the apparent Congressional desire for immediate judicial review, it is unclear why the Court was concerned about staying "within [their] proper constitutional sphere."<sup>102</sup> In *United States v. Richardson*, Justice Powell offered the

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<sup>98</sup> A functionalist would hardly find this surprising. Courts are part of the overall political system, and it would be unusual to find decisions substantially at odds with the results produced elsewhere in their political systems, especially over a sustained period and on matters of fundamental interest to the regimes' leading political figures. See generally MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

<sup>99</sup> 2 U.S.C. § 692 (a)(1) (Supp. II 1994). It also provided for expedited review in the Supreme Court. See *id.* §§ 692 (b)-(c).

<sup>100</sup> See *Raines*, 117 S.Ct. at 2322 (holding that individual members of Congress did not have a sufficient personal stake in the dispute and did not allege a sufficiently concrete injury to have established Article III standing).

<sup>101</sup> *Id.* at 2318.

<sup>102</sup> *Id.*

standard explanation: “[A]llowing unrestricted . . . standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government . . . . [R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either.”<sup>103</sup> But, as Chief Justice Rehnquist noted in *Raines*, “Congress’ decision to grant a particular plaintiff the right to challenge an act’s constitutionality . . . significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit.”<sup>104</sup> When the courts decide a lawsuit that Congress expressly authorized, they are less likely to provoke a confrontation even if they hold the underlying statute unconstitutional,<sup>105</sup> because they are acting in support of a democratically made decision to submit the underlying statute to immediate judicial resolution.<sup>106</sup> A statutory provision that authorizes Congress members to sue alleviates concerns of confrontation and confines the expansion of judicial power to those cases that Congress itself identifies as particularly important.<sup>107</sup>

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<sup>103</sup> *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (addressing the question of standing in the context of Congress’s failure to publish the budget of the Central Intelligence Agency).

<sup>104</sup> *Raines*, 117 S. Ct. at 2318 n.3.

<sup>105</sup> Indeed, one might think that holding a statute expressly authorizing suit unconstitutional is *itself* the sort of confrontation that Justice Powell thought the standing doctrine was designed to avoid. This may account for the Court’s reluctance to assert in *Raines* that it was, in fact, holding the statutory authorization of suit unconstitutional.

<sup>106</sup> The concern about “shifting” power seems misplaced if the constitutional system provides for eventual review, as in the line-item veto example. The only question is the *timing* of judicial intervention, not *whether* it will happen. By contrast, in *Richardson*, no one was likely to be in a position to challenge the practice at issue if the plaintiffs there were not. See *Richardson*, 418 U.S. at 167. Thus, there is reason to conceptualize *Richardson* as a political question case rather than a standing case.

<sup>107</sup> A functionalist approach to comparative constitutional experience is unlikely to provide any leverage on the question of the constitutionality of the line item veto. Among comparative constitutionalists, the U.S. presidential system is generally thought to be unique. See GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES* 86 (1994) (referring to “the exception of the United States”).

All presidential systems face the possibility of divided government in which the president has one political agenda, and the legislature has another. Most presidential systems provide enough power in the presidency that the president prevails in such cases. It is therefore quite unusual for a president to be faced with a budget with which he or she disagrees; as a result, it is generally unnecessary for a president to have the power to veto particular items in a budget. See *id.*

The closest analogue to the U.S. experience with divided government is probably the experience in France with cohabitation, “where the president and prime minister are leaders of opposing political coalitions with antagonistic programs.” Jean V. Poulard, *The French Double Executive and the Experience of Cohabitation*, 105 POL. SCI. Q. 243, 254 (1990). Cohabitation in France existed when the socialist president Francois Mitterand governed with the conservative prime minister Jacque Chirac. Students of that period suggest that political outcomes resulted less from any structural characteristics of the French constitution – from which a functionalist might draw lessons – than from the particular talents and balance of power between the two leaders. See *id.*

This decision delayed judicial review. If prompt judicial review was desirable,<sup>108</sup> the Court might have drawn on the apparently successful use of legislator standing in France and Germany to justify a finding of standing here. A functionalist might note that France and Germany are also democracies, and that judicial review is as counter-majoritarian there as it is in the United States. Nor are their courts held in any lower esteem than are the U.S. courts;<sup>109</sup> indeed, one might suggest that the German Constitutional Court is perhaps the most widely respected governing institution in Germany.<sup>110</sup> If those systems find that legislator standing is useful, and that it serves the same counter-majoritarian functions as does the United States Supreme Court, perhaps there are fewer functionalist arguments against legislator standing than the analysis of *Raines* might suggest.

What is needed is an opening for interpretation. That opening is provided by the plain language of the statute. The Court asked whether the legislators were adversely affected. However, the statutory language seems straightforward: “[a]ny Member of Congress or any individual adversely affected.”<sup>111</sup> The provision’s natural, more accurate reading is that any person who is adversely affected may sue, and that any member of Congress may sue, without regard to whether that member is adversely affected.<sup>112</sup> That reading would open the way to considering the constitutionality of the statute specifically authorizing legislator standing, an issue which might be illuminated by comparative experience.

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<sup>108</sup> *But see* Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court’s Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 365-66 (1997) (arguing that prompt judicial review was not particularly desirable because it allowed Congress to shirk its responsibility). As their title suggests, Devins and Fitts are concerned with a timing question more traditionally slotted under the doctrinal heading *ripeness* than with the plaintiff-identity question addressed by standing doctrine. *See id.* They argue that a decision on the Line Item Veto Act’s constitutionality ought to have been informed by experience with the Act. This argument, however, assumes a particular view of what properly goes into constitutional interpretation; that is, it rests on the view that separation-of-powers jurisprudence ought to be *functional* rather than *formal*. *See* Strauss, *supra* note 81, at 516-26. Moreover, it is not clear that modern methods of prompt review allow enough experience to accumulate so that the courts’ judgment would be significantly more informed by waiting.

Supporting Devins and Fitts is the fact that the statute itself authorizes the veto only if the President determines that the deletion of an expenditure will “reduce the Federal budget deficit.” 2 U.S.C. § 691(a)(A)(i). If current projections of federal budget surpluses are correct, this a determination that will apparently be impossible for any president to make before the Act sunsets in 2005.

<sup>109</sup> James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 351 (1998) (reporting a slightly higher level of diffuse support for the German Constitutional Court from West Germans than for the U.S. Supreme Court among knowledgeable citizens).

<sup>110</sup> *See* Donald Kommers, *The Federal Constitutional Court in the German Political System*, 26 COMP. POL. STUD. 470, 471 (1994).

<sup>111</sup> 2 U.S.C. § 692(a)(1) (emphasis added).

<sup>112</sup> If the statute required that only members of Congress who were adversely affected could sue, then specifically authorizing suit by members of Congress would be redundant. Those members of Congress would fall within the class of “persons adversely affected” who are authorized to sue under the second clause.

How much can a functionalist make of the preceding argument for interpreting the statute and the Constitution to authorize legislator standing? The most a functionalist can truly claim is that mature constitutional systems in which judicial review plays an important part should find it useful to have mechanisms for relatively prompt review of significant constitutional innovations.<sup>113</sup> Legislator standing, however, is only one such mechanism.

The United States constitutional system routinely allows pre-enforcement review of newly enacted statutes at the behest of those who would be adversely affected were the statutes to go into effect. For example, it seemed unremarkable that the courts enjoined the operation of the Communications Decency Act before it took effect.<sup>114</sup> The courts have constructed reasonably prompt review mechanisms from traditional materials. These materials include the law defining what constitutes a harm against which the courts protect individuals, the law of sovereign immunity, the amenability of officials to injunctive proceedings, and the law of temporary injunctions. These mechanisms, moreover, are not only available when a particularly important legislative innovation is involved. Instead, they are generally available as long as the courts are satisfied that the criteria they have set out are met.<sup>115</sup>

Congress sometimes uses another review mechanism, the statutory provision requiring courts to provide expedited consideration of constitutional challenges to particular statutes.<sup>116</sup> These statutory provisions do not themselves alter the judicially created doctrines that identify who has standing to sue; rather, they supplement those doctrines. In functional terms, the statutory provisions identify a subset of particularly important circumstances that, in Congress's view, require even more prompt resolution than would otherwise occur

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<sup>113</sup> Although the U.S. law of standing has functionalist elements, it also has a formalist aspect. Functional considerations might undermine the Court's assertion in *Raines* about the functional effects of denying legislator standing, but they are irrelevant to the Court's formalist concerns.

<sup>114</sup> See *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2339 (1997) (noting that enforcement of the act was enjoined one week after the statute was enacted).

<sup>115</sup> See, e.g., *United States v. New York, New Haven, and Hartford R.R. Co.*, 275 F.2d 525, 556 (2d. Cir. 1959) (noting that the need for prompt review arises from the very nature of an injunction); *Thomas v. Fiedler*, 700 F. Supp. 1527, 1536-37 (E.D. Wis. 1988) (declaring that opportunities for review within an administrative proceeding were insufficient).

<sup>116</sup> See, e.g., *United States v. Eichman*, 496 U.S. 310, 313 (1990) (involving expedited review pursuant to statutory requirement under the Flag Protection Act of 1989); see also *Reno v. American Civil Liberties Union*, 117 S.Ct. at 2339 ("[A] three-judge District Court was convened pursuant to . . . the Act.").

Sometimes the statutes respect judicial prerogatives by urging the courts to expedite the cases rather than mandating that they do so. As far as I am aware, the U.S. Supreme Court has expedited review in every case involving such a statute, as well as in some others where expedited review was plainly appropriate, such as where Congress limited the Supreme Court's jurisdiction to review cases brought under the act. See, e.g., *Felker v. Turpin*, 517 U.S. 1182, 1183 (1996) (granting expedited review of Congressional limitation of Supreme Court's jurisdiction to review cases under Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996).

through the judicially developed mechanisms of reasonably prompt review.

Legislator standing might not be functionally necessary in light of these alternative mechanisms for securing prompt judicial review of statutory innovations; perhaps, in functionalist terms, the French and German systems have legislator standing because they do not have the alternative of pre-enforcement or immediate post-enforcement review.<sup>117</sup> The Supreme Court decided on the line item veto's constitutionality within a year anyway, after only one round of vetoes. That delay may not be substantial enough to pose the problems functionalists might suggest would arise in the absence of reasonably prompt judicial review of important innovations that have constitutional overtones.<sup>118</sup> There are reasons to think that constitutional systems would be better off if they delayed judicial review of controversial legislation. The prospect of prompt judicial review may induce legislators to ignore serious constitutional questions about the laws they enact.<sup>119</sup> At times, legislators have strong incentives to avoid constitutional

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<sup>117</sup> The small role of abstract review in Germany as compared to France might be understood as the result of the availability of the concrete review which is available in Germany but not in France.

<sup>118</sup> Functional considerations might, however, support the Court's decision to treat provisions for expedited review generously. The line item veto case returned to the Supreme Court after President Clinton exercised the power it purported to give him, to eliminate a provision that relieved New York City of a liability that federal authorities had announced they would impose on the City. *See Clinton v. City of New York*, 118 S. Ct. 2091, No. 97-1374, 1998 U.S. LEXIS 4215 (1998). Everyone agreed that the President's actions caused an Article III injury, but the government contended that the City could not invoke the expedited review provision, which referred to *individuals*. *See id.* at \*22. The government argued that federal law generally uses the term *person* when it refers to a class including both natural persons and corporate entities like New York City. So, it argued, Congress's use of the less common term *individual* should be interpreted to refer to natural persons only. The City might have Article III standing, but the Court would then lack jurisdiction to consider the City's appeal under the special statutory provisions; it could invoke only whatever other statutory mechanisms there were for securing Supreme Court consideration of its appeal. *See id.* Disagreeing, Justice Stevens wrote that the expedited review provisions "evidences an unmistakable Congressional interest in a prompt and authoritative judicial determination" of the Act's constitutionality. *See id.* at \*23. With that purpose in mind, the Court could find "no plausible reason" for making expedited review available to natural persons but not to corporate entities in a similar position. *See id.* Justice Scalia, in contrast, thought that the Court's interpretation of the provision was inconsistent with the ordinary meaning of the term "individual." *Id.* at \*111-112 (Scalia, J., concurring in part and dissenting in part). He noted that "it may be unlikely that this is what Congress actually had in mind; but it is what Congress said, it is not so absurd as to be an obvious mistake, and it is therefore the law." *Id.* at \*112. But, "in light of the public importance of the issues involved," he would have treated the purported appeal as a petition for certiorari before judgment in the Court of Appeals, and granted the petition. *See id.* at \*113. From a functionalist point of view, the key would be the bottom line – the availability of some means of prompt judicial review. Means to that end were available under both the majority's and Justice Scalia's analyses.

<sup>119</sup> *See* ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 119-20 (1992) (discussing the political use of review by legislators in France); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 248-9 (1995) (discussing the degree to which policy distortion arises from more-than-minimal judicial review).



questions, such as when the statutes raise questions that divide political parties from within.<sup>120</sup> The Line-Item Veto Act, however, and the few additional examples we have from U.S. practice, suggest that this concern may be overstated with respect to situations in which Congress must expressly focus on whether to authorize suit.<sup>121</sup> Congress's deliberations about enacting the legislation were pervaded by discussions of the proposal's constitutionality, discussions that were at least as well-informed as the Supreme Court's decision invalidating the Act.<sup>122</sup> Against this, one must place concerns about the unit of comparison: the effects of legislator standing may differ in systems with centralized rather than dispersed judicial review, in those with and without a well-organized public interest bar, and in those with parliamentary rather than divided powers political systems. Although the possibility of successful borrowing may be dependent on who is evaluating the factors that lead to potential success, those in a position to evaluate such a possibility ordinarily will have a well-developed understanding of the overall U.S. constitutional culture. Such persons will have a reasonably sound background with which to determine whether a particular institution or a whole module could be profitably imported.

A functionalist analysis of comparative experience with legislator standing allows us to draw some modest conclusions. The functional arguments against legislator standing appear to be weak, but the Court's formalism may have relatively few costs when weighed against the smooth operating of a constitutional system facing recurrent important innovations, especially because the U.S. constitutional system has substitutes for legislator standing that perform most of its functions reasonably well.<sup>123</sup> Perhaps the most that can be said about the kind of enterprise looking to constitutional experience elsewhere is that it draws into question the kinds of functional claims offered by Justice Powell. In a world where functionalist arguments carry some weight, that may amount to something. But in a world where formalist arguments are sometimes dispositive, it may not amount to much.

This discussion suggests the possibility of reciprocal influence among constitutional systems. Under the influence of European systems of constitutional review, the U.S. might come to appreciate the

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<sup>120</sup> See Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 37, 39-42 (1993) (describing the tendency of controversial legislation to expand judicial power by shifting responsibility for resolving the conflict to the courts).

<sup>121</sup> See, e.g., Departments of Commerce, Justice, and State Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, §§ 209(b), (d)(2) (1998) (giving members of Congress explicit permission to sue if aggrieved by the use of statistical methods for redistricting). Note that Congress enacted this statute *after* the Court's decision in the line-item veto case.

<sup>122</sup> See *Clinton v. City of New York*, 118 S. Ct. 2091.

<sup>123</sup> There may be cases in which no one would have standing unless Congress designated a challenger. Perhaps such cases should be analyzed under the doctrinal heading of the "political questions" doctrine, rather than the "standings" doctrine. Or, perhaps, they show that the U.S. system has some, but relatively few, costs.

benefits of legislator standing to ensure reasonably prompt judicial review of statutory innovations that raise serious constitutional questions.<sup>124</sup> Drawing on the U.S. system, European systems might come to appreciate the benefits of authorizing judicial review at the instance of legislators only in restricted circumstances,<sup>125</sup> in contrast to the general authorization that exists in European systems.

The foregoing is only a sketch of the conceptual issues associated with the ideas of constitutional borrowing, lending, importation, and re-importation. The example of legislator standing is intended to demonstrate how U.S. constitutionalists might productively draw on foreign constitutional experience and what contextual issues must be evaluated in determining how a foreign constitutional experience will be translated in another culture. By necessity, much of the theorizing about constitutional borrowing is quite speculative. Nonetheless, even if the study of comparative constitutional law proves not to have the kind of reciprocal pay-off about constitutional policy that we might hope for, it still may be useful as part of a lawyer's liberal education.<sup>126</sup>

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<sup>124</sup> It may be that the U.S. system of general pre-enforcement review and expedited review does, in fact, offer a mechanism that satisfies the hypothesized functional requirement for reasonably prompt judicial review, making a system of legislator standing unnecessary. At the level of democratic theory, one might ask whether Congress or the judiciary is the institution that ought to decide which mechanism satisfies that hypothesized requirement.

<sup>125</sup> One could restrict the circumstances in at least two ways: 1) by some enumeration of criteria under which legislator standing is appropriate; or 2) by the facts of political life, which may lead legislators themselves to authorize legislator standing only when it is appropriate according to outside observers whose views do not have the force of law.

<sup>126</sup> See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, YALE L.J. (forthcoming Apr. 1999) (providing a more extended analysis of functionalism and other uses of comparative constitutional law).