

# The Possibilities of Comparative Constitutional Law

Mark Tushnet<sup>†</sup>

I. INTRODUCTION .....	1226
II. THE LEGAL RELEVANCE OF COMPARATIVE CONSTITUTIONAL LAW	1230
III. FUNCTIONALISM .....	1238
A. <i>The Problem of Subsidies and the Concept of the Quango</i> .....	1239
1. <i>Introduction</i> .....	1239
2. <i>Proposed Solutions in Domestic Law</i> .....	1242
3. <i>The Idea of the Quango</i> .....	1257
B. <i>Critiques of Functionalism</i> .....	1265
C. <i>Conclusion</i> .....	1269
IV. EXPRESSIVISM.....	1269
A. <i>Introduction</i> .....	1269
B. <i>Expressivism and the Controversy over the Constitutionality of Hate Speech Regulation</i> .....	1274
C. <i>Expressivism and Functionalism</i> .....	1281
V. BRICOLAGE.....	1285
A. <i>Bricolage as the Source of Critique</i> .....	1287
B. <i>The Limitations of Bricolage in Light of Functionalism and Expressivism</i> .....	1301
C. <i>Bricolage as Symptom</i> .....	1303
VI. CONCLUSION.....	1306

---

<sup>†</sup> Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. This Article is the outgrowth of work done in conjunction with the development of VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (forthcoming 1999). I am of course indebted to Professor Jackson for her contributions to my thinking about this topic, Kobie Alan Flowers for valuable research assistance, and Guido Calabresi, Mary Ann Glendon, Vicki C. Jackson, Robert Post, Annelise Riles, Eric Segal, L. Michael Seidman, and participants in a Georgetown University Law Center Faculty Research Workshop for comments on a draft of this Article.

## I. INTRODUCTION

In 1995, Judge Guido Calabresi referred to constitutional experience in Germany and Italy in concluding a concurring opinion dealing with an equal protection challenge to the disparity between the sentences required for crack and powder cocaine offenders.<sup>1</sup> Citing decisions from those nations' constitutional courts, Judge Calabresi suggested the possibility that U.S. courts might someday hold that the disparity violated the Equal Protection Clause because new information not available to the enacting Congress might demonstrate that the distinction was irrational. Constitutional experience in Germany and Italy was relevant to interpreting the U.S. Constitution, Judge Calabresi argued, because the constitutional systems there were our "constitutional offspring," a reference to the fact that they "unmistakably dr[e]w their origin and inspiration from American constitutional theory and practice."<sup>2</sup> Reciprocating was appropriate because "[w]ise parents do not hesitate to learn from their children."<sup>3</sup>

Judge Calabresi's comment is a symptom of broader tendencies in contemporary constitutional law.<sup>4</sup> Several Supreme Court opinions<sup>5</sup> and recent law journal articles<sup>6</sup> expressly raise the question of the relevance of

1. See *United States v. Then*, 56 F.3d 464, 468-69 (1995) (Calabresi, J., concurring).

2. *Id.* at 469.

3. *Id.*

4. I should note that some readers have found that Judge Calabresi's formulation calls to mind another set of concerns in recent comparative law scholarship. Critics contend that traditional scholarship in the field contains an ethnocentric bias, which takes the form of implicitly or explicitly commending "Western" law when it is compared to law elsewhere. For recent overviews, see David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545; and Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221 (1999). For these readers, Judge Calabresi's use of the words "parents" and, in particular, "children" evokes the condescension associated with that strand of comparative law scholarship, even though the manifest content of Judge Calabresi's reference commends non-U.S. law to U.S. decisionmakers. Some recent scholarship in comparative constitutional law, in taking U.S. constitutional law as the model for all nations now developing new constitutional arrangements, has been far less careful than Judge Calabresi. For example, a condescending tone suffuses CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990).

5. See *infra* Part II; cf. Elizabeth Greathouse, *Justices See Joint Issues with the EU*, WASH. POST, July 9, 1998, at A24 (reporting on a press briefing at which Justices Sandra Day O'Connor and Stephen Breyer asserted that they might use and cite decisions by the European Court of Justice).

6. See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1005 (1998); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 371-73 (1997); Michel Rosenfeld, *Justices at Work: An Introduction*, 18 CARDOZO L. REV. 1609, 1609-12 (1997); John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 L. & SOC. INQUIRY 501, 502 (1997) (reviewing RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995)); Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510, 527-28 (1998) (reviewing ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996)). An example that seeks to demonstrate the

learning from our “offspring.” But precisely how can we go about learning? Scholars in the field of general comparative law have paid a great deal of attention to similar questions.<sup>7</sup> Some of the best work in the field suggests skepticism about any direct “borrowing” of solutions developed in one system to resolve problems in another.<sup>8</sup> One version of the difficulty is this: Comparative study is sometimes said to allow a person embedded in one system to gain some distance from it.<sup>9</sup> Having become intellectually estranged from that system, one can then see that seemingly unchangeable arrangements actually might be altered without substantial loss and sometimes with substantial gain.<sup>10</sup> Familiar arrangements seem necessary to us, but comparative study demonstrates that they might be false necessities. And yet the estrangement, the sense that particular arrangements might indeed be false necessities, could be misleading. Some think that comparative study is worth little if it consists of yanking something that seems useful out of one system in which it is embedded and inserting it into another.<sup>11</sup> Put another way, we might begin by believing that certain arrangements are necessary, then have that belief displaced by comparative study into thinking them false necessities, only to learn, on deeper

---

relevance to broader issues of constitutional theory is Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997), which notes, with the author’s typical exuberance, that “the global transformation has not yet had the slightest impact on American constitutional thought.” *Id.* at 772. Much here turns on the definition of “American constitutional thought.” See COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA (Mark Tushnet ed., 1990) (suggesting the possibility of an overstatement); see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW at xxxiii (3d ed. 1996) (noting the effort in a widely used casebook “to introduce readers to some comparative materials”).

7. The analytic framework developed here is not novel in the study of comparative law generally, nor do I contend that the three analytic methods I describe exhaust the possibilities. My sense of the literature in general comparative law, however, is that scholars tend to argue that one of the analytic methods is superior to the others, in contrast to my more eclectic approach. For a critique of comparative law scholarship along these lines, see Riles, *supra* note 4.

8. For a summary observation, see J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT’L L. & BUS. 354, 355 (1996-1997) (“The dangers of ‘borrowing’ from one legal system to another are famous: the law of any polity is a construct embedded in a specific social and political culture and its transmutation to other polities is not easily achieved.”). The most influential analysis of the existence, advantages, and disadvantages of “borrowing” as a general legal phenomenon is ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993). For a careful analysis of the logic of claims about the possibilities of successful borrowings, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995).

9. See, e.g., Balkin & Levinson, *supra* note 6, at 1005 (asserting that the purpose of comparative study is to “make the object . . . ‘strange’ to us”).

10. See, e.g., Waldron, *supra* note 6, at 527 (arguing that comparative study can identify “which bright ideas have proven resilient under real life conditions and which have proven impracticable”).

11. See, e.g., Daniel H. Foote, *The Roles of Comparative Law: Inaugural Lecture for the Dan Fenno Henderson Professorship for East Asian Legal Studies*, 73 WASH. L. REV. 25, 36 (1998) (“Just as it is dangerous for us to assume that U.S. standards will apply in other societies in the same way that they do in ours, so too is it risky, without first carefully considering other aspects of U.S. society that may affect the equation, to counsel the United States to adopt an approach that works well elsewhere.”).

comparative study, that they were necessary all along.<sup>12</sup> And if that is so, it is unclear what comparative study can do to inform the making of constitutional law.<sup>13</sup>

This Article offers a more systematic approach to the possibility of learning from constitutional experience elsewhere. Its main effort is to describe three ways—functionalism, expressivism, and a process I call *bricolage*, using a term made familiar to social scientists by Claude Lévi-Strauss—in which comparing constitutional experience elsewhere might contribute to interpreting the U.S. Constitution. In addition, I seek to assess with some precision what the contribution of each approach might be.<sup>14</sup> Although I discuss these three approaches briefly here, I devote separate Parts to them in the remainder of this Article. My claim is, in the end, rather modest: U.S. courts can sometimes gain insights into the appropriate interpretation of the U.S. Constitution by a cautious and careful analysis of constitutional experience elsewhere.

Functionalism claims that particular constitutional provisions create arrangements that serve particular functions in a system of governance.<sup>15</sup> Comparative constitutional study can help identify those functions and show how different constitutional provisions serve the same function in different constitutional systems. It might then be possible to consider whether the U.S. constitutional system could use a mechanism developed elsewhere to perform a specific function, to improve the way in which that function is performed here.

According to the expressivist view, constitutions help constitute the nation, to varying degrees in different nations, offering to each nation's people a way of understanding themselves as political beings. The United States may lie at one extreme of a continuum, but that would only make it all the more important to think about whether comparative inquiries could advance an expressivist understanding of U.S. constitutional law. It might seem that comparative study could do little with respect to constitutional provisions or doctrines understood in this constitutive sense, because each

---

12. Cf. Rosenfeld, *supra* note 6, at 1609-10 (noting that “apparent similarities between different constitutional jurisprudences often prove to be quite superficial and, conversely, seeming differences can sometimes conceal more deeply rooted similarities” (citation omitted)).

13. Of course, comparative constitutional law can and probably should be part of the general liberal education of lawyers in the modern world. See *infra* Part VI. But that is not what the academic and judicial proponents of comparative study seem to mean when they suggest that we should learn from our children.

14. If the functionalist approach might also be thought of as rationalist, the expressivist approach is social constructionist, and the “bricolage” approach is postmodernist. It is not surprising that most advocates of the utility of comparative constitutional study offer functionalist arguments, which are consistent with modernism's rationalism.

15. For a short statement of the functionalist assumption, see Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 535 (1992). Glendon explains that “[e]very country is grappling with a set of problems that are in a general way similar.” *Id.* For a bibliographic overview of functionalism, see Kennedy, *supra* note 4, at 588 n.73.

nation's constitution constitutes its people differently. The bulk of Part IV's discussion of expressivism aims at developing arguments that make it possible to think about learning from experience elsewhere in an expressivist mood.

The process I call bricolage is perhaps the method least familiar to U.S. constitutional scholars. Describing a people she studied who annoyingly seemed to appropriate elements of its culture from anything at hand, Margaret Mead wrote, "A picture of a local native reading the index to the *Golden Bough* just to see if they had missed anything, would be appropriate."<sup>16</sup> Claude Lévi-Strauss called this sort of activity bricolage, the assembly of something new from whatever materials the constructor discovered.<sup>17</sup> Contemporary references to comparative constitutional materials may be a form of bricolage. Functionalists and expressivists worry about whether appropriating selected portions of other constitutional traditions is sensible, or whether the appropriation will "work" in some sense. The *bricoleur* does not have these concerns about maintaining proper borders among systems.

Comparative constitutional analysis can use the idea of bricolage in several ways. In contrast to functionalism and expressivism, which offer ways of interpreting particular constitutional provisions, bricolage cautions against adopting interpretive strategies that impute a high degree of constructive rationality to a constitution's drafters. Further, the idea of bricolage can displace our sense of the taken-for-granted in the constitutional system with which we are most familiar, without suggesting, as the functionalist would, that we can replace some parts of what we take for granted with elements appropriated from other systems. Finally, bricolage brings the historical contingency of all human action to the fore. It may therefore help us think about the recent interest in comparative constitutional law in the Supreme Court and the legal academy.

The suggestion that bricolage might somehow help us use comparative constitutional experience in interpreting the U.S. Constitution raises an immediate question: What does Lévi-Strauss have to do with interpreting the Constitution? More precisely, constitutional interpretation is an exercise within U.S. constitutional law, which has its distinctive methods and sources on which interpreters may justifiably rely. We must know what methods and sources authorize interpreters to refer to constitutional

---

16. Margaret Mead, *Note from New Guinea*, 34 AM. ANTHROPOLOGIST (2d ser.) 740 (1932) (letter), reprinted in JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 230 (1988). Sir James Frazer's *Golden Bough* is a classic anthropological collection of myths from diverse cultures. See generally JAMES FRAZER, *GOLDEN BOUGH* (1900).

17. See CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* 16-17 (University of Chicago Press 1966) (1962).

experience elsewhere before we can examine how that experience aids us in interpreting the Constitution. The next Part of this Article develops the argument that the Constitution, either in particular provisions or in the interpretive methods we have developed, licenses reliance on experience elsewhere through the three approaches I have sketched.

The succeeding Parts examine functionalism, expressivism, and bricolage in more detail. Each has the same structure. After briefly describing the approach that is the topic of the Part, I analyze a problem in U.S. constitutional law, initially using only domestic sources and then adding the functionalist's, expressivist's, or bricoleur's contribution. Each Part then proceeds to discuss the limitations of relying on experience elsewhere in the specific ways that functionalists, expressivists, and bricoleurs would, and concludes by sketching some connections among these varying approaches. Part VI defends the comparative enterprise as a form of liberal education in law.

Before launching into the extended discussions that follow, an advance warning seems necessary. By far the bulk of this Article deals with U.S. constitutional law, not the constitutional law of other nations. This apparent imbalance is justified, however, by the underlying inquiry. To know what we can learn from constitutional experience elsewhere, we must first find out how far we can go using only domestic resources. Comparative study may well produce only small, though perhaps important or at least interesting, adjustments to what we can conclude from those resources.<sup>18</sup> Indeed, it would be quite surprising to draw dramatically different conclusions once we introduce comparative considerations, for that would mean that people who had done and thought about U.S. constitutional law for two centuries had somehow overlooked something quite fundamental.

## II. THE LEGAL RELEVANCE OF COMPARATIVE CONSTITUTIONAL LAW

Those who interpret the U.S. Constitution rely on sources that the U.S. constitutional tradition accepts: evidence of original understanding, the Supreme Court's precedents, and the like.<sup>19</sup> This Part examines how constitutional experience in other nations can be added to the list of such sources.

*Stanford v. Kentucky*<sup>20</sup> rejected one attempt to use comparative law to affect the outcome of a controversy over the proper interpretation of the

---

18. Another way of putting this point is that all learning necessarily occurs at the margin of what we have already learned. We have to discover where that margin is before we can determine what we can learn from *any* particular novel technique or field.

19. For an influential typology of constitutional interpretation, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

20. 492 U.S. 361 (1989).

U.S. Constitution. The case involved a challenge to the execution of two murderers who were, respectively, sixteen and seventeen years old at the time they committed their crimes.<sup>21</sup> The challenge relied on the principle that punishments inconsistent with the “evolving standards of decency that mark the progress of a maturing society”<sup>22</sup> violated the Eighth Amendment’s bar to the imposition of “cruel and unusual punishments.”<sup>23</sup> To determine such standards, the challengers looked not only to the practices of jurisdictions in the United States, but to the practices elsewhere in the world. They noted, for example, that many countries, including those in Western Europe typically described as advanced industrial societies, had abolished capital punishment or severely restricted its use to a narrow class of truly unusual crimes.<sup>24</sup> Where nations retained capital punishment, a majority barred the execution of juveniles. And, finally, they pointed out that only eight criminals under the age of eighteen had been executed anywhere in the world in the decade prior to *Stanford*. According to the challengers, then, the law and practice “generally throughout the world” demonstrated that the execution of juveniles was inconsistent with “evolving standards of decency” and therefore should be held unconstitutional under the Eighth Amendment.<sup>25</sup> A majority of the Court rejected this argument. According to Justice Scalia’s opinion for the Court, “it is *American* conceptions of decency that are dispositive.”<sup>26</sup> Practices in other nations accordingly were not “relevant” to the Court’s interpretive task, which demanded a determination of whether a practice was “accepted among *our* people.”<sup>27</sup>

*Stanford* establishes that comparative material is not always relevant to the Court’s job of interpreting the U.S. Constitution. We might say that the Constitution must *license* the use of comparative material for the courts to be authorized to learn from constitutional experience elsewhere.<sup>28</sup> The kind

---

21. *Stanford* consolidated two cases. In one case, the criminal was 17 at the time of the murder; in the other, the criminal was 16. *See id.* at 365-66.

22. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

23. U.S. CONST. amend. VIII.

24. For the details in this and the succeeding sentences, see *Stanford*, 492 U.S. at 389-90 (Brennan, J., dissenting).

25. *Id.* at 390 (Brennan, J., dissenting).

26. *Id.* at 369 n.1.

27. *Id.* (emphasis added).

28. In older formulations, the Court found a limited license for interpreting the Due Process Clause with a view to the experience of the Anglo-American people. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (“The question . . . is whether . . . a procedure is necessary to an Anglo-American regime of ordered liberty.”); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.) (“The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness.”); *Hurtado v. California*, 110 U.S. 516, 528 (1884) (“[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country.”). A slightly more offensive version of the same reliance on a broader tradition occurs in *Malinski v. New York*, 324 U.S. 401, 416-17 (1945)

of license one thinks the Constitution requires will of course turn on one's interpretive theory. For example, if one believes that constitutional interpretation is the application of reason to problems of governance within a framework set out in the Constitution's words, experience elsewhere is relevant because it provides information that an interpreter committed to reason might find helpful.<sup>29</sup> Even those with a less capacious vision of constitutional interpretation might nonetheless find it permissible to rely on constitutional experience elsewhere in interpreting the U.S. Constitution. I believe that different kinds of licenses can sometimes be found for the three ways in which we can learn from constitutional experience elsewhere, although the license for functionalist uses of that experience is most easily explained.<sup>30</sup>

The existence of a license to rely on foreign constitutional experience arose more recently in *Printz v. United States*,<sup>31</sup> a case in which the Court invalidated on federalism principles the Brady Handgun Violence Prevention Act's requirement that state law enforcement officials perform reasonable background checks on people who sought to purchase handguns.<sup>32</sup> Justice Breyer pointed out, in his dissent, that other nations with federal systems "have found that local control is better maintained" by allowing the national government to use local governments to administer national law.<sup>33</sup> This experience, according to Justice Breyer, could "cast an empirical light on the consequences of different solutions to a common legal problem."<sup>34</sup> Justice Breyer can be taken to be working within a functionalist model of the value of comparative constitutional law for constitutional interpretation.

Justice Scalia's majority opinion did not see Justice Breyer's position in functionalist terms, however. Its reply was that "such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of

(Frankfurter, J., concurring). In *Malinski*, Justice Frankfurter noted that the Due Process Clause requires judges to determine whether "the whole course of the proceedings . . . offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Id.*

29. See *infra* Part VI. Similarly, a person who believes that the Constitution is completely open-ended would be indifferent to invoking experience elsewhere, as she could accomplish her interpretive goals without reference to that experience. Such a person would find invoking experience elsewhere to be useful, if at all, as a rhetorical device, and under conditions discussed in Section V.C below.

30. The legal realist tradition has such strong functionalist elements that, I believe, U.S. constitutionalists should find it easy to see how the Constitution might license functionalist uses of comparative constitutional law. As I argue below, however, the claim that the Constitution does indeed license such uses depends on a particular vision of the Constitution.

31. 521 U.S. 898 (1997).

32. Pub. L. No. 103-159, § 102(a)(1), 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s)(2) (1994)).

33. *Printz*, 521 U.S. at 976 (Breyer, J., dissenting).

34. *Id.* at 977 (Breyer, J., dissenting).

course quite relevant to the task of writing one.”<sup>35</sup> This answer is not entirely responsive to Justice Breyer’s position. A specific constitutional provision, such as the Due Process Clause, might license comparative analysis. More important in *Printz*, general interpretive methods might also confer such a license. On Justice Breyer’s analysis, for example, the Constitution’s protection of federalism rests at least in part on policy, or what he called “empirical,” judgments. Experience in other countries, when used with appropriate caution, can inform the Court’s assessment of the constitutionally relevant policies. Alternatively, his position might be that the Constitution licenses reliance on comparative analysis when other sources of interpretation are not decisive—when, for example, considerations of text, structure, and democratic theory fail to determine the constitutional question at issue.<sup>36</sup>

*Raines v. Byrd*<sup>37</sup> illustrates how we might find a license for examining comparative materials.<sup>38</sup> As part of the Line Item Veto Act,<sup>39</sup> Congress authorized “[a]ny Member of Congress or any individual adversely affected” by the Act to bring an action challenging its constitutionality.<sup>40</sup> After presenting an analysis demonstrating to the Court’s satisfaction that individual members of Congress lacked the standing required by Article III’s case or controversy requirement, despite this statutory provision, Chief Justice Rehnquist observed that “[t]here would be nothing irrational about a system which granted standing in these cases” and pointed out that “some European constitutional courts operate under one or another variant of such a regime.”<sup>41</sup> But, he said, that “is obviously not the regime that has obtained under our Constitution to date.”<sup>42</sup>

How might the Court conclude that Article III licenses comparative analysis for purposes of interpreting the standing requirement? The argument would operate on the level of interpretive method. Broadly speaking, we can identify two components of the Court’s standing jurisprudence, the second of which itself has two elements. The first

---

35. *Id.* at 921 n.11.

36. A slight variant of this position would take as its premise the proposition that legislation is constitutional unless (1) considerations such as text, structure, and democratic theory establish its unconstitutionality; or (2) it is arbitrary or irrational. Comparative analysis might show that the legislation is not arbitrary.

37. 521 U.S. 811 (1997).

38. I discuss in this Article the question of finding a license for invoking experience elsewhere only as an aid in interpreting the “case or controversy” requirement. For a discussion of what a comparative inquiry might show, see Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 324 (1998).

39. Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified at 2 U.S.C. §§ 691-692 (Supp. III 1998)).

40. 2 U.S.C. § 692(a)(1) (Supp. III 1998).

41. *Raines*, 521 U.S. at 828.

42. *Id.*

component, most clearly articulated in *Flast v. Cohen*,<sup>43</sup> can be called a *court-centered functionalism*. The concern is that cases be presented to the courts “in an adversary context and in a form historically viewed as capable of judicial resolution.”<sup>44</sup> The second component of standing doctrine can be called a *separation-of-powers functionalism*. Again, *Flast* offered one version of the concern, that Article III “define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”<sup>45</sup> Separation-of-powers functionalism itself has two elements. The first focuses on the balance of power between the legislature and the Executive.<sup>46</sup> In this way, standing doctrine conforms to a more general principle of separation-of-powers law, which, in some important aspects, focuses on whether congressional legislation contributes to the aggrandizement of power by one branch at the expense of another.<sup>47</sup> The second element of separation-of-powers functionalism is court-centered. Here the concern is that the courts not exceed their proper role, regardless of whether in so doing they would enhance the power of Congress or the Executive at the expense of the other.<sup>48</sup>

43. 392 U.S. 83 (1968).

44. *Id.* at 101. The underlying idea is that the standing requirement ensures a concrete adversary context, so that courts can obtain enough information from the parties to resolve constitutional questions appropriately. Court-centered functionalism also requires that the litigant be injured. This requirement provides the courts with information about how the challenged statute operates in a real-world context.

45. *Id.* at 95.

46. Justice Scalia, speaking for the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), fleshed out this element. There Congress had enacted a statute authorizing “any person” to sue to enjoin violations of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1994). Several individuals claimed that the Secretary of the Interior and the Secretary of Commerce had violated the Act by limiting administrative review of projects funded by other agencies to those projects occurring in the United States or on the high seas, excluding administrative review of projects occurring in foreign nations. They rested their claim, in part, on the Act’s citizen-suit provision. The Court held that the citizen-suit provision could not authorize an action that would “convert” the generalized “public interest in executive officers’ compliance with the law into an ‘individual right.’” *Id.* at 577. The reason was “obvious”: “To permit Congress to [do so] . . . is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’” *Id.* (quoting U.S. CONST. art. II, § 3).

47. See *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (recognizing that the Framers “built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other”).

48. One might put it this way: The first element of separation-of-powers functionalism addresses problems that might arise if the courts sided with Congress or the Executive in a controversy between them, while the second element addresses problems that might arise if the courts’ powers were enhanced at the joint expense of Congress and the Executive, even with their acquiescence.

*Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), made it clear that this element is indeed distinct from the legislative/executive element. A neighborhood group sued Steel Company, alleging that it had violated a federal statute requiring that the Company make timely reports of its storage and discharges of toxic and hazardous chemicals. At the time the suit was filed, the Company had brought its filings up to date, and the Court held that the statute did

With this apparatus in place, we can return to *Raines v. Byrd*. Article III requires courts to engage in several functional inquiries: whether a particular suit provides the courts with adequate information; whether a judicial resolution of the controversy will alter the balance of power between Congress and the Executive; and whether a judicial decision will unnecessarily or imprudently enhance judicial power without regard to its effects on the other branches. But functional inquiries are inherently empirical. They prompt the courts to make some assessment of the way institutions work in the real world—how will courts work when given information of a certain sort, what will happen to relations between Congress and the President if the courts resolve the constitutional question, and the like. And, finally, in resolving empirical inquiries it makes sense for a decisionmaker to use whatever empirical information he or she can. In this way, a functionalist analysis of Article III does indeed license comparative inquiry.

The limits on the foregoing argument should be clear. I have developed the view that the Constitution licenses comparative analysis with respect to both federalism and separation of powers. In its narrow version, the argument is that the Constitution might sometimes license comparative inquiry when other sources of constitutional interpretation run out. One might think, however, that those sources *never* run out. To take one recent formulation, where “there is no constitutional text speaking to th[e] precise question,” one must look to “historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of [the] Court” to determine the constitutionality of a statute.<sup>49</sup> On one view, where these sources do not resolve the question, the constitutional inquiry is at an end: The statute at issue is constitutionally permissible.<sup>50</sup> Functionalism’s pull is

---

not authorize suit for past violations with no continuing effects. *See id.* at 1019. The case differed from *Lujan* because it was a suit against a private company, and resolving it in the plaintiffs’ favor would not in any obvious way interfere with the President’s duty to see that the laws are faithfully executed. But, Justice Scalia wrote for the Court, “[o]ur opinion is not motivated . . . by the more specific separation-of-powers concern [about the Take Care Clause] . . . . The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches.” *Id.* at 1016 n.4.

The Court has given little content to this element, which perhaps might be better described as formal rather than functional. (The distinction between formal and functional approaches to separation-of-powers questions was made familiar by Peter Strauss. *See* Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1972).) To develop Justice Scalia’s metaphor, *Lujan* involves a case in which Congress sought to shift something from the Executive’s sphere into that of the courts. *Steel Co.*, in contrast, appears to be a case in which Congress imposed a regulatory requirement but set up an enforcement regime that placed citizen complaints of a certain type outside the sphere of *any* of the branches. A truly functional account of this case would have to explain why such an enforcement regime promotes both Congress’s regulatory goals and constitutional concerns about the functioning of the three branches.

49. *Printz v. United States*, 521 U.S. 898, 905 (1997).

so strong, however, that it seems worthwhile to consider whether we could learn from experience elsewhere, taking the Constitution to license at least some functional inquiries that could be informed by such experience.<sup>51</sup>

In addition, there are ways of learning that need not depend directly on functionalism.<sup>52</sup> The expressivist approach to comparative constitutional law takes as its premise that comparative inquiry may help us see our own practices in a new light and might lead courts using *non*-comparative methods to results they would not have reached had they not consulted the comparative material. The license for expressivist analysis is not at all distinctive to comparative approaches. Rather, it is that judges of wide learning—whether in comparative constitutional law, in the classics of literature, in economics, or in many other fields—may see things about our society that judges with a narrower vision miss.<sup>53</sup> And, having seen our society from this broader perspective, such judges might find themselves

---

50. The possibility of a license for comparative inquiry might nonetheless survive even this formulation. The argument I have developed takes the view that examination of “the structure of the Constitution” authorizes courts to consider functional matters. Comparative inquiry would indeed be irrelevant if one thought that functional considerations were irrelevant to the interpretation of the Constitution as a whole, or of particular constitutional provisions or arrangements.

51. For critiques of functionalism, see *infra* Section III.B.

52. Justice Breyer has suggested another reason to attend to quasi-constitutional developments elsewhere. Dissenting from a denial of review in *Elledge v. Florida*, 119 S. Ct. 366 (1998), Justice Breyer pointed out that determining whether a person under sentence of death suffered cruel and unusual punishment when his stay on death row was extremely long (and due to the government’s “faulty procedures”) would ease the tension between U.S. law and international human rights law created by the holding of the European Court on Human Rights in *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). *Soering* held that the extradition of a capital defendant to the United States would violate Article 3 of the European Convention of Human Rights, in part because of the delays attendant to the administration of capital punishment in Virginia. See *id.* at 45. This is not, however, a suggestion that U.S. constitutional interpretation should rely on constitutional experience elsewhere in the sense I am using (even apart from the point that international human rights law is not yet constitutional, again in the sense I am using). It is a suggestion that the administration of domestic law could be improved by coordinating it with legal developments elsewhere.

53. On this view, judges can use comparative constitutional law as part of an interpretive approach that resembles a version of common law reasoning, in which experience elsewhere is a source of insight into the ways in which alternative interpretations might advance constitutional policies. (For an argument that constitutional interpretation takes the form of common law reasoning, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).) This view may also account for some of the resistance to reliance on comparative constitutional experience as well, because the constitutional law of other nations has no obvious place in the hierarchy of authorities that common law judges ordinarily consult. *But see infra* text accompanying note 359 (suggesting how that law might become part of the hierarchy of authority). On some views of common law reasoning, only authority matters; on other views, judges properly draw on empirical evidence and other sources of policy insight. These contrasting approaches to common law reasoning parallel the alternatives offered by Justices Scalia and Breyer for reliance on comparative constitutional experience. See also Vicki C. Jackson, *Ambivalent Resistance, Comparative Constitutionalism and Opening Up the Conversation: “Proportionality,” Rights, and Federalism*, 1 U. PA. J. CONST. L. (forthcoming Winter 1999) (describing other sources of resistance to, and attractions of, comparative constitutionalism in U.S. adjudication).

using standard methods of constitutional interpretation—text, structure, history, democratic theory—to reach results that their colleagues would not have reached. In this aspect, comparative constitutional law operates in the way that general liberal education does. To the extent that we think that judges are licensed to rely on what they take from great works of literature as they interpret the Constitution, we should think that they are licensed to rely on comparative constitutional law as well.<sup>54</sup>

The license for bricolage is more subtle. As Justice Scalia pointed out in *Printz*, bricolage is clearly available at the stage of constitution-drafting.<sup>55</sup> In attempting to figure out what constitutional provisions make sense for the regime that a new constitution is going to put in place, constitution-drafters will inevitably scavenge around to see what they can appropriate from the materials available to them in other constitutions.<sup>56</sup> Justice Scalia noted the discussions of other constitutional systems in *The Federalist Papers*.<sup>57</sup> He could have added that, in preparing for the constitutional convention, James Madison engaged in a comprehensive survey of prior constitutional experience,<sup>58</sup> or noted that John Adams compiled an impressive collection of such experiences.<sup>59</sup> Bricolage in constitutional interpretation, in contrast, seems harder to justify. Why should judges be able to rely on the cultural materials made available to them by comparative analysis in interpreting the U.S. Constitution?<sup>60</sup>

The question is particularly serious if we understand bricolage as a process of random or playful selection from materials at hand. Both randomness and playfulness seem incompatible with the justificatory obligations we ordinarily think judges have. Perhaps we can take the sting out of the question without quite offering a positive justification for

54. It should be clear that judges *rely on* their general liberal education not by extracting “holdings” from great works of literature, but, for instance, by developing a sensitive appreciation for the many ways people live their lives in, and respond to, institutional structures. It would, of course, be a bad idea for U.S. constitutionalists to rely on experience elsewhere as authority for conclusions about U.S. constitutional law, but it should be equally clear that I do not describe the process of learning from experience elsewhere as one that generates “holdings.”

55. See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

56. For a modern illustration, see *infra* Section V.A.

57. See *Printz*, 521 U.S. at 921 n.11 (citing THE FEDERALIST NOS. 18-20 (James Madison & Alexander Hamilton)).

58. See James Madison, *Notes on Ancient and Modern Confederacies* (1786), in 9 THE PAPERS OF JAMES MADISON 3 (Robert A. Rutland & William M.E. Rachal eds., 1975).

59. See JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1787), reprinted in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 271 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851).

60. Of course they must, or at least inevitably do, rely on cultural materials generally in interpreting the Constitution. They will, therefore, rely on comparative materials to the extent that such materials become available to them as part of their culture. In this form, the license for using comparative materials is fundamentally the same as the one discussed in the preceding paragraphs on expressivism.

bricolage. Often bricolage is an unconscious process: Picking up a piece from somewhere just seems like a natural thing to do. So, for example, it seems unlikely that Justice Frankfurter had a strong theory of comparative constitutional law, an account of the license Justice Scalia argues is needed, to back up his references to Anglo-American legal traditions as a source one could consult in interpreting the Due Process Clause.<sup>61</sup> To the extent that bricolage has this unconscious, natural character, the practice warrants its own use.<sup>62</sup> Further, I will argue that functionalist and expressivist considerations are likely to constrain the effectiveness of bricolage.<sup>63</sup>

In different ways, then, judges can find licenses for looking to constitutional experience elsewhere in interpreting the U.S. Constitution. The remainder of this Article identifies the ways in which they should conduct that search and offers a number of cautions against thinking that looking elsewhere will dramatically alter the interpretive conclusions judges would otherwise draw.

### III. FUNCTIONALISM

According to functionalism, political institutions perform certain tasks common to all (well-functioning) systems of governance. A functionalist might claim, for example, that such systems must have some institutions to resolve conflicts among their components, or mechanisms for ensuring some stability in a changing extra-political environment. Functionalists naturally think in comparative terms, for only by examining different political systems can they identify the functions common to all and the institutions they think serve those functions. Functionalism faces challenges from two directions. It must avoid specifying functions so generally that its purported insights become banal.<sup>64</sup> But it must also avoid specifying functions so precisely that every institution performs a complex set of functions unique to it as an institution.<sup>65</sup>

This Part examines whether functionalism is a helpful approach to thinking about how or whether U.S. constitutional law can learn from constitutional experience elsewhere. I use recent Supreme Court decisions

---

61. See *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.); *Malinski v. New York*, 324 U.S. 401, 416-17 (1945) (Frankfurter, J., concurring).

62. Cf. BOBBITT, *supra* note 19 (offering an account of constitutional interpretation in which practices are self-legitimizing).

63. See *infra* Section V.B. If so, judicial bricoleurs may accomplish something, but not much, and perhaps not enough for us to have a serious concern about the justification for their (flawed or failed) efforts.

64. For example, a useful functionalism cannot assert that a political system's institutions taken as a whole preserve the system's equilibrium, unless it offers a well-specified concept of disequilibrium.

65. That is, a useful functionalism cannot say that an institution is functional because it serves precisely the functions it serves and no others.

dealing with selective funding for political and artistic programs as a case study in the possibilities of functionalist analysis. The study shows how experiences elsewhere can provide useful insights and elaborations of functional themes already present in domestic law. I then develop a critique of comparative functionalism: Identifying common functions across constitutional systems is always problematic because doing so inevitably omits institutional details unique to the systems being compared. The Part concludes by pointing out that the natural response to this critique, which would involve adding in the details and thereby qualifying the description of the functions, drives functionalism toward expressivism.

### A. *The Problem of Subsidies and the Concept of the Quango*

#### 1. *Introduction*

The expansion of government's reach since the New Deal has transformed the central issues of free speech law. To put it most broadly, free speech law deals with government actions that favor or disfavor expression. The classical cases, arising from government efforts to suppress political dissent, involved laws imposing criminal penalties on people who said things the government thought dangerous.<sup>66</sup> Such cases have almost disappeared from the courts' dockets. Today, the cases involve government actions that favor or disfavor speech by awarding or withholding public resources, ranging from space in a park to hold a demonstration, to time on a public broadcasting station, to money itself. These actions are interventions in the marketplace of ideas. And classical free speech theory has difficulty in dealing with such interventions. One important strand in classical free speech theory directs us to cast a suspicious eye on government interventions that are said to skew public debate and deliberation. One of the things wrong with imprisoning dissenters, for example, is that the public is deprived of their distinctive viewpoint, and thus is less able to arrive at its own conclusions uninfluenced by the government's decisions about which points of view are right.

Government speech and selective subsidies necessarily skew the debate. Yet, the modern state simply cannot refrain from speaking on its own or subsidizing speech it favors. The examples are easy to list. The federal government sponsors an advertising campaign urging people to "Just Say No" to illegal drugs. A state university's history department decides that the point of view known as "Cold War revisionism," which

---

66. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

treats the United States and the Soviet Union as equally responsible for the Cold War, has become too dominant in the field and hires someone who insists on the Soviet Union's primary responsibility over an equally qualified candidate who accepts the revisionist view. A high school makes its auditorium available after school only to groups whose messages enhance the school's educational program.

Some selective subsidies *must* be constitutional if the modern state is to have the reach we have come to accept.<sup>67</sup> Equally clear, however, is that some selective subsidies must be unconstitutional. The plurality in *Board of Education, Island Trees Union Free School District v. Pico*<sup>68</sup> offered the canonical example: "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books."<sup>69</sup> Courts and commentators have struggled to develop ways of drawing lines between permissible and impermissible selective subsidies. Each proposed solution has sensible things to say, but to this point, no proposed solution deals well with all the cases.

This Section uses two recent Supreme Court cases as the vehicle for exploring the problem of selective subsidies. *Arkansas Educational Television Commission v. Forbes*<sup>70</sup> arose from a debate for congressional candidates in Arkansas sponsored by the Arkansas Educational Television Commission (AETC), the state's public television system. The system's board was appointed by the state's governor for eight-year terms and could not hold other public positions, except as educators, while they served on the board. "To insulate its programming decisions from political pressure, AETC employs an Executive Director and professional staff" and has adopted a statement of principles that "counsel[s] adherence to 'generally accepted broadcasting industry standards.'"<sup>71</sup> "Working in close consultation" with an experienced political reporter, the AETC staff developed a plan for debates among candidates for Arkansas's congressional seats.<sup>72</sup> Each debate would last one hour, which, the staff concluded, required that participation had to be limited to "'major party

---

67. Many of the problems, although perhaps not all, could be avoided were we to reduce sharply the scope of government, or were we to free *state* (and local) governments from the constraints imposed by the First Amendment as incorporated in the Fourteenth. The reduction would be quite severe. Selective subsidy problems routinely arise, for example, in the operation of public elementary and secondary education.

68. 457 U.S. 853 (1982) (plurality opinion).

69. *Id.* at 870-71. For an expression of some doubt about the obviousness of this claim, see *infra* text accompanying notes 92-95.

70. 118 S. Ct. 1633 (1998).

71. *Id.* at 1637 (citation omitted).

72. *See id.*

candidates or any other candidate who had strong popular support.”<sup>73</sup> Ralph Forbes qualified to appear on the ballot as an independent candidate; although he had not run for Congress before, Forbes had been a candidate in the Republican primaries for Lieutenant Governor in 1986 and 1990, and, in 1990, he had received almost forty-seven percent of the statewide vote before he was defeated in a run-off.<sup>74</sup> Forbes asked for permission to participate in the debate for the Third Congressional district seat, and he sued when AETC denied him permission because he was not a “serious” candidate. The Supreme Court held that AETC’s decision did not violate Forbes’s constitutional rights.

*National Endowment for the Arts v. Finley*<sup>75</sup> was a challenge to the constitutionality of a provision directing that the NEA “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public” in making awards for artistic excellence and artistic merit.<sup>76</sup> The NEA makes its awards based on evaluations by panels of experts in the various fields of arts; the statute requires that the panels “reflect ‘diverse artistic and cultural points of view’ and include ‘wide geographic, ethnic, and minority representation.’”<sup>77</sup> A handful of grants, including two that indirectly supported work by Robert Mapplethorpe and Andres Serrano that critics said were pornographic and blasphemous, respectively, attracted substantial public criticism from members of Congress. After Congress adopted the “decency and respect” provision in 1990, the NEA interpreted the statute to require that panel members be selected in a way sensitive to concerns for decency and respect. The Supreme Court rejected a facial challenge to the provision, saying that it simply identified some considerations that panels had to take into account but did not preclude the NEA from making any award, including awards to indecent or disrespectful art that was nevertheless artistically excellent.<sup>78</sup>

In what follows, I survey a number of possible approaches to the problems posed by *Forbes* and *Finley*, paying particular attention to two elements: (1) the strands of analysis in each approach that seem sensible; and (2) the points at which the approach fails to deal well with either the obviously constitutional or the obviously unconstitutional forms of selective subsidy I described earlier. The Section then shows how the sensible strands can be pulled together by using a concept drawn from constitutional

---

73. *Id.* (citation omitted).

74. *See id.* at 1644-45 (Stevens, J., dissenting).

75. 118 S. Ct. 2168 (1998).

76. 20 U.S.C. § 954(d)(1) (1994).

77. *Finley*, 118 S. Ct. at 2172.

78. *See id.* at 2176-77.

experience in Great Britain, the quango, to give us a way of thinking about the problem of selective subsidies that advances our understanding.

## 2. *Proposed Solutions in Domestic Law*

Treating the question of subsidies as a matter to be resolved substantively, courts and scholars have offered a range of solutions designed to ensure that political authorities retain rather wide discretion to allocate limited public resources to speech without allowing them to engage in what are regarded as the worst kinds of abuses, of which providing funds only to those who support one political party is the prime example. Yet, none is entirely satisfactory. No single solution appears to provide acceptable answers to all the testing cases. As those hypotheticals indicate, the real objective is to devise an approach that identifies *when* discrimination on the basis of viewpoint is allowed.<sup>79</sup> The following analysis shows that the Court and First Amendment scholars have identified the importance of politics in constraining the government from adopting truly troublesome selective subsidies and have suggested a further barrier through a requirement that subsidy decisions rest on objective criteria. These themes derive from the First Amendment concern of avoiding government-induced skewing of public debate. I then turn to comparative

---

79. The Court has rejected the possibility of treating state funds as public forums, asserting that "the almost unfettered access of a traditional public forum would be incompatible with the programming dictates a television broadcaster must follow." *Forbes*, 118 S. Ct. at 1641. This is a slight overstatement. The public forum doctrine requires that a government's programmatic goals, such as ensuring that commuters be able to use the streets to get to work and back home on time, must yield to interests in expression, in the sense that the programmatic goals cannot be accomplished to the degree that decisionmakers unconstrained by the Constitution would seek to accomplish them. The "programming dictates" might similarly have to yield to such interests, at least to the extent that distributing time on a first-come, first-served basis is not fundamentally incompatible with the government's programmatic goals. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."). The only real incompatibility I can see here is that the public might forgo operating a public broadcasting system were access available on a first-come, first-served basis.

Some Canadian cases suggest the possibility of avoiding constitutional analysis by finding that funding decisions are not governmental action. *Compare McKinney v. Board of Governors* [1990] 3 S.C.R. 229 (Can.) (holding that a university was not a government actor), *with Lavigne v. Ontario Pub. Serv. Employees Union* [1991] 2 S.C.R. 211 (Can.) (holding that a community college was a government actor). The cases turn on such matters as the composition of the actor's governing board and the precise reporting relation it has to public agencies, and their outcomes might be influenced by the subject matter of the underlying dispute. (*McKinney* rejected a challenge to a mandatory retirement age for professors, while *Lavigne* involved a challenge to the use of union funds for political purposes over the objection of a person required to pay the fees pursuant to a collective bargaining agreement.) The Canadian cases suggest that the "no state action" approach is not likely to be workable. For a discussion in the U.S. context, see A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 570-74. The U.S. Supreme Court rejected the Canadian approach in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995), which involved a public corporation all of whose board members were appointed, directly or indirectly, by the President.

experience as a way of seeing how these themes help identify distinctive governmental institutions, called quangos, whose decisions might be subject to the lessened degree of First Amendment scrutiny that seems necessary to make sense of some of modern government's operations.<sup>80</sup>

The Court began its analysis in *Forbes* by asking "whether public forum principles apply to the case at all."<sup>81</sup> It was concerned that applying that analysis "would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."<sup>82</sup> The Court concluded, again "[a]s a general rule," that public broadcasters should not be subject to claims of viewpoint discrimination, because of "the nature of editorial discretion . . . [E]ven principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint-based."<sup>83</sup> Quoting liberally from *Columbia Broadcasting System, Inc. v. Democratic National Committee*,<sup>84</sup> which involved the journalistic discretion of private broadcasters, the Court concluded "that, in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming."<sup>85</sup>

According to this view, public television stations can dramatically skew their news broadcasts and other programming. For example, a public broadcasting system in a state dominated today by a single political machine, as Louisiana was by Huey Long, could present news broadcasts that shut out the opposition. A public broadcasting system in the United States could become "state television" along the lines of the state-dominated systems in Russia, which were reported to have presented news

---

80. Frederick Schauer describes the ways in which the Court has hinted at the importance of drawing distinctions among institutions for First Amendment purposes and suggests that these hints are incompatible with a more general interpretive preference on the Court for principle-based rather than policy-oriented constitutional doctrine. See Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998). This Section's analysis deepens Schauer's argument by drawing attention to a description of institutions made available by constitutional experience elsewhere, a description that can be given an acceptably principled form, and by noting that the preference for principle-based doctrine is only one of several already present in contemporary constitutional adjudication.

81. *Forbes*, 118 S. Ct. at 1639.

82. *Id.*

83. *Id.*

84. 412 U.S. 94 (1973).

85. *Forbes*, 118 S. Ct. at 1640. Justice Scalia made a similar point in *Finley*. In his view, there was a "fundamental divide" between laws "abridging" speech and those funding it, and the First Amendment was "inapplicable" to funding decisions. *NEA v. Finley*, 118 S. Ct. 2168, 2184 (1998) (Scalia, J., concurring in the judgment). For Justice Scalia, selective funding decisions, even those discriminating against particular viewpoints, do not infringe free speech rights because they "have [no] significant coercive effect." *Id.* at 2183 (Scalia, J., concurring in the judgment) (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)).

stories openly favoring the reelection of Boris Yeltsin as President in 1996.<sup>86</sup>

The Court's opinion in *Forbes* suggests one response to the "state television" problem: the system's *statutory* obligations.<sup>87</sup> That seems

---

86. See Geoffrey York, *Post-Communism*, *GLOBE & MAIL* (Toronto), Dec. 21, 1996, at D1 (reporting "an independent study of television coverage" of the 1996 election, in which "Yeltsin enjoyed 492 more positive reports than negative stories, while almost every other candidate was given negative coverage," and, in the second round, "247 more positive stories than negative stories about Mr. Yeltsin, while the coverage of the Communists was almost precisely the opposite"). I use the term *state-dominated television* rather than *state television* because television in Russia has been nominally privatized, but in 1996 it was dominated by close political allies of President Yeltsin.

87. An unelaborated footnote in Justice Scalia's opinion in *Finley* asserts that there is a solution to this problem. Justice Scalia asserted that "it would be . . . unconstitutional for the government itself to promote candidates nominated by the Republican party, and I do not think that that unconstitutionality has anything to do with the First Amendment." *Finley*, 118 S. Ct. at 2184 n.3 (Scalia, J., concurring in the judgment). The basis for the unconstitutionality is unclear. The most obvious candidate is the Equal Protection Clause (or, in *Finley*, the equal protection component of the Fifth Amendment's Due Process Clause). But, if the First Amendment truly does not have "anything to do" with the problem, a decision to fund Republican candidates would be subject only to rational basis review, and it is trivially easy to devise public-oriented justifications for favoring such candidates (for example, the legislature reasonably believes that their election is more likely than the election of their opponents to result in the implementation of the public-oriented policies laid out in the Republican Party platform). If the selective subsidy is unconstitutional because the discrimination would not survive some higher level review, the question then becomes: "What, other than the First Amendment, triggers that higher level of review?" Professor Daniel Conkle pointed out in an e-mail message to the Conlaw discussion list (July 6, 1998) that Justice Scalia responded to Justice White's invocation of equal protection principles in his dissent in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), by saying that the Equal Protection Clause did no work independent of the First Amendment in Justice White's analysis, *see id.* at 384 n.4. That observation seems applicable here as well.

Because *Finley* involved a federal subsidy, perhaps Justice Scalia meant that he could not imagine an enumerated federal power justifying a selective subsidy program. That argument would not be available in *Forbes*, and in any event it is a non-standard form of analysis of challenges to distinctions drawn in federal legislation that there be an enumerated power that would justify the distinction rather than the legislation.

Finally, perhaps the thought is that the constitutional commitment to selection of representatives through elections entails the conclusion that the representatives themselves cannot enact laws whose principal (or almost exclusive) effect is to determine more or less directly who their successors will be. (The qualifications are needed because all good politicians will attempt to enact laws one of whose effects will be to increase the probability that they, or the people they favor, will be elected in the next election.) The constitutional commitment could be linked to Article I, Section 2; the Seventeenth Amendment; and perhaps the Guarantee Clause, U.S. CONST. art. IV, § 4. *Cf. Australian Capital Television Pty. v. Australia* (1992) 177 C.L.R. 106 (Austl.) (finding constitutional basis for invalidating Australia's campaign finance regulations in its constitutional commitment to governing through elected representatives). For a discussion of this case, see Gerald N. Rosenberg & John M. Williams, *Do Not Go Gently into That Good Right: The First Amendment in the High Court of Australia*, 1997 SUP. CT. REV. 439. The Australian experience suggests that it is possible to generate a reasonably full-fledged law of free expression from the kinds of structural inferences that would be required to justify this third approach, which in turn suggests that Justice Scalia's attempt to escape from a general First Amendment jurisprudence might not succeed (at least if the approach he suggests were to be placed in other hands).

insufficient standing alone.<sup>88</sup> The existence of statutory duties, however, may signal the possibility of a different, and perhaps more satisfactory, response. The Court said in *Forbes* that “[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”<sup>89</sup> When the government speaks, either directly or by purchasing the speech-services of others, it necessarily engages in viewpoint discrimination.<sup>90</sup> In light of the scope of modern government, these interventions have the potential to skew public debate and understanding quite substantially. Indeed, they are praised if they do so, as is asserted to be true in the example of government anti-drug and anti-tobacco propaganda.<sup>91</sup> Why do these forms of viewpoint discrimination fail to present substantial constitutional problems?

The answer, if there is one, lies in politics.<sup>92</sup> We can begin by noting that the problem of “state television” arises in Russia because there is little competition from television stations not dominated by the government’s political allies. But nowhere in the United States does public television have anything approaching a dominating role as a source of news.<sup>93</sup> More important, in the modern world it is extremely unlikely today that a single political party would have the degree of influence within a jurisdiction that Huey Long did in Louisiana.<sup>94</sup> The statutory obligations to which the Court alluded in *Forbes* arise from party competition, which produces a system of public broadcasting that prevents it from becoming “state television.”<sup>95</sup>

---

88. I doubt that repealing the statutory obligations to which the Court referred would be unconstitutional in itself, but it is then puzzling how a constitutionally permissible repeal would somehow convert a previously constitutional action into an unconstitutional one.

89. *Forbes*, 118 S. Ct. at 1639.

90. See *Finley*, 118 S. Ct. at 2190-93 (Souter, J., dissenting) (discussing the constitutionality of viewpoint-discrimination when the government acts as a speaker or a buyer of services).

91. See, e.g., Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 819 (1993) (asserting that “[m]ost people agree that . . . regulation [of tobacco advertising] present[s] no constitutional problem” because the regulation is “based on such obvious harms that the notion that it is viewpoint-based does not even register”).

92. In my view, nothing written since has improved significantly on Mark Yudof’s analysis in MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

93. Competition from private broadcasting might constrain public broadcasters, limiting their ability to be strongly biased, or it might reduce the impact of skewed public broadcasting on public understanding. In the extreme, the courts might invoke the First Amendment to restrict the government’s power to reduce competition from private media. Cf. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (finding unconstitutional a differential tax on newspaper publishers imposed by Louisiana during the Huey Long era). For background on *Grosjean*, see generally RICHARD C. CORTNER, *THE KINGFISH AND THE CONSTITUTION: HUEY LONG, THE FIRST AMENDMENT, AND THE EMERGENCE OF MODERN PRESS FREEDOM IN AMERICA* (1996).

94. By “jurisdiction” I mean to include states, cities, and towns. The present Mayor Daley of Chicago dominates the city in a substantially different way from the way the prior Mayor Daley did.

95. Were a single state to eliminate such obligations, it seems quite likely that federal regulatory agencies, or Congress itself, would deprive the state’s broadcasting system of its licenses to operate “public” television. The possibility of moving from a lower-level jurisdiction,

Still, some problems do not seem amenable to an analysis taking the government to be the speaker.<sup>96</sup> The state university's history department might have one revisionist and one counter-revisionist; it could hardly be said to be speaking when one of them is advancing a position the other rejects. The NEA funds so many different kinds of artistic expression that no one could sensibly say that each artist was speaking for the government. Rather, as Justice Souter said in his dissent in *Finley*, "the 'communicative element inherent in the very act of funding itself' is an endorsement of the importance of the arts collectively" or of the importance of having a diverse range of views presented in a state university.<sup>97</sup> That, however, is an argument *against* selective funding; it does not provide the defense that seems necessary.

An alternative analysis, urged by the parties seeking access to public resources in *Forbes* and *Finley*, is that the cases involved public resources that had been designated as public forums.<sup>98</sup> The government designates a forum for speech when it identifies a broad class of persons who automatically qualify for access to the forum and then allocates the use of the forum on some basis that does not take into account precisely what the speaker plans to say. So, for example, a city might designate its municipal auditorium for use by political parties, civic organizations, and theatrical productions. What is it to do when a civic organization and a theatrical production request the use of the space on the same Saturday night? The city could allocate the facility to the first one to apply or to the activity predicted to attract the larger number of people,<sup>99</sup> but it could not reject the

---

in which one party might dominate, to a higher-level one, in which there is substantial party competition, reduces the threat posed by one-party domination on the local level, which is a more serious possibility in today's United States than such domination on the state or, of course, national level.

96. Politics may not provide a complete answer even to the problems already discussed. The examples of anti-drug and anti-tobacco propaganda demonstrate that there are issues on which public agreement appears to be so great that competing voices will have little influence on structuring the way in which the government speaks. A skeptic might note that, in such circumstances, the chances that the courts would enforce a constitutional constraint on government speech are exceedingly small. *Forbes* itself shows that competition between the major parties may induce public broadcasters to avoid blatant bias in favor of or against one or the other major party, but will have little effect on decisions biased against third-party or independent candidates.

97. *NEA v. Finley*, 118 S. Ct. 2168, 2190 n.6 (1998) (Souter, J., dissenting) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 892 n.11 (1995) (Souter, J., dissenting)).

98. My thinking about the analysis in this and the following four paragraphs was clarified by the comments made by participants on the e-mail Conlaw discussion list.

99. This latter strategy may be subject to a challenge on the basis that the criterion leaves too much discretion to the subjective judgment of the facility's manager. See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1648 (1998) (Stevens, J., dissenting) (discussing the "unbridled" discretion present in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)).

theatrical production on the ground that its planned production of *Angels in America*, a gay-themed play, would offend many in the community.

Forbes argued that the candidate debate was a designated public forum, with the criterion for membership in the group eligible to participate being a *qualified candidate in the Third District*. The Court disagreed. In the Court's view, the government designates a public forum when it "intend[s] to make the property 'generally available' to a class of speakers."<sup>100</sup> But it does not create such a forum when it "allows selective access for individual speakers rather than general access for a class of speakers."<sup>101</sup> That description, the Court said, fit the candidate debate. But, the Court continued: "The debate's status as a nonpublic forum . . . did not give AETC unfettered power to exclude any candidate it wished."<sup>102</sup> The station's decision had to be "reasonable in light of the purpose of the property," and, more important, could not have been "based on the speaker's viewpoint."<sup>103</sup>

Again the Court's formulation is deceptively simple. In elaborating it, the Court explained:

[T]he government creates a designated public forum when it makes its property generally available to a certain class of speakers . . . . [I]t does not create a public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission" to use it.<sup>104</sup>

In *Finley*,<sup>105</sup> the Court described *Rosenberger v. Rector and Visitors of University of Virginia*,<sup>106</sup> another designated-forum case. The forum in *Rosenberger* was a fund created by a mandatory student-activity fee. The Court held that this was a designated public forum and therefore held it unconstitutional to bar a Christian student newspaper from receiving a grant. The *Finley* Court distinguished "the competitive process"<sup>107</sup> used by the NEA to make awards from the process used in *Rosenberger*. The university made awards from the fund, the Court said, to "all student organizations that were 'related to the educational purpose of the University.'"<sup>108</sup> The Court's thought appears to be that anyone within the

---

100. *Forbes*, 118 S. Ct. at 1642 (quoting *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)).

101. *Id.*

102. *Id.* at 1643.

103. *Id.*

104. *Id.* at 1642 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 804 (1985)).

105. *NEA v. Finley*, 118 S. Ct. 2168 (1998).

106. 515 U.S. 819 (1995).

107. *Finley*, 118 S. Ct. at 2178.

108. *Id.* (quoting *Rosenberger*, 515 U.S. at 824).

class automatically gets access to the resource when a designated public forum is involved, whereas access to nondesignated forums is discretionary.

The municipal auditorium example shows why the Court's definition of designated public forums is questionable.<sup>109</sup> Despite what the Court suggests, access can never be automatic, even to designated forums, when the resource is limited. The university in *Rosenberger* had to decide which student groups, out of all whose work was "related to the educational purpose of the University,"<sup>110</sup> should get an award. The real question is

109. In addition, the Court's definition of designated public forums allows public authorities to manipulate their designations, perhaps even after the event. The *Forbes* Court briefly noticed this difficulty, observing almost in passing that the fact that its "distinction turns on governmental intent does not render it unprotective of speech." *Forbes*, 118 S. Ct. at 1642. The false dichotomy aside, the difficulty does not lie in the use of intent as such in defining the distinction, but in the fact that an intent-based criterion opens up the possibility of discriminatory gerrymandering based on viewpoint. Consider the *Angels in America* example. When the city's denial of the auditorium for that production is challenged, the city could contend that it had always meant that the auditorium was designated for use by family-oriented theatrical productions. (I treat *family-oriented* as describing a particular type of subject matter, identifying a class similar to *classic plays* or *plays about U.S. history*, although I concede that it might be regarded as describing a viewpoint.) It might rely on historical practices, designing its descriptions of the productions that had used the auditorium to fit a designation that would exclude *Angels in America* from the "class of speakers" to whom the facility had been made available. If prior written guidelines referred to "theatrical productions" generally, the city could respond that it had always intended that to mean *family-oriented* productions and that its prior imprecision resulted from the simple fact that the question had not come up before. Although a court could theoretically get at this sort of gerrymandering by finding that the facially-neutral criterion was the product of an intent to discriminate against a particular viewpoint, the Court's experience with various types of gerrymanders does not make me confident that its intent-based approach would give it the resources to address what might be widespread practices of gerrymandered viewpoint discrimination. Cf. *Larson v. Valente*, 456 U.S. 228 (1982) (analyzing gerrymandering in an Establishment Clause case); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (analyzing gerrymandering in a Dormant Commerce Clause case). Similarly, the public broadcaster in *Forbes* could have described its candidate debate as a designated public forum without fearing that it had to open it to *Forbes*: It would designate the forum for use by serious candidates for the Third Congressional District seat and then allow everyone in that class to use the forum. *But see Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 251, 253 (3d Cir. 1998) (finding that the Transportation Authority had created a designated public forum in its display areas because it "accept[ed] . . . a broad range of advertisements" and rejecting the argument that the forum was designated for use only by those whose advertisements were not objectionable "for any reason").

One can summarize the problems with the Court's definition by quoting the point at which it applied the definition in *Forbes*:

AETC did not make its debate generally available to candidates for Arkansas' Third Congressional District seat. Instead, . . . AETC reserved eligibility for participation in the debate to candidates for the Third Congressional District seat (*as opposed to some other seat*). At that point, . . . AETC made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate.

*Forbes*, 118 S. Ct. at 1642-43 (emphasis added). The parenthetical phrase, which comes out of nowhere but which the Court seems to believe adds something, signals that something has gone wrong with the analysis.

110. *Rosenberger*, 515 U.S. at 824 (internal citation and quotation marks omitted). Unless, as was not the case in *Rosenberger*, the university made its awards on a *pro rata* basis. But that could never be the case, or at least could not be administered in a way that avoids the underlying First Amendment issue. Given *N* applicants for a limited fund, should each get one-*N*th of the fund? That has perverse incentive effects. Should the funds be allocated in proportion to the

whether awards within the eligible group are made on an “objective” basis.<sup>111</sup>

The role of objective criteria in the preceding analysis connects it to a more promising approach, developed primarily by Robert Post.<sup>112</sup> Post first notes the difference recognized in free speech law between the government-as-regulator and the government-as-speaker.<sup>113</sup> No free speech problems arise when the government chooses to sponsor a “Just Say No” anti-drug campaign; here the government *is* the speaker. Free speech problems would obviously be serious were the government to prohibit a privately-sponsored “Say Yes to Dope” advertisement; then the government would be a regulator. Only slightly more difficult are cases where the government hires someone to say what the government wants. Consider the actor hired to deliver a “Just Say No” message. The government could undoubtedly fire him if he insisted on saying, “And by the way, I personally think drugs are great” during the advertisement’s filming.<sup>114</sup>

---

number of students who are members of the *N* groups? That ignores the different programs that different groups seek to implement and the different costs that result.

111. See *Finley*, 118 S. Ct. at 2178 (differentiating the “content-based ‘excellence’ threshold for NEA support” from “objective decisions on allocating public benefits”). That the government must make objective decisions within the eligible group implies that, to get an award, an applicant must obtain the government’s permission to use the resource, thus collapsing the distinction the Court drew between designated public forums and nonpublic forums. In addition, while there is a distinction between a requirement that a decision be made on an objective basis and a ban on decisions that discriminate on the basis of viewpoint, the distinction is quite thin. At the very least, the failure to have objective criteria might suggest that the decision rested on viewpoint discrimination. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987) (describing as “precious” and “unworkable” a distinction, suggested by earlier decisions, “between the intent to include the class of speakers or subjects of which the plaintiff is the representative, and the intent to exclude the plaintiff”). This makes the distinction between designated public forums and nonpublic forums less important than it might otherwise appear. (It may be of interest in this connection to note that on remand of *Lebron*, the Second Circuit held both that the advertising area Lebron wanted to use was a nonpublic forum and that Amtrak’s policy against accepting political advertising was not viewpoint-discriminatory. See *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650, 656, 658-59, *amended by* 89 F.3d 39 (2d Cir. 1995).)

112. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995) (providing the clearest statement of Post’s general approach). Post’s approach identifies important considerations that will go into any fully developed law, although his specific doctrinal recommendations probably are inadequate.

113. As a pioneer in the area, Post did not use these precise terms, which became common currency after he began writing about the problems. Post distinguished between the government’s exercise of managerial authority and its exercise of governance authority. See Post, *supra* note 111, at 1717. This distinction is broader than, though related to, the distinction drawn more recently in free speech theory between the government as regulator and the government as speaker. For one use of the more recent distinction, see Schauer, *supra* note 80, at 100-01.

114. This has come to be the accepted understanding of *Rust v. Sullivan*, 500 U.S. 173, 203 (1991), which upheld a regulation denying funding from a federal family planning program to programs that engaged in activities that encouraged or promoted abortion as a method of family planning. Post argues that the accepted analysis fails to take enough account of the social understanding of the patient-physician relationship. See Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 171-76 (1996).

First Amendment concerns seem quite weak in these cases. But, as the government uses its power as employer to exercise greater leverage over speech, such concerns play a larger role.<sup>115</sup> According to *Pickering v. Board of Education*,<sup>116</sup> a balancing approach that would not be used when the government acts as regulator is appropriate when the government acts as employer.

Post's insight is that these adaptations reflect a broader understanding. He divides the "social domain" into three parts: the domain of democracy and public discourse, the domain of management, and the domain of community.<sup>117</sup> The government has instrumental or programmatic goals within the domain of management.<sup>118</sup> When acting there, it may restrict individual autonomy in the service of its programmatic goals. Those restrictions, however, need not be imposed only on government employees.<sup>119</sup> As Post observes, "What is at stake is whether we wish to

115. Consider again the actor delivering the anti-drug message. Could the government include within its contract a provision depriving the actor of a portion of his salary if, during the time the advertisement was being broadcast, he made any public speech advocating the use of drugs? The government's theory would be that such activities would undermine the anti-drug message the actor was hired to deliver. A private sector example is the discomfort felt by the Beef Industry Council when it discovered that Cybill Shephard, used in its advertising, did not eat beef. See Laura Bird, *Sour Remarks on Milk May Focus Attention on Big Dairy Campaign*, WALL ST. J., Oct. 1, 1992, at B5. At the same time, however, the government's use of the employment relation here would have a significantly greater leveraging effect on free speech than the simple rule that people it hires have to say what the government wants them to say in their capacity as public employees. Compare *Rust*, 500 U.S. at 196 (observing that the challenged regulations "do not force the . . . grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from [the funded] activities"), with *Snepp v. United States*, 444 U.S. 507, 515-16 (1980) (per curiam) (relying on equitable principles to impose a trust for the benefit of the United States on profits earned by the publication of a memoir by a former employee of the CIA who had signed an agreement that he would not publish any information relating to the Agency without its prior approval).

116. 391 U.S. 563, 568 (1968) (holding that, in determining whether a school board properly disciplined a teacher for a public statement, "[t]he problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

117. The general distinctions are outlined in POST, *supra* note 112, at 1-10.

118. For a similar concept, which C. Edwin Baker describes as "institutionally bound speech," see C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 16-21 (1998). Baker refers to "situations where resources and activities are authoritatively organized to further or accomplish particular objectives within a limited realm of social life. Institutional realms . . . are purposely designed to advance particular functional objectives." *Id.* at 19. Baker notes that his term "closely resembles Robert Post's emphasis on the distinction between government action involving management and that involving governance." *Id.* at 19 n.88.

119. Consider here the modern, restrictive law of the public forum. Members of the general public seek to use a state fairgrounds or the sidewalks leading to a post office for speech that would express their autonomy and contribute to public discussion. The Court has held that the government may bar them from using the public area, not upon a showing that their expressive uses would substantially interfere with the government's programmatic goals, but simply upon a showing that the regulation is reasonable. See *United States v. Kokinda*, 497 U.S. 720 (1990)

consign speech to a social space where ‘the attainment of institutional ends is taken as an unquestioned priority.’ This represents a serious contraction of our ordinary understanding of freedom of expression.”<sup>120</sup>

Deeper difficulties lurk. The government’s programmatic goals—what it manages public resources to accomplish—are determined in the domain of public discourse. Restrictions on speech in the managerial domain are simultaneously produced by and affect what happens in the domain of democracy.<sup>121</sup> Post suggests that the way out of this dilemma lies in the process of defining the boundaries between the domains. The definition, Post argues, is not in the first instance a *legal* one. It is instead a *social* definition, resting on the social practices that construct different institutions.<sup>122</sup>

Post recognizes that the question of who “we” are is always contested.<sup>123</sup> Determining what we want requires us to decide first who we are. For Post, that latter decision is made in the domain of community.<sup>124</sup> And now the difficulties Post’s approach reveals become quite severe. Many selective subsidy programs involve institutions—in Post’s terms, social practices constituted by social roles—whose instrumental goal is shaping the community’s self-understanding.<sup>125</sup> Public education, including universities, public broadcasting, public sponsorship of the arts—these are some important institutions through which communities constitute themselves. In equivalent but more mundane terms, the domain of community is where we determine the boundary between the domains of democracy and management, but the institutions I have listed help define where we think the appropriate boundary is. And yet what is at issue in the

---

(discussing sidewalks leading to post office); *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640 (1981) (addressing state fairgrounds).

120. Post, *supra* note 114, at 171 (quoting Post, *supra* note 111, at 1789).

121. Baker concludes from this that we should treat the electoral process as a special governing institution, allowing the people acting through representative government or direct democracy to regulate speech to promote the functional goals of the electoral system. *See Baker, supra* note 118, at 24-28.

122. *See POST, supra* note 112, at 252 (“[F]or constitutional purposes an organization’s boundaries can be recognized by the predominance of functionally defined organizational roles.”).

123. In addition, Post’s approach seems to direct courts to ask what restrictions we as a society think are appropriate for institutions composed of people acting in certain roles to impose on people acting in other roles. But in constitutional cases there usually is a short answer to that question: We as a society think the restrictions we have imposed to be appropriate. That is, putting aberrational regulations to one side, Post’s approach seems to incline strongly in the direction of requiring the courts to see what restrictions on speech in the managerial domain emerge from the democratic domain—and then uphold them all.

124. *See POST, supra* note 112, at 3 (“Laws instantiating community seek to reinforce this shared world of common faith and fate.”).

125. *See id.* at 323-24 (describing “public institutions of higher learning” as governed by “the logic of instrumental rationality”).

cases we are considering is precisely the question of whether to locate the institutions in the domain of democracy or in the domain of management.

In *Forbes*, for example, AETC made a managerial decision about the best use of the scarce public resource of air-time on the public station. That decision was guided by appropriate journalistic norms that regulate public broadcasting as an institution in the managerial domain. Obviously, and in Post's approach unproblematically, the decision also affects deliberation in the democratic domain. But that deliberation helps constitute our social understanding of public broadcasting as an institution, which makes uncertain the normative basis for accepting a public decision to authorize the station to use managerial norms. Again more mundanely, the station's managerial norms appear to include a preference for the two-party system, in the sense that all candidates from the two parties are taken to be serious candidates while other candidates, whose participation in a debate might affect the outcome, need not be serious. But allowing the station to use those norms in allocating the public resource they control may entrench the two-party system.<sup>126</sup>

Post's subtle analysis does not yield recommendations for crisp rules. Instead, it conforms to the prevailing view among legal academics that selective funding should be addressed by a multifactor balancing test sensitive to the contexts in which particular problems arise.<sup>127</sup> In the context of free expression, a version of the test would ask whether the government has reasons to fund some speech and not others on the ground at issue and whether its actions in doing so would skew public debate and understanding to a degree sufficient to raise questions about the public's ability to arrive at judgments autonomously.<sup>128</sup>

---

126. As I argue in the next Subsection, Post's approach may ultimately founder on this difficulty. See *infra* text accompanying note 178.

127. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 291-318 (1993); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). Sunstein offers the following formulation: "In all the cases considered, the question is whether the measure at issue interferes with a constitutional right, properly characterized, and, if so, whether the government has a sufficient justification." SUNSTEIN, *supra*, at 306; cf. Post, *supra* note 114, at 179 (asserting, within a slightly different but related analytic framework, that "[t]he characterization of government action entails judgments that are contextual and multidimensional").

128. See, e.g., SUNSTEIN, *supra* note 127, at 310 (concluding that refusing to fund art projects the public "find[s] abhorrent . . . [has] a skewing effect [that] could not plausibly be tolerated"); Sullivan, *supra* note 127, at 1490 (indicating the importance of recognizing the degree to which subsidies "determine the overall distribution of power between government and rightholders generally"). Post argues that the problem with an analysis predicated on the claim that subsidies "skew public discourse" is that "it is not obvious how to give useful content to the concept of 'distortion' once it is accepted that the government may allocate grants to support particular values." Post, *supra* note 114, at 185. He then discusses possible distinctions among "kinds of distortions." *Id.* at 186. It seems to me more compatible with the thrust of multifactor balancing tests to focus, as the formulation in the text does, on the degree to which shifts occur. Cf. *id.* at 192 ("Subsidies that literally overwhelm public discourse . . . should be set aside.").

*Forbes* and *Finley* may provide useful contrasts. Arguably the selective funding decision in *Forbes* rests on a permissible reason but has an impermissible skewing effect, while the selective funding decision in *Finley* rests on an impermissible reason but has no troublesome skewing effect. On the reasons for the selection, *Forbes* finds that AETC made its decisions on the basis of the candidates' likely appeal to voters.<sup>129</sup> This reason certainly seems permissible, because acting on it promoted the station's permissible desire to ensure that voters would watch the debate.<sup>130</sup>

*Forbes* suggests another reason for the selective funding decision. According to the Court: "Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all," and "[a] First Amendment jurisprudence yielding [that] result[] does not promote speech but represses it."<sup>131</sup> Given the choice between all or nothing, government might choose nothing. Here we must disentangle some strands in general free speech theory. One strand is that as a general matter more speech is better than less. That is one reason for the public forum doctrine and is one reason behind the idea that the best remedy for speech of which the government disapproves is counterspeech rather than suppression.<sup>132</sup> So, picking up this strand, the Court in *Forbes* says that some speech is better than none.<sup>133</sup>

At this point, however, we must consider a second strand in free speech theory, the concern that government actions may skew public debate or understanding. If a selective funding program actually does that, we cannot say that funding only some speech is better than funding none at all. Of course, any selective funding program will have some impact. But the

---

129. Justice Stevens argued that the facts in *Forbes* showed that this reason could not have been the true ground of the station's decision. See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1645 n.6 (1998) (Stevens, J., dissenting) (describing one district in which the Democratic incumbent won with 74.2% of the vote over a Republican challenger who, nonetheless, was invited to participate in the public broadcasting system's debates, despite the fact that this Republican challenger had raised \$6000, which was less than the amount *Forbes* raised); *id.* at 1645 (describing the Republican candidate's narrow margin of victory in the Third District and *Forbes*'s "strong showing" in recent Republican primaries). For present purposes, that factual point is irrelevant.

130. In contrast, one possible reason for selective funding in *Finley* could be that a significant number of viewers (and voters) would find indecent art works distasteful. This reason either is or is quite close to distaste *as such* and might be problematic as a reason for a selective funding decision.

131. See *Forbes*, 118 S. Ct. at 1643.

132. For the latter idea, see *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). In *Whitney*, Justice Brandeis noted that "If there be time . . . to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id.*

133. Similarly, it seems reasonable to think that, given the choice between funding indecent art or none at all, Congress would choose to fund none at all. But funding some art is better than funding none. This analysis of course, gives a government a potentially troubling incentive. It can avoid First Amendment scrutiny by credibly threatening to withdraw from the area entirely.

question seems best addressed by considering that impact relative to the distribution of speech prior to the government's action: If voices speak in roughly the same proportion after the selective funding decisions as they did before, the government's action would have some skewing effect, but one small enough to avoid constitutional difficulty, or at least small enough that it is offset by the benefits accruing from more speech rather than less.

Determining whether a skewing effect actually occurs, then, requires us to consider the speech opportunities available in the nongovernment market.<sup>134</sup> The station's decision in *Forbes* might (or might not) have an impermissible skewing effect, depending on whether commercial broadcasters were willing to televise candidate debates and on whether voters find such debates a significant source of information to guide their choices. The skewing effect of selective arts funding, in contrast, seems likely to be small relative to the nongovernment market. Private patrons of the arts have been common in the past and continue to play a significant role in supporting art, particularly avant garde art of the sort that is likely to be offensive to the general public.<sup>135</sup>

Like all balancing approaches, the one sketched in the preceding paragraphs has a number of flaws,<sup>136</sup> notably its reliance on contestable empirical judgments and rather personal judgments about what weights to assign to which factors.<sup>137</sup> Yet, it correctly identifies the important role that

---

134. See Post, *supra* note 114, at 178-79 (distinguishing public subsidy of magazines through favorable mailing rates from public sponsorship of productions at the Kennedy Center on the ground that "magazines are . . . completely dependent" on the mail subsidy).

135. For some evidence of the relative importance of public and private patronage, see *id.* at 193 n.208. Post concludes that direct NEA support for the arts "is about 5% of total donations," but he notes as well that "[t]his estimate may understate the extent of NEA influence," because NEA grants "are often highly leveraged" through matching programs and may have an indirect leveraging effect by giving private donors a signal about which projects are worth their funds. *Id.*; see also David Wasserman, *Public Funding for Science and Art: Censorship, Social Harm, and the Case of Genetic Research into Crime and Violence*, in CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION 169, 173 (Robert C. Post ed., 1998) (quoting Daniel Shapiro as stating that "NEA funding in 1989 was a small fraction of the \$114.7 billion in private giving for the arts that year" and noting Shapiro's speculation that attacks on particular art works may have improved "the overall funding prospects for [those] kinds of works").

136. The classic modern critique of balancing approaches is T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

137. Consider the following argument, which I personally find reasonable. It could be that nongovernment sources of support for offensive art are available in New York but not in New Hampshire, in which case the selectivity in the New York program would be constitutional while the same provision in the New Hampshire one would be unconstitutional. That is an odd enough result to raise questions about the general approach. It rests on what some might think an invidious comparison between New York and New Hampshire, a comparison for which I can provide no support. Consider as well my argument about the availability of nongovernment support for the arts. In reaching the judgment that there is a significant amount of such support, I implicitly have discounted claims by artists of the importance of public funding to their ability to work because artists have an obvious interest in making such claims. Unfortunately, so do potential private patrons of art, who will have greater opportunities to spread their money around if the government, too, is subsidizing art. Because there seems to be no disinterested observer, I rely on my personal judgments about social reality in the contemporary United States. But that

free speech law's concern for the skewing effect of government action must play in whatever constitutional analysis we ultimately adopt.

Finally, we can consider Justice Stevens's dissent in *Forbes*, which would have finessed the problems with devising a substantive rule for selective subsidy cases by adopting a purely procedural approach. He was concerned that the Court's rule left too much room for the viewpoint discrimination that it purported to bar. The difficulty was that the Court allowed AETC to exclude *Forbes* without having any predetermined guidelines for its decision: Its staff "had nearly limitless discretion to exclude *Forbes* from the debate based on ad hoc justifications."<sup>138</sup> Justice Stevens argued that the Constitution requires the station to have objective standards to guide the exercise of that discretion. This would "provid[e] the public with some assurance that state-owned broadcasters cannot select debate participants on arbitrary grounds."<sup>139</sup>

AETC's Executive Director had identified a number of reasons for excluding *Forbes*: "[V]oters did not consider him a serious candidate,"<sup>140</sup> and news organizations, including the Associated Press, did not plan to include *Forbes*'s name in its national election reporting service; *Forbes* had little financial support and did not report campaign finances to state or federal authorities; and *Forbes* had no campaign headquarters outside his house. A purely procedural approach would allow the station to exclude *Forbes* for these reasons, as long as they were embodied in previously established criteria. Justice Stevens described standards such as *viability* and *newsworthiness* as impermissibly subjective,<sup>141</sup> but it should not be difficult to devise standards that capture those ideas in more concrete terms. So, for example, it is difficult to see why the AP's decision should not count against including *Forbes* in the debate.

Justice Stevens emphasized that his approach "would impose only a modest requirement" that would not substantially affect broadcasters'

---

counts against using a multifactor balancing test as a legal standard: It is one thing for an academic to rely on such judgments in an article; it is another for a judge to do so openly in a decision. It may be inevitable that judges implicitly rely on such judgments as they apply other tests, and one standard defense of balancing tests is that they bring into the open what the judge actually is taking into account. They need not do so, of course. A judge may enumerate one consideration being placed in the balance, which actually has much less weight in the judge's implicit deliberations than some unmentioned interest. Further, expressing an element of personal judgment may be inconsistent with general public expectations about the nature of the rule of law.

138. *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1645 (1998) (Stevens, J., dissenting).

139. *Id.* at 1649 (Stevens, J., dissenting).

140. *Id.* at 1643 (Stevens, J., dissenting) (quoting AETC Executive Director Susan Howarth's testimony at trial).

141. *See id.* at 1645 (Stevens, J., dissenting).

decisions.<sup>142</sup> Modest requirements typically produce only modest benefits, of course. Justice Stevens appears to have believed that his concerns could not be met unless he imposed a small substantive constraint, that the station's criteria must be objective. But the modesty of his approach turns precisely on keeping the substantive constraint modest. The Court was concerned that this was unlikely. Its decision to treat public broadcasting as free from constitutional scrutiny except for candidate debates<sup>143</sup> was motivated by the view that *any* substantive constraint would "implicat[e] the courts in judgments that should be left to the exercise of journalistic discretion."<sup>144</sup>

The lower courts in *Finley* similarly attempted to finesse the problem of developing substantive criteria for determining when selective subsidies are constitutionally impermissible. The district court held,<sup>145</sup> and the court of appeals affirmed,<sup>146</sup> that the statutory directive to consider standards of decency and respect for the diverse values of the American people was unconstitutionally vague. The Supreme Court rejected the vagueness argument, saying that terms that might be unconstitutionally vague when used to regulate speech might not be unconstitutional when used as the basis for subsidizing it.<sup>147</sup> It also observed that "if this statute is unconstitutionally vague, then so too are all government programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence.'" <sup>148</sup>

It is worth noting one instinct that may lie behind these efforts to develop procedural solutions to the problem of selective funding. As Alexander Bickel pointed out, procedural solutions may be particularly appropriate in areas where it seems difficult to develop substantive ones.<sup>149</sup> Neither vagueness nor a requirement of prior written standards might be the

142. *Id.* at 1649 (Stevens, J., dissenting); *see also id.* at 1649 n.19 (Stevens, J., dissenting) (stating that the First Amendment would be satisfied if a station "simply . . . set[] out participation standards before the debate").

143. *See id.* at 1640 (Stevens, J., dissenting) ("Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule.").

144. *Id.* at 1639. Justice Stevens's approach seems unresponsive to the problems faced by a public agency feeling its way into a new area. As a first attempt, standards like *viability* and *newsworthiness* might be all that professional journalists could feel comfortable in using. After some experience, they might be able to develop more precise criteria, geared to candidates' campaign finances or organization, or to their showing in polls. Justice Stevens would impose those requirements at the outset. Despite this concern, however, a procedural approach is promising.

145. *See Finley v. NEA*, 795 F. Supp. 1457, 1471-72 (C.D. Cal. 1992).

146. *See Finley v. NEA*, 100 F.3d 671, 680-81 (9th Cir. 1996).

147. *See NEA v. Finley*, 118 S. Ct. 2168, 2179 (1998).

148. *Id.* at 2179-80; *see also id.* at 2184 (Scalia, J., concurring in the judgment) (noting that "the constitutional rule against vague legislation . . . has no application to funding").

149. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 150-53, 177-83 (1962).

right procedural solution, but Bickel's insight—that a procedural approach may help avoid resolving difficult substantive questions—might still deserve consideration.

I have sketched a number of approaches to the problem of selective subsidies in U.S. constitutional law. Each gets at something important in the selective subsidy problem, but none is entirely satisfactory. A concept drawn from comparative constitutional experience suggests a way of incorporating the key insight scattered through the U.S. approach to the problem: the perception that it somehow matters that the decisions in *Forbes* and *Finley* were made by journalists and art specialists, who are likely to be guided by the standards of judgment that characterize their professions.<sup>150</sup>

### 3. *The Idea of the Quango*

During the 1970s, British political observers noted an interesting transformation in governance.<sup>151</sup> Decisions that formerly had been made within governmental departments were now being made by new bodies. They called these bodies *quangos*: quasi-autonomous nongovernmental organizations.<sup>152</sup> The government exercises power through different types of institutions. First, sometimes the government exercises its power through subordinate agencies whose officers are entirely responsible to higher-level political appointees.<sup>153</sup> Second, sometimes the government uses independent agencies to act. In the United States, the heads of these agencies are appointed by the President with the advice and consent of the Senate and have statutory terms of office.<sup>154</sup> They typically are understood

150. This perception radiates into many of the topics discussed in this Section, suggesting, for example, one source of the political constraints that diminish the "state television" threat.

151. See Gavin Drewry, *Quelling the Quango*, 1982 PUB. L. 384, 386 nn.12 & 13 (citing the British literature). A more recent collection is THE QUANGO DEBATE (F.F. Ridley & David Wilson eds., 1995), which includes a discussion of the politics of the debate in Great Britain. See Tony Stott, "Snouts in the Trough": *The Politics of Quangos*, in *id.* at 145.

152. Taken as an abbreviation, the term is a bit misleading. The institutions are actually quasi-autonomous *governmental* organizations, and some early discussions did use the term *quaggo*. But this was rather rapidly replaced by the more euphonious *quango*. For a brief history of the term, see Craig Alford Masback, Note, *Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts*, 10 YALE L. & POL'Y REV. 177, 183 n.34 (1992). See also Drewry, *supra* note 151, at 385 (quoting a source asserting that the term quasi-nongovernment organization "was invented during the late 1960s as an administrative quasi-joke in the United States of America." (citations omitted)). It has had little impact on public law scholarship. The most substantial discussion is in Froomkin, *supra* note 79, which focuses on operating (that is, goods-producing) government corporations. Masback provides an extensive discussion of the idea of the quango in connection with the NEA. See Masback, *supra*, at 185-88.

153. This is clearer in Great Britain, where the term "government" typically refers to the Prime Minister and Cabinet, who govern through lower-level officials for whose decisions Cabinet members have personal responsibility.

154. See, e.g., 15 U.S.C. § 41 (1994) (regarding the Federal Trade Commission).

to be agencies making general policy decisions in areas where specialization is important. Third, sometimes the government delegates its power to truly nongovernmental, entirely autonomous bodies.<sup>155</sup>

Quangos might be thought of as a fourth device for exercising government power.<sup>156</sup> The key feature of the quango is its quasi-autonomy. Its decisionmakers, appointed by political officials,<sup>157</sup> respond not only to ordinary political concerns and the special policy issues associated with their areas of expertise, but also to professional norms that arise from and are supported by social structures outside the government.<sup>158</sup> For example, history departments in state universities may be sensitive to the concerns of the state legislature, but they are also—and probably are more—responsive to the norms of the historical and academic professions.<sup>159</sup> Public librarians see themselves as professionals in providing information services; library boards may see themselves as more responsive to the public the library serves. An official British publication describes the purposes of quangos as including “distancing activities from direct ministerial responsibility in order to demonstrate the independence of judgements” and “involving outside interests in a representative capacity . . . in executive responsibility for decisions.”<sup>160</sup>

Quangos vary in the degree of their autonomy. The professionals who administer a quango’s program are sure to be more responsive to professional norms than the quango’s governing board. Board members will be appointed by political authorities, and the appointing officials may draw nominees from pools whose members have varying degrees of sympathy for the staff’s professional orientation. We should not be surprised to find, for example, that members of the NEA’s relatively apolitical advisory

155. Probably the most significant example in the United States is the self-regulation of the stock exchanges. For a description, see Marianne K. Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N.C. L. REV. 475, 475-87 (1984).

156. See Ian Harden, *A Constitution for Quangos?*, 1987 PUB. L. 27, 27 (the “original connotation” of *quango* was “as one element for a fourfold classification of organisations into government, quasi-government, quasi-non-government and non-government”).

157. For a somewhat defensive description of the appointment process in Great Britain, written by a member of Parliament who served as Chancellor of the Duchy of Lancaster, see David Hunt, *Worthwhile Bodies*, in THE QUANGO DEBATE, *supra* note 151, at 14, 19-22. But see John Stewart, *Appointed Boards and Local Government*, in *id.* at 48, 51-54 (criticizing that appointment process).

158. Cf. Paul Hirst, *Quangos and Democratic Government*, 48 PARLIAMENTARY AFF. 341, 349 (1995) (referring to “the common presence of like-minded personnel” in the institutions of “the major public but non-state bodies” with which the government dealt at “arms’ length” before the rise of the quango).

159. See Frederick Schauer, *The Ontology of Censorship*, in CENSORSHIP AND SILENCING, *supra* note 135, at 147, 162 (asserting that the case of academic freedom suggests that “professional competence (or, more skeptically, guild prerogative) rather than censorship” is at issue in these controversies).

160. NON-DEPARTMENTAL PUBLIC BODIES: A GUIDE FOR DEPARTMENTS 4-5 (2d ed. 1985), *quoted in* Harden, *supra* note 156, at 30.

council are more sympathetic to the concerns of the arts community than more purely political appointees to state university boards of regents are to the concerns of the academic community.<sup>161</sup> Autonomy is affected as well by the degree to which a quango is subjected to legislative oversight and the degree to which oversight committees think it appropriate to delve into the details of decisions taken by the quango with primary reference to professional norms. For example, some legislators will be more deferential than others to the NEA's judgments about which projects have artistic merit.

Oversight is connected to another element of autonomy. Quangos vary in the ways in which they are authorized and funded by the government. A quango that has a short authorization of three years is less autonomous than one authorized for five years,<sup>162</sup> and both are less autonomous than a state university that is not subject to any sunset provision at all. Further, quangos funded almost entirely by annual appropriations are less autonomous than ones receiving substantial funding from sales of products, as universities do in charging tuition and public broadcasting may through licensing products and annual fund-raising drives. These funding variations define different ways in which quangos are accountable. The appropriations process makes the quango accountable to the public understood in one way—the electorate speaking through its representatives. In that process, a certain kind of public-oriented deliberation may take place, as representatives and interest groups articulate the grounds for support and criticism. Fiscal support through fees and sales makes the quango accountable to the public understood in a different way—the consuming public speaking through its purchases. In that process, a different kind of deliberation takes place, as consumers choose between purchasing a good from the quango and purchasing on the private market.<sup>163</sup>

The issue of accountability introduces a final matter of greatest importance here.<sup>164</sup> Legislative oversight hearings provide one way of

---

161. Cf. Masback, *supra* note 152, at 183 (noting the argument that “public citizens would be members of NEA advisory bodies, thereby providing a significant buffer against government meddling”).

162. See *id.* at 179-80 (asserting that the “combination of limited authorizations and annual appropriations hearings guarantees congressional scrutiny of the NEA on a regular basis, too much scrutiny for the organization to be characterized by either *program independence*, . . . *process independence*, . . . or *fiscal independence*”); cf. *id.* at 190-92 (describing NEA oversight mechanisms).

163. Cf. Hirst, *supra* note 158, at 358 (critically noting that “[q]uangos are a means of farming out government functions based on . . . the belief that [the public is] best left as passive consumers”); Stewart, *supra* note 157, at 58-59 (describing and criticizing a Conservative minister's argument that “accountability has been strengthened by making public services responsive to consumers”).

164. British discussions of quangos have focused on the extent to which the quangos' *lack* of accountability is troubling in a system of parliamentary supremacy and ministerial responsibility. See, e.g., Drewry, *supra* note 151, at 387-88; Hirst, *supra* note 158; Stewart, *supra* note 157, at

assessing the merits of what a government agency has done. They are, in short, a form of substantive review of agency performance. Judicial review is another form of substantive review. The insight suggested by the identification of quangos as a fourth form of governance is that perhaps we could subject decisions by quangos to a different level of judicial review than we do decisions by less autonomous agencies. With respect to some constitutional guarantees, and in particular the First Amendment, their lesser degree of accountability to directly representative officials actually justifies a lesser degree of judicial scrutiny of their decisions.<sup>165</sup>

Randall Bezanson's recent discussion carefully lays out the argument.<sup>166</sup> He notes that arts funding decisions, library acquisition decisions, and tenure decisions all rely on criteria that would be "foreclosed" in general to courts.<sup>167</sup> But, he points out, they are all made "within a specialized professional culture, a culture that serves to assure expertness and experience," and "a defined and common procedure exists by which the professional judgment . . . is made."<sup>168</sup> Deferential review of these decisions gives "part of government" acting "pursuant to fairly circumscribed conventions and procedures" the authority to make judgments that would be troubling if made by legislatures or even courts.<sup>169</sup> Bezanson says that such deference is "a product of necessity" because "[i]f the government can and must [make such decisions], they must be undertaken with the creative freedom and pursuant to the qualitative criteria that would mark choices made by private institutions."<sup>170</sup>

Bezanson's analysis does not quite get to the ultimate conclusion. It explains why deference may be a necessity, but not why the courts would not be routinely upholding practices that threaten First Amendment values. To develop such an explanation, we should consider one rationale for stringent judicial review in the area of free speech: We are concerned that political actors, concerned about preserving their own position, would make decisions that skew public debate and understanding in a direction that

---

54-55 (noting explicitly the connection between the problem of quango accountability and the system of ministerial responsibility); Stuart Weir, *Quangos: Questions of Democratic Accountability*, in THE QUANGO DEBATE, *supra* note 151, at 128-44; *see also* Masback, *supra* note 152, at 188 ("There is an inevitable tension between the values of independence and the values of accountability in a quasi-governmental body.").

165. This is a procedural approach that works on a more general level than the ones examined in the preceding section. *See* Masback, *supra* note 152, at 184 (defining *process independence* with reference to an agency's "organizational scheme, the frequency and degree of congressional oversight, and the extent to which congressional or executive *program* directives restrict agency freedom").

166. *See* Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 375-79 (1998).

167. *Id.* at 377.

168. *Id.* at 377, 378.

169. *Id.* at 378.

170. *Id.* at 379.

favors the “ins” against the “outs.”<sup>171</sup> A quango’s quasi-autonomy might reduce that concern somewhat. The quango’s decision would be less influenced by these sorts of political concerns than would decisions by political actors and so would be less likely to skew public debate and understanding in this particularly troubling way.

The idea that decisions made by quangos are constitutionally distinctive helps organize some themes that are scattered through the cases and commentary and resonates with broader themes in a few modern Supreme Court decisions. For example, it helps explain the relevance of the Court’s factual descriptions of the AETC board’s membership and the board’s decision “[t]o insulate its programming decisions from political pressure” by hiring a professional staff and adopting “Principles of Editorial Integrity” that invoke professional journalistic standards.<sup>172</sup> It gives us some reason to support a common intuition that decisions made by city councils are somehow different from decisions made by librarians.<sup>173</sup>

The limits of the argument about quangos should be clear. To say that decisions made by quangos should be subject to only a loose form of judicial review because quangos are relatively insulated from ordinary political pressures and operate according to professional norms leaves a large number of questions open. How insulated must quangos be? The governing boards of public universities are not entirely apolitical, and a governor who stays in office long enough is likely to have appointed all the members of one or more such boards. They may be unable to carry out extraordinarily gross political actions because they are constrained by traditions of academic freedom that will be asserted against them by faculties and newspaper editorialists; governing boards may, however, be able to discriminate on the basis of politics in a way that remains

---

171. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105-06, 111-12 (1980).

172. *Forbes*, 118 S. Ct. at 1637.

173. The argument made here about quangos is connected to the perhaps still-born idea of what Laurence Tribe called structural due process. See Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 269 (1975). In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976), the Court invalidated a regulation adopted by the federal Civil Service Commission that barred aliens from most federal civil service jobs. The Court assumed that such a ban would be constitutional if it had been adopted by Congress or the President. *Id.* But the Civil Service Commission was supposed to be concerned with technical questions about the federal bureaucracy’s efficient operation, not with wide-ranging foreign policy issues. *Id.* at 114. The Court thereby recognized that an agency’s bureaucratic mission bears on the constitutionality of what it does. Similarly, in *Regents of the University of California v. Bakke*, one reason Justice Lewis Powell gave for refusing to allow the University of California to justify its affirmative action program as a remedy for general societal discrimination was that the University’s mission was education, not legislative policy of that sort. See 438 U.S. 265, 309 (1978) (opinion of Powell, J.). Structural due process generalized from these cases constitutional principles connecting varying substantive standards and standards of review to the decisionmaking structures from which these decisions issued. The special role that the preceding argument accords quangos can be understood as a component of such a theory.

normatively troubling. Similarly, the degree to which a quango is subject to regular and, perhaps, aggressive, legislative oversight, as well as the degree to which it depends on annual appropriations, appropriations for a longer term, and self-financing through fund-raising and sales all will affect the degree to which it will be free from overtly political control.<sup>174</sup> And these considerations have enough subjectivity to them to suggest that distinguishing between those quango actions that are subject to low-level judicial scrutiny only, and those that trigger more intensive scrutiny will often be fairly difficult.<sup>175</sup>

In addition, *Forbes* shows that professional norms are themselves limited in ways that might be troubling.<sup>176</sup> *Forbes* was excluded from the debate because of judgments made by the public broadcasting system's professional staff, acting after consulting the state bureau chief of the Associated Press. We can assume that the staff was accurately applying norms common in the profession of journalism. Justice Stevens's dissent brought out facts suggesting that those norms were themselves too limited. According to journalistic norms, *any* candidate nominated by either the Democratic or Republican Party is by that fact alone a serious candidate, even though the candidate may have no greater chance than *Forbes* of winning the election (and less chance than *Forbes* of influencing its outcome).<sup>177</sup> Journalists, that is, are committed to the two-party system. The idea of the quango helps explain why decisions by quangos that skew public debate need not be as troubling as decisions by clearly political bodies: The quangos' composition and orientation ought not lead them to tilt public understanding in favor of the political "ins" or against the political "outs." But *Forbes* shows that this may not be so; there, professional norms converged with the interests of the "ins" against the "outs." Some quangos operate in ways that stabilize the status quo, and one might find the limitations on speech that result when professionals apply their norms at least as troubling as those that emerge when politicians act for partisan advantage.<sup>178</sup>

---

174. See Masback, *supra* note 152, at 197-204 (advocating structural changes in the NEA to ensure greater autonomy in the service of artistic freedom).

175. It recalls, for example, the difficulties the Canadian courts have had in explaining why their doctrine distinguishes between universities and community colleges. See *supra* note 79.

176. See also Schauer, *supra* note 159, at 151, 161 (describing decisionmaking by librarians and curators as a form of censorship).

177. See *supra* notes 138-141 and accompanying text (describing Justice Stevens's account of the facts in *Forbes*).

178. See Schauer, *supra* note 159, at 162-63 ("In the context of funding for the arts, the question is whether the judgments of artistic peers, themselves infused with the politics of art as well as the judgments of professionals, should be preferred to the judgments of public officials . . ."). In the particular context of *Forbes*, I should note that the Supreme Court is committed to the two-party system too, which makes it unlikely that it would act in a sustained way to support that system's challengers. The Court found the state's interest in supporting the two-party system to be a sufficient justification for a restriction on speech in *Timmons v. Twin*

Several broader concerns deserve mention as well.<sup>179</sup> First, the idea that quangos' decisions can be given low-level scrutiny rests on an account of free speech theory in which the central concern is to avoid the skewing of political debate by decisionmakers driven by political considerations. There are, of course, other free speech theories, as to which the fact that a condition is imposed or administered by a quango is irrelevant: The source of the condition does not matter, for example, if one's free speech theory makes autonomous decisionmaking by citizens (including candidates and artists) central or if it takes maximizing the opportunities for speech as its goal.<sup>180</sup>

Second, the approach I have proposed for quangos might work when rules issued by quangos are challenged. Suppose, however, that the rule in question was adopted by a legislature, as in *Finley*.<sup>181</sup> We might treat the NEA as a quango, using panels of experts in artistic excellence to make decisions about awards, and then would invoke low-level review had it decided to take general standards of decency into account. But what of Congress's decision?<sup>182</sup> We might say that Congress, having established a quango, must let it operate according to its own norms, subject only to the sort of retrospective political control that occurs through legislative oversight hearings, the appropriations process, and the process of nominating and confirming the NEA's head. Or we might apply full-fledged judicial review to Congress's action.<sup>183</sup> The approach I have outlined gives no leverage on the choice between those options.<sup>184</sup> Finally,

*Cities Area New Party*, 520 U.S. 351, 369-70 (1997). For discussions of the Court's recent decisions endorsing the two-party system, see Richard L. Hasen, *Entrenching the Duopoly: Why The Supreme Court Should Not Allow the States To Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331; and Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

179. Nothing in what I have said is a defense of quangos, whose operations often raise troubling questions about democratic legitimacy and responsiveness. Rather, my argument is conditional: If a quango exists, its insulation from direct political control provides a reason for adopting a less demanding standard of First Amendment justification for its actions.

180. Those theories have their own problems, of course. For example, reconciling a theory centering on maximizing the opportunities for speech with the state action doctrine is not an easy task.

181. See *NEA v. Finley*, 118 S. Ct. 2168, 2170-71 (1998).

182. See Masback, *supra* note 152, at 184 (noting that legislative program directives can restrict a quango's autonomy).

183. For an argument suggesting that Congress *must* use quangos, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992).

184. See Schauer, *supra* note 80, at 97 n.70 (noting this point). It might provide some modest support for the Court's resolution of *Finley*. The majority interpreted the "standards of decency and respect" provision to do no more (and perhaps less) than identify for NEA panels some matters they ought to take into account in making awards, without prescribing the weight to be given to those standards in any particular decision. This interpretation makes the provision an extremely modest alteration of the NEA's autonomy.

In addition, the approach I have sketched might help resolve the vagueness puzzle in *Finley*. The Ninth Circuit had held the provision unconstitutional because it was vague. See *Finley v.*

the possibility of barring Congress from regulating a quango's decisionmaking processes once it creates one raises the most general concern about the approach I have described. The rule I have proposed is that governments that create quangos must allow them to operate fairly autonomously so that their boards and panels can apply professional standards or else accept substantive review of the quangos' decisions. But what in the Constitution gives this special status to quangos?<sup>185</sup> In the areas of concern here, the Constitution may impose substantive limits on what government may do, but it does not appear in any obvious way to prescribe the decisionmaker who must make particular decisions.<sup>186</sup>

The concept of the quango, drawn from the ways in which theorists have tried to understand constitutional experience elsewhere, provides some illumination of the selective funding problem by drawing together the themes of professionalism, objectivity, and political limits that already appear in U.S. law. But, it should be clear, it does so only because we already know a great deal about the problem from analyses cast solely in domestic terms.<sup>187</sup> I turn next to more general concerns about functionalism and argue that functionalist efforts to learn from constitutional experience elsewhere may run up against such severe constraints that they may contribute even less to constitutional interpretation than the preceding analysis suggests.

---

NEA, 100 F.3d 671, 680-81 (9th Cir. 1996). The Court rejected that conclusion in part because the provision was no more vague than the unchallenged directive that awards be made on the basis of artistic excellence and merit. See *Finley*, 118 S. Ct. at 2179-80. It could be, however, that the standard for determining whether a criterion is unconstitutionally vague should vary depending on whether it is a criterion going to the core values of the profession of the administrators of the quango that applies it. So, for example, the NEA could apply the standard *artistic excellence*, and university boards could apply the standard *academic merit*, but neither could apply a "decency" standard, because determining what is decent and what indecent lies outside their areas of professional expertise. (It should be clear that this suggestion is subject to a fair amount of pressure around its edges.)

185. In terms used earlier, the Constitution may not provide any license for making "quango" a constitutionally relevant concept. The theory of structural due process foundered on a similar problem: Where in the Constitution can the Court find authority for prescribing the decisionmaking *processes* of legislatures and executive agencies? This is particularly true in a case like *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), where the theory of structural due process required the Supreme Court to prescribe decisionmaking processes for state governments, in the face of a constitutional text whose only relevant provision appears to be the Guarantee Clause, U.S. CONST. art. IV, § 4.

186. The Constitution does, of course, prescribe decisionmaking structures in creating a separation-of-powers system. These prescriptions, however, implicate general categories of decisions (for example, is some exercise of public power an instance of legislation or of the execution of the laws?) rather than the content of any decision. In addition, these prescriptions involve the national government. The problem I describe in the text is most acute in a case like *Bakke*, 438 U.S. at 309, where Justice Powell appeared to impose limits on how the people of California could allocate decisionmaking power among their institutions. The constitutional warrant for such a prescription is quite obscure.

187. That is, the contribution of comparative constitutional law is marginal. But so are all increments to knowledge.

## B. *Critiques of Functionalism*

Montesquieu observed that “the political and civil laws of each nation . . . 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>188</sup> This comes close to an express statement that one constitutional system cannot learn from another. To do so, one people would have to rely on the experiences that were “appropriate to” another—and were at least presumptively inappropriate to themselves. We can understand this claim as an internal critique of functionalism. Every society’s law is tied to so many aspects of that society—its politics, its particular history, its intellectual life, the institutional forms in which its activities are conducted, and many more—that no functionalist account can identify and take into account all the variables that might affect the degree to which participants in one system can learn from the experience in others.<sup>189</sup>

The critique of functionalism that emerges from these observations comes in two versions. The first is that functionalist analysis *always* omits some relevant variables; the second is that once even a limited number of additional variables are taken into account, the number of cases from which one might actually learn turns out to be too small to support any functionalist generalization.

Bruce Ackerman’s essay on world constitutionalism provides a useful illustration. Ackerman at least occasionally describes his work in functionalist terms.<sup>190</sup> Ackerman’s short essay proposes two basic scenarios for the transition to constitutionalism. The first describes a process through which a treaty-based relationship among relatively independent states becomes a constitution for a relatively unitary state; the second involves a reasonably self-conscious effort on the part of constitution-designers to set an existing nation-state on a new course. As it turns out, however, each of these processes comes in contradictory variants. Not only can a group of states transform a treaty relationship into a constitutional one, but a constitution can become a treaty.<sup>191</sup> Presumably, a treaty can remain a treaty, although Ackerman does not describe this case. A functionalist might want to try to figure out *when* each scenario occurs, explaining the conditions for its realization. But, as Ackerman recognizes, this is impossible. The treaty-to-federation scenario is constructed on the basis of

---

188. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

189. I refrain from an extended discussion of a different critique of functionalism. According to that critique, functionalist analysis depends on securing agreement that different systems seek to perform similar or identical functions, albeit with different institutions.

190. See Ackerman, *supra* note 6, at 789 (referring to “functional reasons” and a “functional need for a relatively impartial judge to coordinate the on-going institutional interaction”).

191. See *id.* at 775-78.

one-and-a-half cases: the United States and the apparently emerging relation between the post-Communist regimes in eastern and central Europe and the (emerging) European federation. The federation-to-treaty scenario is based on a single case, Canada.<sup>192</sup> It is hard to see exactly what sort of functionalism is really at work here.

Claus Offe's analysis of the transitions in eastern Europe and East Germany provides another example of the difficulty.<sup>193</sup> Offe, a German sociologist, begins by classifying the transitional nations into three groups, each containing two nations. So, for example, Czechoslovakia and East Germany went through short transitions, while Hungary and Poland underwent long ones, and Bulgaria and Romania underwent very short ones.<sup>194</sup> The latter two nations were "remote from Western Europe," while the first group were "front-line states."<sup>195</sup> Offe lists seventeen characteristics that distinguish the three groups.<sup>196</sup> Then, after introducing and defending this typology, Offe argues against it: "[I]nstead of the straightforward '2-2-2' grouping . . . , we should opt for a '1-5' division according to which [East Germany] is a clearly emphasized exceptional case."<sup>197</sup> Offe establishes East Germany's exceptional status by examining in some detail the precise "starting conditions, course and results of the upheaval" in East Germany.<sup>198</sup> These details identify a large number of omitted variables, demonstrating that even a list of seventeen characteristics cannot capture the constitutional experience of a group of nations. The omitted-variables critique suggests that Hungarian or Romanian or Polish scholars could present evidence at a similar level of detail to show that the transitions in their nations were as exceptional as the East German one.

Clearly one cannot develop functional generalizations from these instances. As Ackerman puts it, "the number of variables [is] much too large."<sup>199</sup> In the end, Ackerman says that "[t]here is no way out but an

---

192. *See id.* at 777. The same problem of limited numbers infects Ackerman's account of the "new beginnings" scenario. Here, too, it turns out that the scenario comes in contradictory forms. One version is "the triumphalist scenario," *see id.* at 782, which has, according to Ackerman, "a five-stage dynamic," *see id.*, which starts with a mass mobilization centered on a party led by a charismatic leader who, however, rejects party rule after a constitution is created and instead seeks to transfer the leader's and the party's charisma to the constitution itself, *see id.* at 782-83. For this scenario, Ackerman has a few more cases: India, France, and—he hopes—South Africa. *See id.* at 782-84. But there are also failures, such as Poland and Czechoslovakia, *see id.* at 784, and ambiguous cases, such as Mexico and perhaps contemporary Russia, *see id.* at 785-87.

193. *See* CLAUS OFFE, *VARIETIES OF TRANSITION: THE EAST EUROPEAN AND EAST GERMAN EXPERIENCE* 131-61 (1996).

194. *See id.* at 139 tbl.7.1.

195. *Id.*

196. *See id.* The list is qualified by eight footnotes indicating some inaccuracies in classification for some periods.

197. *Id.* at 144.

198. *Id.* at 159.

199. Ackerman, *supra* note 6, at 775.

appeal to old-fashioned insight.”<sup>200</sup> It is entirely unclear how a U.S. constitutionalist could learn anything about U.S. constitutionalism from the distinctive cases Ackerman has assembled. In reality, all he has done is attach functionalist labels to different cases; functionalism, however, is not doing much analytic work when there is a different label for each case. Insight, as a method, can be productive when it is backed up by a theory that strips away case-specific peculiarities and produces generalized explanations or predictions from something less than everything one could know about each individual case. To do so, however, one needs a theoretical account of why the omitted variables are irrelevant. The critique of functionalism asserts that functionalist analysts have rarely produced such an account. Further, the critique claims, we must therefore build into our functionalist analyses all variables we have no reason to omit, but when we do so the number of cases becomes entirely too small to be useful.<sup>201</sup>

The difficulty of learning when the number of cases available for comparison is small would seem to weaken the argument made earlier about quangos, which relied on experience in England and some Western European nations, surely a small number of cases.<sup>202</sup> Inferences from small numbers are possible, however, if they are supplemented by a theoretical account that provides reasons for thinking that particular cases exemplify more general social tendencies. The argument that follows offers such an account.<sup>203</sup>

We can begin to see the structure of the argument by considering whether quangos exemplify more general forms of constitutional development. Why do quangos emerge as a new form of governance? The British legal academic and sociologist Paul Hirst places the rise of quangos in historical perspective.<sup>204</sup> He identifies two trends. The first is the extension of suffrage to the point where democratic regimes are characterized by nearly universal suffrage. The second is economic development, and particularly the increasing complexity of national economies. The democratic electorate places increasing demands on representative government, seeking to have it deal with the consequences of economic development. But, Hirst argues, these demands have come to outstrip the governing capacity of classical representative institutions such

---

200. *Id.*

201. *Cf.* Glendon, *supra* note 15, at 531-32 (noting that including a large number of factors in a functional analysis produces “speculation [that] leads only to the sort of conclusions that make sociology so unsatisfying to many people”).

202. The inferences one can draw from the British developments, for example, would be limited if they are best understood in light of that country’s particular history (that is, in the current jargon, if what happened there is path-dependent).

203. I offer it without strongly endorsing its particulars and primarily to demonstrate the appropriate form of argument.

204. *See* Hirst, *supra* note 158, at 342-43.

as the legislature or, in Great Britain, the ministries.<sup>205</sup> Responding to these demands, governments develop novel governing mechanisms, including quangos.

Gunther Teubner, a German legal academic and sociologist, offers a parallel evolutionary account.<sup>206</sup> Although his account may be overly formal, Teubner makes an important contribution in identifying a new form of legal regulation appropriate to the new mechanisms of governance. He calls this new form *reflexive* law, in which the legal system “orients its norms and procedures to a theory of social autonomy and structural coupling.”<sup>207</sup> The legal system interacts with other social systems, including the arts community and professions such as journalism. Reflexive law is the method by which the legal system merges with those other systems. Teubner argues that one of the most important characteristics of reflexive law is the mutual “interference” between two interacting systems.<sup>208</sup> *Finley* provides an example.<sup>209</sup> Lawmakers believe that they are imposing their norms on the arts community, but because they are using a quango to administer their program, the arts community effectively asserts its norms to constrain what Congress may have sought to achieve.<sup>210</sup> As Teubner puts it, “What is gained, in terms of direct communicative contact, . . . has to be paid for with problems of motivation and information in the interfering worlds of meaning.”<sup>211</sup>

---

205. *See id.* at 347; *see also* Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in *BRINGING THE STATE BACK IN* 3, 9 (Peter B. Evans et al. eds., 1985) (defining “state capacity” as the ability of governments “to implement official goals, especially over the actual or potential opposition of powerful social groups”).

206. GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Zenon Benkowski ed. & Anne Bankowska & Ruth Adler trans., 1993), collects essays laying out Teubner’s general evolutionary approach. In what follows, I extract from Teubner’s work some themes that seem to me most relevant to the discussion here. I understand that in doing so I may be depriving Teubner’s work of the scientific character he seeks for it, but to my mind that is an improvement. *But cf.* Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 563-65 (summarizing and approving, with qualifications, Teubner’s approach).

207. TEUBNER, *supra* note 206, at 97. For a general discussion operating at roughly the same (lower) theoretical level as my account, *see* Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986).

208. *See* TEUBNER, *supra* note 206, at 90-91 (describing the phenomenon of interference).

209. Teubner cites two articles applying his approach to “constitutional issues of the freedom of art.” *Id.* at 123-24 (citing Leonie Breunung & Joachim Nocke, *Die Kunst als Rechtsbegriff oder wer definiert die Kunst?*, in *LITERATUR VOR DEM RICHTER: BEITRÄGE ZUR LITERATURFREIHEIT UND ZENSUR* 235 (1988), and Christoph Beat Graber, *Pecunia non olet, oder: Wer rettet die Kunst vor ihren Gönnern?*, 110 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 237 (1991)).

210. Teubner thereby accounts for the fact that the Supreme Court interpreted the statute at issue in *Finley* to do rather little to impose Congress’s prescribed norms on the arts community. For Teubner, the Court’s narrow interpretation of the statute is the legal system’s acknowledgment of the fact of normative interference when two systems interact.

211. TEUBNER, *supra* note 206, at 90. Again, I do not endorse the sociological framework implicit in Teubner’s precise choice of words.

A functionalist can respond to the “omitted variables” problem by offering a theoretical account explaining why the few variables she uses are in fact important. But, as my cautious comments on Hirst’s and Teubner’s accounts suggest, everything then depends on whether the theory is correct. The experience of social scientists who have tried to develop well-supported theories indicates that we might properly be rather skeptical about what we can truly learn when we think about constitutional experience elsewhere in functionalist terms.

### C. *Conclusion*

Functional analysis is possible when a few “case studies” are placed in a more general theoretical context. Then, of course, the theory rather than the case studies does the analytic work. Still, examining a few cases—comparing the U.S. with foreign experience—may alert us to some theories about which we might want to think, and the comparison may suggest that something that seems initially to be a purely local phenomenon, such as the persistent problem of figuring out what to do about selective subsidies, actually exemplifies some more general trends. This is not everything that a strong functionalist would claim for comparative analysis, but it is not nothing either.

The “omitted variables” critique of functionalism has prepared the way for a consideration of the expressivist approach to comparative constitutional law. As an analyst introduces one new variable after another, she comes close to treating each constitutional system as the unique expression of the particular values each variable takes on. In this sense, expressivism might not be different from a full-fledged functionalism, except that expressivism abandons the language of science in which functionalism is usually cloaked.

## IV. EXPRESSIVISM

### A. *Introduction*

The expressivist tradition in comparative legal analysis goes back a long way. For Hegel, a constitution is “the work of centuries, . . . the consciousness of rationality so far as that consciousness is developed in a particular nation.”<sup>212</sup> More recently, Mary Ann Glendon has vigorously

---

212. GEORG WILHELM FRIEDRICH HEGEL, HEGEL’S PHILOSOPHY OF RIGHT 286-87 (T.M. Knox trans., Oxford Univ. Press 1942) (1821).

promoted the idea that law “tells stories about the culture that helped to shape it and which it in turn helps to shape.”<sup>213</sup>

For the expressivist, constitutions emerge out of each nation’s distinctive history and express its distinctive character.<sup>214</sup> Here we should distinguish between constitutions with a small *c*, to which Montesquieu and Hegel referred, and documents like the U.S. Constitution.<sup>215</sup> The expressivist claim is plausible—perhaps even tautological—with respect to the former class. In contrast, nations vary widely in the degree to which their written constitutions are organically connected to the nation’s sense of itself. To return to Glendon’s formulation, perhaps small-*c* constitutions tell stories about their cultures and help shape them, but the degree to which large-*C* Constitutions shape cultures surely varies from nation to nation.

Pathological documents like those of the former Soviet Union aside, we still can see written constitutions that operate at a substantial remove from their nation’s character. The Indian Constitution, for example, has been reasonably vigorously enforced by India’s Supreme Court, some of whose decisions are articulate confrontations with the dilemmas posed by the efforts of the nation’s founders to design a secular and democratic constitution for a highly stratified and religiously pluralist society.<sup>216</sup> And

213. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8 (1987). Some aspects of expressivism develop out of, or are a form of, a critique of functionalism. See Kennedy, *supra* note 4, at 590 n.75 (describing Glendon as offering “the critique of functionalism in the name of a philosophical search for universal value and principle”).

214. For an example of the expressivist approach, see Glendon, *supra* note 15, at 524. Glendon asserts that differences between the rights given constitutional status in the United States and elsewhere “are legal manifestations of divergent, and deeply rooted, cultural attitudes toward the state and its functions.” *Id.* For a discussion of the idea that a nation can have a national character, see *infra* text accompanying notes 254-255.

215. Another qualification should be noted. Some nations may take openness to foreign influence as a dimension of their national character. For example, the South African Constitution directs that courts “may consider foreign law” “[w]hen interpreting the Bill of Rights.” S. AFR. CONST. § 39(1)(c). Seen expressively, this provision is a statement that South Africans view themselves as participants in a world-wide system seeking to implement fundamental rights that have a transnational (if not necessarily universal) character. In what follows, I assume that the U.S. Constitution does not express a similar national commitment to transnational legal norms. The Constitution authorizes Congress to “define . . . Offenses against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. Recent commentators have discussed the proposition that customary international law, which today includes some human rights norms, is part of those “Laws of the United States” that the Supremacy Clause makes “the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). To the extent that Congress exercises its power, or to the extent that customary international law is part of “the supreme Law of the Land,” the U.S. Constitution may be said to express a national commitment to learning from experience elsewhere. In my view, this version attenuates the expressivist argument so much that it would be unprofitable to explore it in detail here.

216. See, e.g., Ashabhai Patel v. Dabhi Fulsinji, (1965) 1 S.C.R. 712, 717-21 (India) (discussing differences between religion and myth in Indian political discourse). For a critical discussion of the Indian Supreme Court’s efforts to distinguish between religion and mere ceremony, see V.S. Rekhi, *Religion, Politics and Law in Contemporary India: Judicial Doctrine*

yet, because the Indian Supreme Court does not occupy a large space in the nation's political culture,<sup>217</sup> it seems inaccurate to suggest that the Indian Constitution as interpreted by the nation's Supreme Court expresses much about India.<sup>218</sup> Similarly, one would not expect to learn much about what it means to be French from reading the decisions of the French Constitutional Council.<sup>219</sup> In contrast, scholars seeking to describe the American character routinely refer to the Constitution and Supreme Court decisions.<sup>220</sup> Again invoking Glendon, we might say that the constitutions of some nations tell clearer stories about who those nations are, or that constitutions vary in the extent to which they shape the cultures in which they are located.

The expressivist claim about constitutional law might still matter for the purposes of this Article in spite of the skepticism I have suggested about its broadest version. One can plausibly contend that the United States lies at an extreme and that to be an American is to be attached to the principles of the written Constitution.<sup>221</sup> For the United States, then, the large-*C* Constitution does express our national character. This notion raises a difficult question: How can we learn from experience elsewhere as we try to interpret our Constitution, if that Constitution expresses *our* national character?

in *Critical Perspective*, in RELIGION AND LAW IN INDEPENDENT INDIA 179 (Robert D. Baird ed., 1993).

217. Carl Baar, writing in 1992, called the Indian Supreme Court "the world's most active judiciary," but he concluded that the Court had a limited impact. See Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, in COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 77, 77 (Donald W. Jackson & Neal C. Tate eds., 1992); see also CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 71, 80-81 (1998) (asserting that India's Supreme Court is "greatly revered among the educated classes," has "great popular support," and "clearly tried to spark a rights revolution—but little happened"); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 515 (1989) (asserting that Indian "formal legal arrangements exist in almost metaphysical isolation from social reality").

218. The decisions may of course illustrate the positions taken by members of particular segments of Indian society, but that seems different from providing support for the expressivist claim.

219. For excerpts from some important decisions by the Constitutional Council involving fundamental rights, see JOHN BELL, FRENCH CONSTITUTIONAL LAW 308-55 (1992). I should qualify my claim by noting that the Constitutional Council has held that French law must conform to the "fundamental principles recognized by the laws of the Republic." Cons. const., July 16, 1971, D. 1972, Jur. 685, reprinted and translated in *id.* at 272-73. Over time decisions identifying such principles might come to define a distinctively French national character.

220. For two recent examples of "culture criticism" that rely on U.S. constitutional law for important points, see ANNE NORTON, REPUBLIC OF SIGNS: LIBERAL THEORY AND AMERICAN POPULAR CULTURE (1993); and MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996).

221. See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181-82, 188-93 (1999) (defending this proposition, in part by confining the commitment to the "thin" Constitution defined by the principles of the Declaration of Independence and the Constitution's Preamble, as distinguished from the "thick" Constitution containing detailed prescriptions for organizing the national government).

We can see the difficulty by noting that the Irish Supreme Court has issued numerous decisions interpreting fundamental guarantees of human rights. Consider the Irish Constitution's Preamble:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice, and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.<sup>222</sup>

This statement is extremely rich. Its express reference to individual freedom and dignity is an attractive way of making a point about the purpose of constitutional guarantees of human rights. One might think a U.S. court could refer to it in defending a particular view of the First Amendment. On a more theoretical level, the statement that the people "give to ourselves" the Constitution suggests a relation between a constitution's framers and ratifiers on the one hand and their successors on the other: We today might be induced to take the constitution seriously when we understand that it was "given" to us by "our fathers," who struggled for our benefit, as fathers do, in the Preamble's vision.

---

222. IR. CONST. preamble. The referendum held to ratify the Good Friday Accords added the following provision to the Constitution, elaborating on the concept of national unity expressed in the Preamble, which was not amended:

It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

Agreement Reached in the Multi-Party Negotiations, Constitutional Issues, Annex B, Art. 3, 37 I.L.M. 751, 755 (1998).

Yet these phrases come with others from which they cannot be separated. The Preamble refers to the particular struggle for Ireland's independence, for example, and it is easily imaginable that specific constitutional interpretations will flow from the particular historical experience from which the Constitution emerged. Germany's Constitutional Court referred explicitly to the nation's experience during the Hitler era as a reason supporting its decision to restrict the German legislature's power to permit abortions.<sup>223</sup> A nation that did not have the experience of having to live with the knowledge that its people put Hitler in place might not be in a position to learn much from the German abortion decisions.<sup>224</sup>

Even more obvious is the Catholic commitment expressed in the Preamble of Ireland's Constitution. One might find the references to "Prudence, Justice, and Charity" attractive, but they too can only be understood within the framework of Catholic thought about the social and political order. To see why the Irish Constitution's expression of a distinctively Irish (and therefore Catholic) national character limits what someone outside Ireland can learn from the Irish constitutional experience, consider how the Irish High Court addressed the claim that water fluoridation violated individual rights and the rights of families to control their children's upbringing.<sup>225</sup> The Constitution enumerates some rights, prefacing them with the words *in particular*. One issue in the fluoridation case was whether the courts could enforce unenumerated constitutional rights. In a widely cited analysis, Judge John Kenny agreed that they could. As he saw it, the Irish Constitution conferred a personal "right to bodily integrity"<sup>226</sup> because it "include[d] all those rights which result from the Christian and democratic nature of the State."<sup>227</sup> The conclusion that there was a right to bodily integrity, Judge Kenny wrote, "gets support from a passage in the Encyclical Letter, 'Peace on Earth.'"<sup>228</sup>

The question of constitutional protection for unenumerated rights is, of course, a familiar one in U.S. constitutional law. But one would be hard-pressed to say that in deciding that question the U.S. courts should learn from the Irish experience considered in expressivist terms.<sup>229</sup> Precisely

---

223. See *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 JOHN MARSHALL J. PRAC. & PROC. 605, 637-38 (Robert E. Jonas & John D. Gorby trans., 1978).

224. For a contrary view that stresses Germany's social democratic traditions and the parallel tradition drawn from the social teachings of the Catholic Church, rather than the experience of the Holocaust, see GLENDON, *supra* note 213, at 26-27.

225. See *Ryan v. Attorney Gen.* [1965] I.R. 294 (Ir.).

226. *Id.* at 313.

227. *Id.* at 312.

228. *Id.* at 314.

229. One might learn from the Irish experience in some ways. For example, the experience might be used to counter claims that courts that enforce unenumerated rights tend to lose legitimacy in the public's eyes (if this empirical claim is supported by evidence). In my view, however, this amounts to a functionalist reliance on experience elsewhere.

because Judge Kenny defended his conclusion by referring explicitly to the Christian character of Irish constitutionalism, U.S. courts would have to put his analysis to one side as implicating considerations that are quite problematic, if not entirely impermissible, as a matter of constitutional law in a nation whose Constitution includes the Establishment Clause.<sup>230</sup>

In light of these difficulties, how might an expressivist argue that U.S. constitutionalists can learn about interpreting our Constitution by examining constitutional experience elsewhere? I next examine some aspects of discussions of hate speech regulation to show how the skepticism described here might be weakened.

### B. *Expressivism and the Controversy over the Constitutionality of Hate Speech Regulation*

Mari Matsuda's widely-cited article on racist speech contains a section on the treatment of hate speech in international law, which for Matsuda includes its treatment in the domestic law of foreign nations.<sup>231</sup> She points out that the United States is "alone among the major common-law jurisdictions in its complete tolerance of [hate] speech."<sup>232</sup> Matsuda's critics sometimes rely on experience elsewhere as well. Offering a functionalist critique, for example, Nadine Strossen concludes that "[h]istory teaches us that anti-hate speech laws regularly have been used to oppress racial and other minorities" because hate speech laws "inevitably" give enforcers substantial discretion, which is likely to be exercised against racial minorities.<sup>233</sup>

Functional arguments may, however, miss the point of expressivist uses of comparative constitutional law. Recall Glendon's idea that small-*c* constitutions tell stories about and help shape their societies. Sometimes

230. My formulation here is designed to bracket the highly controverted question of the degree to which lawmakers, including judges, can expressly advert to religious considerations in justifying the conclusions they draw. My view is that they can do so without violating any non-establishment norm, but that prudence generally cautions rather strongly against doing so. See TUSHNET, *supra* note 221, at 91-94. For the conclusion that, whatever is the case for legislators, judges should not advert to such considerations in their opinions (although they may rely on them in coming to their conclusions), see KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 239 (1988). Greenawalt states: "[O]pinions should not contain direct references to the religious premises of judges." *Id.*

231. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341-48 (1989). A survey in 1996 found that this article was then the most-cited article of those published in 1989. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 766 (1996). In what follows, I discuss only a small portion of the response to Matsuda's article.

232. Matsuda, *supra* note 231, at 2347-48.

233. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 556. Matsuda herself refers to such arguments. See Matsuda, *supra* note 231, at 2351-52.

discussions of comparative experience with the hate speech issue invoke this idea almost off-handedly. Susan Gellman, for example, notes that “[p]erhaps some of those European nations, with a long history of official toleration of ‘beyond speech’ hate crime such as pogroms, purges, and blood libel, feel they cannot afford a First Amendment as well as the United States can.”<sup>234</sup> More generally, Kent Greenawalt writes, “Any country’s dominant culture will place more or less emphasis on individuals or communities, and this will affect the kind of latitude the political branches and courts will afford to speech.”<sup>235</sup> He makes the temperate observation that the Canadian Supreme Court’s free speech “outlook is somewhat more centered on communities” than is the U.S. Supreme Court’s.<sup>236</sup>

I treat Robert Post’s exploration of the way in which constitutional law constructs the public domain of democracy against the background of an equally constructed private domain of civility as the best recent analysis of U.S. free speech law from an expressivist point of view.<sup>237</sup> Post’s premise is that constitutional law is among the social activities that define various domains of life, which means that understanding constitutional law is at least in part an exercise in cultural analysis.<sup>238</sup> Common law communicative torts, for example, identify and enforce community norms of civility, which themselves help define the domain of private life. And, according to Post, the existence of such a domain is a predicate for democratic self-governance. Democracy entails the possibility of endless self-revision of a community’s self-understandings. Its preservation therefore requires the existence of a private domain, which provides the location in which citizens can develop values that they might use in the political domain to challenge prevailing views. As Post presents the argument, the public domain of democracy must have some essential characteristics, independent of any cultural construction, whereas the private domain is constructed in part by

---

234. Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 392 n.230 (1991); see also Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 897-98 (1997) (connecting Germany’s willingness to subordinate expression rights to privacy interests to “the deep desire to protect the integrity of the human person, a lesson learned bitterly from the horrors of Naziism”).

235. KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 8-9 (1995). For a detailed study illustrating the point, see Eric Stein, *History Against Free Speech: The New German Law Against the “Auschwitz”—and Other—“Lies,”* 85 MICH. L. REV. 277 (1987).

236. GREENAWALT, *supra* note 235, at 27.

237. See POST, *supra* note 112. This is a severe simplification and, to some extent, distortion of Post’s subtle work, which attempts to develop an account that is simultaneously expressivist and normative. I have my doubts about the possibility of doing so, but I acknowledge that my discussion of Post’s work truncates it.

238. On the limited contribution of law to the construction of norms, see, for example, *id.* at 65. Post notes, “[T]he common law can maintain only a small subset of these norms. The law itself claims to enforce only the most important of them . . .” *Id.*

norms of civility that express a particular community's self-understanding. In Post's terms, "these [civility] rules . . . define the very community that . . . [a person] inhabits."<sup>239</sup>

Post is, of course, acutely aware that this identifies a deep paradox: Public authorities, acting through law and expressing the community's values, help construct the private domain from which challenges to the community's values, sometimes expressed through law, are to be launched.<sup>240</sup> The cultural analysis that Post relies on allows him to say that U.S. constitutional law addresses this paradox, though it does not resolve it, by insisting on a vision—resting on an interpretation of the U.S. community's deepest values—of a highly individualist First Amendment. As Post puts it in criticizing as "collectivist" Alexander Meiklejohn's view that free speech is valuable because it contributes to the development of public policy, "Traditional First Amendment jurisprudence uses the ideal of autonomy to insulate the processes of collective self-determination . . ." <sup>241</sup> It is significant for Post's analysis that he refers to "tradition" and "First Amendment jurisprudence," locating his analysis in the specific United States context, rather than "principles of free speech," a phrase looking more globally or philosophically.

Post deploys this argument in his analysis of the U.S. Supreme Court's decision in *Hustler Magazine v. Falwell*,<sup>242</sup> which imposed severe restrictions on the ability of a public figure to recover damages from a publisher who intentionally inflicted emotional damage on him.<sup>243</sup> Post explains, and to some degree defends, the result in *Falwell* on the ground that the nation's commitment to a particular kind of free speech culture precludes the community from attempting to extend its definition of civil discourse into the public domain.<sup>244</sup>

What sort of culture is constituted by U.S. free speech law? One of the most celebrated versions is Justice William Brennan's description in *New York Times v. Sullivan* of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>245</sup> We can juxtapose this description to the statement in *Chaplinsky v. New Hampshire*,<sup>246</sup> defining fighting words as "those which by their very

239. *Id.* at 56.

240. Frank Michelman explores the paradox with his usual care. See Frank I. Michelman, *Must Constitutional Democracy Be "Responsive"?*, 107 *ETHICS* 706 (1997) (reviewing POST, *supra* note 112).

241. POST, *supra* note 112, at 278.

242. 485 U.S. 46 (1988).

243. See *id.* at 57.

244. See POST, *supra* note 112, at 174-78.

245. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

246. 315 U.S. 568 (1942).

utterance . . . tend to incite an immediate breach of the peace.”<sup>247</sup> Feminists and critical race theorists have pointed out that this definition implicitly invokes a male standard, calling up the image of a man who will swing out at a person who utters fighting words to him.<sup>248</sup> One might adapt a phrase from Harry Kalven to assert that the nation is committed to an equally worthy and profound tradition that debate should be nuanced, careful, and respectful.<sup>249</sup> Or, using Post’s framework, one could suggest that cases like *Falwell* and issues like the regulation of hate speech provide the opportunity for the United States to reconsider, and possibly to redefine, the boundaries it has heretofore drawn between the public domain of democracy, over which the community should have no control, and the private domain of civility, which is defined by the community.<sup>250</sup>

Matsuda might then be taken to be arguing for revitalizing the tradition or for a revision of our cultural self-understandings.<sup>251</sup> The argument would have two components. Against those who would characterize our national commitment as univalent, it points out that the nation may have always been committed to free speech considered abstractly but that the meaning of free speech has always been contested. There is no single profound national commitment to a well-specified free speech principle, only a history of repeated confrontations over—or, to use less male-identified terms, repeated discussions of—the meaning of our national commitment to free speech.

Second, the argument would show the places in free speech law where alternative understandings of the meaning of free speech have actually become established. Matsuda describes doctrines providing what has come

---

247. *Id.* at 572.

248. See, e.g., Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 560-61 (1993) (“[T]he fighting words standard, as it has been interpreted thus far, is based upon a male stereotype; it presupposes an encounter between two persons of relatively equal power who have been socialized to respond to insults with violence.”); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 454 (“The fighting words doctrine is a paradigm based on a white male point of view.”).

249. See HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988). In a different work, Kalven described *New York Times v. Sullivan* as “an occasion for dancing in the streets.” Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (quoting and agreeing with Alexander Meiklejohn).

250. Cf. POST, *supra* note 112, at 14 (“The location of that boundary [between democracy and community] will no doubt be unstable and contestable.”). Although he does not focus directly on the possibilities for change in a community’s understandings of democracy and free speech, Lawrence Lessig provides a helpful critique of Post’s discussion of the possibility of change and the role law might play in it. See Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1455-65 (1996) (reviewing POST, *supra* note 112).

251. Cf. Jordan M. Steiker, “Post” Liberalism, 74 TEX. L. REV. 1059, 1073 (1996) (reviewing POST, *supra* note 112) (describing Post’s discussion of “recent, unsuccessful efforts to regulate pornography in the United States . . . as an attempt to break the hold of individualism in First Amendment jurisprudence”).

to be known as “low-value speech” with less protection than speech consisting of arguments about desirable national policy.<sup>252</sup> She identifies areas of free speech law where balancing competing interests replaces crisp categorical approaches.<sup>253</sup> In short, she sketches a *legal* argument supporting the constitutionality of her proposed hate speech regulations.

From an expressivist point of view, the significance of this legal argument lies in the way it connects to a particular—and, of course, contested—version of the nation’s commitment to free speech. Just as Germany’s ability to reconcile regulation of hate speech with principles of free expression derives from its particular history, so, the expressivist argues, the U.S. version of free speech expressed in Justice Brennan’s statement in *New York Times v. Sullivan* derives from a particular vision of U.S. history. Further, the way in which German law reconciles hate speech regulation with free speech principles helps constitute the German people in their constitutional aspect. And, similarly, U.S. free speech law helps constitute the people of the United States—perhaps even more so in the United States because of the central place that the U.S. Constitution has in the self-understanding of the American people. But, once we see that a people’s constitutional character is constituted in part by contestable and contested characterizations of constitutional requirements, we can then see Matsuda’s proposal as an effort to reconstitute the American people through an alternative version of constitutional law that is already available to us.

In reaching this point, I have redescribed the strongest version of the expressivist claim. In that version, constitutional law expresses a nation’s constitutional culture. And, in that version, the expressivist claim has a curiously old-fashioned ring. Among other things, it evokes historical scholarship of the 1950s and 1960s seeking to describe the American national character.<sup>254</sup> Even at the time, sophisticated historians knew that this scholarship was not really about *the* national character but about claims about the nature of that character made by historically-situated proponents of particular visions of the national character, claims that were contested at the moment that they were made.<sup>255</sup>

---

252. See Matsuda, *supra* note 231, at 2354. For the “low-value” characterization, see, for example, STONE ET AL., *supra* note 6, at 1196-97.

253. See Matsuda, *supra* note 231, at 2355.

254. Probably the most influential study was DAVID M. POTTER, *PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER* (1954). Another important study identified differences between the Northern and Southern characters. See WILLIAM R. TAYLOR, *CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER* (1961).

255. For a study casting doubt on the claim that there is a distinctive Southern constitutional character, see James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 *TEX. L. REV.* 1219 (1998). I include this reference, among other reasons, because it shows how the study of constitutional history can provide many of the benefits claimed for the study of comparative

Emphasizing the contested nature of claims about national—and therefore about constitutional—culture is important in assessing the contributions that expressivists can make to constitutional understanding. Expressivism's strong version is troubling because it might make available a criticism of proposals like Matsuda's that they are inconsistent with the nation's constitutional character or culture. And, just as discussions of American character in the 1950s were inextricably linked to concerns over what was and what was not "un-American,"<sup>256</sup> so the strong expressivist claim might serve to heighten criticism of proposals like Matsuda's as anticonstitutional. The more tempered expressivist claim allows us to see such proposals differently. They are simply a modern version of a general phenomenon in constitutional culture. And, to the extent that they are truly challenging a dominant version of the constitutional culture, they seek to retrieve a subordinated version.<sup>257</sup>

Post acknowledges that a nation's self-understandings, which are expressed in constitutional law, are always contested. Indeed, that is his defense of what he describes as the U.S. form of democracy: It allows *any* vision of the nation to prevail in public discourse. And to preserve that possibility our democratic order cannot bar anything from public discussion.<sup>258</sup> Comparative constitutional law lets us see the precise nature of the cultural claim offered here. Lawrence Lessig's review of Post's book pointed out that Germany describes its constitutional law of free speech as committed to "militant democracy," which means that the law must be militant on behalf of democracy in order to suppress antidemocratic speech.<sup>259</sup> The German example is entirely consistent with the cultural dimension of Post's analysis. Germany's understanding of what democracy entails obviously emerged from the nation's experiences under Hitler and in confrontation with the Soviet bloc, but the mere fact that German constitutional law allows more substantial limits on free expression than U.S. constitutional law does not undermine the assertion that Germany is a

---

constitutional law. Cf. L.P. HARTLEY, *THE GO-BETWEEN* 9 (1953) ("The past is a foreign country: they do things differently there.").

256. For some indications of the connection, see PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 323 (1988) ("[F]rom 1948 onward, among historians as among other academics and intellectuals, there was . . . a rapid accommodation to the new postwar political culture."); *id.* at 333 ("['C]onsensus' became the key word in postwar attempts to produce a new interpretive framework for American history, focusing attention on what had united Americans . . ."). Novick does not, however, refer specifically to historians' work on the American character in these passages.

257. In postmodernist jargon, the subordinated tradition is a dangerous supplement to the dominant one.

258. More precisely, it cannot do so without having exceedingly strong reasons for believing that social harms other than a transformation of self-understanding are quite likely to occur if the speech is allowed to proceed unchecked.

259. Lessig, *supra* note 250, at 1463-64.

democracy—a different kind of democracy from the United States, but a democracy even so.

We might return here to the observation that comparative scholarship sometimes seeks to displace a sense of false necessity only to be met with the objection that the necessity is indeed a true one. So, in the present context, the expressivist might reply to the invocation of Germany as a perfectly acceptable democracy that German democracy is perfectly acceptable for the kind of nation Germany is, but that it would not be acceptable for the kind of nation that the United States is. Post then would be understood to be offering not a description of what democracy transcendently requires but what democracy as it has been constituted in the United States requires. As Frank Michelman puts it, the theory of democracy that Post describes “has such centrality in American life that we can’t let go of the theory without ceasing to be the people we are.”<sup>260</sup> Or, in Post’s own terms, in discussing proposals to regulate sexually explicit material, experience in England shows that different approaches are each “compatible with a system of freedom of expression. The question of which we choose turns on the kind of social world that we want to use the First Amendment to help construct.”<sup>261</sup>

The German example shows that a democratic nation can be committed to a version of democracy that is different from the one to which Post claims that the United States is committed. And, Matsuda challenges Post’s claim about the form of democracy to which the people of the United States are committed. She urges her readers to expand their horizons to see that the United States has encompassed a larger “we” than Post’s account suggests. On doing so, she claims, they will see that the nation—properly understood—accepts *her* description of democracy’s requirements rather than Post’s.

Matsuda’s proposal might be understood as an intervention in a cultural contest. She can be understood to be attempting to transform the culture in which her proposal does indeed not (yet) fit through the very act of making the proposal and demonstrating how it is consistent with a tradition available to people in the United States and with some elements of prevailing law.<sup>262</sup> We *should* cease to be the people we are, in her view,

---

260. Michelman, *supra* note 240, at 711.

261. POST, *supra* note 112, at 116.

262. Cf. Michelman, *supra* note 240, at 717 (finding that Post’s argument is “cogent at every step, once we accept that the ‘responsive’ theory of democracy’s relation to freedom is so firmly entrenched in American political consciousness as to make that theory, for the time being, nonnegotiable. Is that, however, a sound and true premise? The question is empirical.”). I believe one could similarly recast suggestions by Mary Ann Glendon and Donald Kommers that U.S. constitutional law could profit from shifting from what they describe as its current absolutist rights discourse to an approach that they find in European, and particularly German, constitutional law in which courts balance the competing claims of community and individual. Cf. GLENDON,

because the people we are perpetuate a system of racial hierarchy that the subordinated tradition to which she appeals condemned.<sup>263</sup> Or, more pointedly, claims about who “we” are are themselves interventions in cultural contests and carry no force against claims that “we” ought to be something else.

This analysis of Matsuda’s proposal allows us to see the issue in *Stanford v. Kentucky* in a new light.<sup>264</sup> Justice Scalia understood the dissenters to be arguing that the views of other nations had weight in determining what was cruel and unusual punishment simply because they *were* the views held by many people, and he responded that the Constitution made only the views of Americans relevant. Perhaps, however, the dissenters could have been understood as making a point about *American* constitutional aspirations toward universalism and, as the Declaration of Independence put it, “a decent respect to the opinions of mankind.”<sup>265</sup> That is, the dissenters might have been asserting that the distinctive American character called on us to take account of foreigners’ opinions.<sup>266</sup> Put more broadly, we express our national character by learning from experience elsewhere.

Of course, this is a contestable account of the American national character. Perhaps looking elsewhere denies, rather than respects, who we are as a people.<sup>267</sup> Expressivism’s strength, however, lies in its ability to allow us to engage in a discussion of what our constitutional character *is*, rather than leaving us to take it for granted.

### C. *Expressivism and Functionalism*

One can raise both functional and expressivist objections to reliance on constitutional experience elsewhere to aid in interpreting the U.S. Constitution. Functionalist considerations might induce some caution in relying on foreign experience with the hate speech problem. Most obviously, the simple language of the applicable constitutional provisions

---

*supra* note 213; Donald P. Kommers, *Can German Constitutionalism Serve as a Model for the United States?*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 787 (1998). Clearly, balancing as an interpretive method has been a prominent part of U.S. constitutional discourse, although perhaps a subordinated one in recent years on the topics of concern to Glendon and Kommers. Their references to constitutional experience elsewhere can be taken as their effort to remind us that balancing is part of the U.S. constitutional tradition too.

263. Cf. POST, *supra* note 112, at 291 (“We cannot overcome that history without changing ourselves and therefore also our legal order.”).

264. See *supra* text accompanying notes 20-27 (discussing *Stanford*).

265. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

266. Cf. TUSHNET, *supra* note 221, at 181-85 (describing the project of American constitutionalism in related terms).

267. Proponents of this claim might give American exceptionalism a positive valence, or they might present a less attractive nativism.

varies. The Canadian Charter of Rights and Freedoms authorizes "such reasonable limits [on fundamental rights] . . . as can be demonstrably justified in a free and democratic society."<sup>268</sup> Kent Greenawalt suggests that this language makes it relatively easy for Canadian courts to develop an analysis that balances social interests in maintaining a free and democratic society against infringements on fundamental rights whereas the more conceptual and categorical language in the U.S. First Amendment makes it more difficult for U.S. courts to be comfortable in developing and administering legal standards that call for explicit balancing.<sup>269</sup>

Lacking a written constitution, Great Britain might understandably administer its racial hatred law<sup>270</sup> in a distinctive manner. As first amended in 1965,<sup>271</sup> the law requires that prosecutions for hate speech be brought only by the Attorney General or with his consent.<sup>272</sup> This provision immediately limits the possibility that U.S. constitutionalists can learn from British experience. By centralizing administration, this mechanism enhances its oppressive potential: Whoever controls the national government can strongly bias the definition of prohibited hate speech. No single hate speech regulation poses such a threat in the United States, where the administration of criminal prohibitions is widely distributed among an enormous number of jurisdictions. And, looking at the problem from the other direction, in Great Britain a single sensible administrator can ensure that the racial hatred law is enforced in a way that minimizes threats to free speech values, while in the United States a number of imprudent local prosecutors could enforce hate speech laws in ways that even their most vigorous academic proponents would reject. Functional differences between the legal regimes in the United States and Great Britain thus make it difficult to learn anything relevant to the United States from the British experience.

---

268. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

269. See GREENAWALT, *supra* note 235, at 13-14; see also Eberle, *supra* note 234, at 897 (arguing that "German civility norms of privacy and reputational interests are a stronger limiting influence on communication freedoms than American ones" in part because "the German Basic Law expressly circumscribes communication freedoms and orders more highly personality rights, in comparison to the textually unbounded First Amendment, which encounters no other express constitutional limitation").

270. See Public Order Act, 1986, ch. 64 (Eng.).

271. See Race Relations Act, 1965, ch. 73, § 6 (Eng.).

272. See Public Order Act, 1986, ch. 64, § 27(1) (Eng.) ("No proceedings for an offence under this Part may be instituted in England and Wales except by or with the consent of the Attorney General.") (superseding section 5A of the Public Order Act, 1936); see also Race Relations Act, 1976, ch. 74, § 70 (Eng.) (adding a new section 5A to the Public Order Act, 1936, and superseding section 6 of the Race Relations Act, 1965). For a discussion of the British racial hatred acts, see Kenneth Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161 (1987).

Nothing in the foregoing expressivist account of Matsuda's argument refutes the functionalist objections to her proposal, which in the end persuade Post to reject it.<sup>273</sup> But the course of the argument shows the value of comparative constitutional law in illuminating an important issue in U.S. constitutional law.<sup>274</sup> Comparative experience suggested some functional objections to Matsuda's proposal. I then recast the proposal in expressivist terms to connect it to Post's analysis. Post presents his argument in cultural or expressivist terms, but experience elsewhere helps show that Post may not sufficiently understand the way in which legal proposals can be interventions in contests over cultural transformation or preservation.

The preceding discussion should have clarified the way in which an expressivist might say that we can learn from experience elsewhere, but it also indicates why one might think that the knowledge thus gained was worth rather little. The expressivist argument turns on the recognition that constitutional law is culturally contingent. That may be true enough, but Post's glances in the direction of a transcendental notion of democracy show that one might well think that cultural contingency has no normative bearing. Suppose Post believes, and correctly so, that the endless possibility of revision in a community's self-understandings *defines* democracy, in the sense that it provides the best normative understanding and defense of the practice of democracy. That would be a sufficient reason for rejecting Matsuda's claims for a cultural transformation that would limit the possibility of such revisions. Expressivism is normatively interesting, in short, only to the degree that some form of cultural relativism is defensible.

Recent developments in the Russian law of religion help make the point. In 1997, Russia's parliament adopted a law on religion that distinguished between religions that had a long tradition in Russia and those that were new.<sup>275</sup> The law's preamble "acknowledg[ed] the special role of Orthodoxy in the history of Russia and in the origin and development of its spirituality and culture."<sup>276</sup> This resembles the preamble to the Irish

---

273. I have not addressed the details of Matsuda's proposals, nor of related ones. I should note, however, that most proponents of hate speech regulation shape their arguments in ways that can fit into Post's framework: They are suggesting ways of redrawing the boundary between the private domain regulated by community-prescribed civility norms and the public domain in which uninhibited speech prevails for Post's democracy-preserving reasons. I do not see in Post's account the resources to challenge such arguments. *See generally* POST, *supra* note 112.

274. It is perhaps worth noting at this point that I have used comparative experience in a way different from Matsuda. Her version approaches the suggestion that U.S. law should borrow solutions arrived at elsewhere, to use the term familiar in comparative law scholarship generally. As I have noted, such suggestions are vulnerable to functional objections. I have suggested, in contrast, that we can learn from experience elsewhere by seeing how constitutional law helps constitute particular cultures and how it might be used to transform those cultures.

275. *See* Law on the Freedom of Conscience and on Religious Association (1997), in *RUSSIAN LEGAL TEXTS: THE FOUNDATIONS OF A RULE-OF-LAW STATE AND A MARKET ECONOMY* 116 (William E. Butler & Jane E. Henderson eds. & William E. Butler trans., 1998).

276. *Id.* at 117.

Constitution.<sup>277</sup> But, unlike that preamble, the Russian law on religion does have legal consequences.<sup>278</sup> New religious groups have the right to have worship services, but they may not, for example, own property or carry out religious activities in hospitals and prisons, as could religious organizations that had existed in Russia for at least fifteen years (that is, during the Soviet era when the government was officially hostile to religion).<sup>279</sup>

A representative of Orthodoxy, speaking before the statute was adopted, defended preferences for the older churches as a solution to the “‘spiritual crisis’” facing Russia in the 1990s.<sup>280</sup> The newer evangelical churches, he said, were “‘offering to the people another simple solution . . . [that] reinforces the old psychology, in which simple slogans were offered in return for immediate minimum rewards but great rewards in the future. Russian Orthodoxy is more complex and more difficult.’”<sup>281</sup> Preferences for Orthodoxy, on this view, were a valuable contribution to Russia’s efforts to democratize; they were both functional and expressive. We might reject this claim if we believed that democratic societies were necessarily committed to a principle barring discrimination among religions. And this would be true no matter how accurately the Russian law on religion expressed Russia’s commitment to Orthodoxy and the other religions that had a long pedigree in Russia.<sup>282</sup> Democracy, in short, cannot be relativized to the point of finding discrimination among religions normatively acceptable.

The foregoing argument develops a functionalist version of expressivism.<sup>283</sup> The idea is that once we understand that law can express cultural values, we can encourage courts to use it to help reshape those values, at least in cultures like that of the United States, where constitutional law plays a significant role in defining national character.<sup>284</sup>

277. See *supra* text accompanying note 222.

278. As discussed above, however, the Irish preamble’s identification of the nation with the Roman Catholic church might shape the way in which constitutionalists in that country understand other constitutional norms. See *supra* text accompanying note 225.

279. See Law on the Freedom of Conscience, *supra* note 275, art. 27(3), at 134 (specifying the rights not held by religious organizations in existence for less than 15 years).

280. Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 285, 302 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (quoting a “representative of the Moscow Patriarchate”).

281. *Id.* at 302-03.

282. We might also discount the argument as self-interested, though it strikes me as not entirely implausible.

283. For a formulation that links the terms directly, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

284. One would of course have to be appropriately cautious and note that courts might botch the job of reshaping values, perhaps because they fail to appreciate the ways in which law-as-expression must mesh with law-as-function. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

Beyond this functionalist expressivism there is a purer version of expressivism.<sup>285</sup> To the expressivist, constitutional decisions express the nation's legal culture. An expressivist would therefore note that Matsuda's argument is constitutionalist to the core. Even a person who presents herself as speaking for outsiders thinks it important to speak in the constitutionalist language of insiders.<sup>286</sup> Matsuda's constitutionalist discourse exemplifies the important fact that constitutionalism in the United States occupies almost all the territory available to critics of existing policy.<sup>287</sup> As Robin West points out, most critics confronted with the argument that one of their policy proposals is unconstitutional do not respond by saying that the proposal's unconstitutionality shows that the Constitution is unworthy of respect.<sup>288</sup> Instead, they engage on the constitutional ground. Dissidents, then, may challenge the way in which the Constitution is being applied, but they do not challenge the Constitution itself. Their very dissidence expresses their commitment to the Constitution. And that is a phenomenon of some significance that need not accompany constitutionalism as such.

One could, of course, see the U.S. Constitution in expressivist terms without looking elsewhere. But seeing how things are done in other constitutional systems may raise the question of the Constitution's connection to American national character more dramatically than reflection on domestic constitutional issues could. If so, expressivism can be another way in which we learn from constitutional experience elsewhere.

## V. BRICOLAGE

Claude Lévi-Strauss distinguished between engineering and bricolage.<sup>289</sup> The engineer, according to Lévi-Strauss, has a project in mind and sees what materials are available with which to work. The engineer

---

285. I discuss an extension of this argument *infra* Part V.

286. It could be, of course, that doing so is an entirely strategic choice made on the basis of a judgment that speaking in constitutionalist terms is more likely than anything else Matsuda could do to advance outsiders' interests. For Matsuda's defense of the outsider methodology, see Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7 (1989).

287. See Robin L. West, *Constitutional Scepticism*, 72 *B.U. L. REV.* 765 (1992).

288. See *id.* at 766, 768-69. The most prominent counterexample is William Lloyd Garrison's endorsement of a resolution adopted in January 1843 by the Massachusetts Anti-Slavery Society, that the Constitution was "'A COVENANT WITH DEATH, AND AN AGREEMENT WITH HELL'—INVOLVING BOTH PARTIES IN ATROCIOUS CRIMINALITY,—AND SHOULD BE IMMEDIATELY ANNULLED." AILEEN S. KRADITOR, *MEANS AND ENDS IN AMERICAN ABOLITIONISM* 200 (1967) (emphasis in original). That position lost its historical viability when Frederick Douglass rejected it. See FREDERICK DOUGLASS, *ORATION, DELIVERED IN CORINTHIAN HALL, ROCHESTER, JULY 5TH, 1852* (Rochester, Lee & Mann 1852), *reprinted in THE OXFORD FREDERICK DOUGLASS READER* 108, 127-28 (William L. Andrews ed., 1996).

289. See LÉVI-STRAUSS, *supra* note 17, at 17.

then assembles or designs tools to use those materials to carry out the project. The bricoleur, in contrast,

make[s] do with “whatever is at hand,” that is to say with a set of tools and materials . . . [that] bears no relation to the current project, or indeed to any particular project, but is the contingent result of all the occasions there have been to renew or enrich the stock.<sup>290</sup>

Constitution-makers and interpreters find themselves in an intellectual and political world that provides them with a bag of concepts “at hand,” not all of which are linked to each other in some coherent way. As engineers, they would sort through the concepts and assemble them into a constitutional design that made sense according to some overarching conceptual scheme. As bricoleurs, though, they reach into the bag and use the first thing that happens to fit the immediate problem they are facing. Lévi-Strauss’s insight is that we are mistaken in thinking that large domains of our culture are best understood as engineering. Rather, he argues, culture is far more the product of bricolage.

We can apply that insight to constitution-making and interpretation as well. I begin by using the idea of bricolage to explore some difficulties with a particular strategy for interpreting the Constitution, which links a highly rationalized textualism to some form of originalism. The argument starts with the modest suggestion that some constitutional provisions should be understood to result from compromises that rest on no single coherent principle. Invoking the idea of bricolage, however, it broadens that suggestion into a far more general perspective on interpretation that brings into question first the idea that the Constitution is the result of rational deliberation, including rational compromises, and then the idea that interpretation is something other than the transformation and coopting of the legal materials that the interpreter’s culture makes available. I follow by briefly discussing the way in which functionalism and expressivism may limit the possibility of appropriating something that might seem to be “at hand” and conclude by suggesting that, nonetheless, recent interest in comparative constitutional law shows how experience elsewhere has become available to U.S. constitutionalists who now find themselves participants in a world-wide legal culture.

---

290. *Id.*

### A. *Bricolage as the Source of Critique*

Justice Scalia suggested in *Printz v. United States* that those designing constitutions might learn from constitutional experience elsewhere.<sup>291</sup> Examining how constitutions are constructed may also give some guidance to us in interpreting our own Constitution, and the concept of bricolage may be particularly helpful here.

Consider two stylized accounts of any particular constitution. On one account, a constitution is a tightly integrated document in which every piece articulates precisely with its neighbors, making the whole a harmonious unity. In interpreting such a constitution we would think it appropriate to adopt interpretations that preserved the structural integrity that was designed into it. Bricolage describes the other account: A constitution is assembled from provisions that a constitution's drafters selected almost at random from whatever happened to be at hand when the time came to deal with a particular problem. There are many ways to interpret this sort of constitution, but adopting interpretations that preserve a structural integrity imputed to the intentions of a constitution's designers may not be one of them.<sup>292</sup>

Is the U.S. Constitution the product of a process yielding a tightly integrated document, or of bricolage? *The Federalist Papers* open with an assertion that the people of New York, and through them the rest of the nation, were being offered the unique opportunity to decide "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."<sup>293</sup> In Lévi-Strauss's terms, Hamilton was claiming that in adopting the Constitution the people of the United States would be engineers.

Against this, however, are common assertions that many constitutional provisions result from compromises made at the time of framing.<sup>294</sup> James

---

291. See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

292. It is important to be precise here. There may be reasons other than consistency with the designers' intentions to interpret a constitution *as if* it were a structurally integrated document. The argument I develop is only that, where the constitution results from bricolage, it does not make sense to do so on originalist grounds.

293. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The assertion of uniqueness comes in the prefatory statement that this question had been "reserved to the people of this country." *Id.*

294. See, e.g., *Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990) (describing the compromise between a fear of a national standing army and the "danger of relying on inadequately trained soldiers" that resulted in Article I, Section 8, Clause 16); *Oregon v. Mitchell*, 400 U.S. 112, 119 n.2 (1970) (Black, J.) (describing Article I, Section 4, as a compromise between those "who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make the laws governing national elections"); *Dooley v. United States*, 183 U.S. 151, 168 (1901) (calling "[t]he regulation of commerce by a majority vote and the exemption of exports from duties or taxes . . . one of the great compromises

Madison, speaking in the first Congress in opposing the creation of a national bank, asserted: "It is not pretended that every insertion or omission in the Constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men."<sup>295</sup> Or, as Justice William Patterson put it in the early case of *Hylton v. United States*: "The constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise."<sup>296</sup> Justice Joseph Story drew an interpretive conclusion from this: Because "many of [the Constitution's] provisions were matters of compromise of opposing interests and opinions, . . . no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses."<sup>297</sup>

Story referred to compromises affecting particular provisions. More generally, though, we might see the Constitution's larger structures, such as the presidency or federalism, or the Constitution as a whole, as tightly integrated or the product of compromises.<sup>298</sup> Wiktor Osiatyński, a Polish legal scholar, contrasts a constitution of compromise with a constitution of principle.<sup>299</sup> In doing so, he suggests that compromises are unprincipled. On this view, we can impose a structure of principle on a constitution of compromise, but we cannot defend our actions by invoking some originalist theory of constitutional interpretation.

We can see the difference between viewing the Constitution as tightly integrated and viewing it as the result of bricolage in an important recent effort to develop an account of a tightly integrated Constitution, which the authors conclude creates a unitary executive solely responsible for law-execution.<sup>300</sup> The aim in what follows is to decouple a rigorous textualist

of the Constitution"); *Pollock v. Farmers' Loan & Trust*, 157 U.S. 429, 563-64 (1895) (describing the compromise that resulted in counting each slave as three-fifths of a person for the purposes of representation and imposition of direct taxes). For a discussion of the interpretive implications of the last of these compromises, see Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999).

295. 2 ANNALS OF CONG. 1899 (1791).

296. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 177-78 (1796).

297. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 610 (1842). I should note that one might refuse to follow the interpretive guidance offered by *Prigg* and *Pollock* on the ground that their guidance endorsed (explicitly in the former case, implicitly in the latter) compromises designed to ensure the adherence of the slaveholding South to the Constitution.

298. I should emphasize that by "compromise" I do not mean here the reasoned accommodation that results in some adjustment of competing principles, but rather a resolution that allows people to wrap up their work and go on with their lives.

299. See Wiktor Osiatyński, *The Constitution-Making Process in Poland*, 13 LAW & POL'Y 125, 129-30 (1991).

300. To summarize the argument: Steven Calabresi and Kevin Rhodes begin by pointing out the linguistic parallels between Article II and Article III, and their differences from Article I. Article I gives Congress powers "herein granted"; Articles II and III "vest[]" "the" executive and judicial powers. Articles II and III both say that these powers "shall" be vested, and the best

approach to constitutional interpretation from originalist versions with which textualism is sometimes associated.<sup>301</sup> A rigorous textualism insists that every constitutional provision—every jot and tittle—contributes meaningfully to the creation of a constitution structured by a set of principles, all of which cohere tightly with each other. As before, I follow an extended discussion focused tightly on the U.S. Constitution with an examination of constitutional experience elsewhere to show how that experience might help us understand how to interpret the U.S. Constitution.

---

interpretation of that word is that it means those powers *must* be vested. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1199-1200 (1992). Article III grants Congress the power to regulate the Supreme Court's jurisdiction, and to create lower federal courts, in terms that can be given broad readings. Article II, in contrast, gives Congress only a limited power to give the courts or department heads the authority to appoint inferior officers. Calabresi and Rhodes argue that the latter congressional power is clearly narrower than the powers Congress has with respect to the judiciary, and that those who defend the courts against jurisdiction-stripping should find even stronger textual reasons for defending the presidency against parallel incursions on executive authority. See *id.* at 1192-93. (Calabresi and Rhodes point out that Article III generally uses the word *all* to mean *every*; Article II generally uses it as a placeholder, or as a substitute, for *the*. See *id.* at 1185. They do not, however, place much weight on this difference. See *id.* at 1193.) In addition, Article III lists nine areas to which the judicial power extends; Article II also has a list, but it is "not offered . . . as an exclusive" one, in contrast to the Article III list. *Id.* at 1195-96. Finally, and most important, Article III creates a plural judiciary, opening up the possibility of substantial congressional power to distribute work among Article III courts, while Article II creates a single President, the ultimate repository of all executive power. See *id.* at 1203-04.

The claim about the unitary executive must be specified precisely. It is *not* that across a wide range of activities it makes sense to commit law-execution to officials directly subordinate to the President. Much of the originalist material provided by Steven Calabresi and Saikrishna Prakash supports only this proposition. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). Rather, the claim is the stronger one, that the Constitution precludes lawmakers—ordinarily, a majority in both houses of Congress with the agreement of the President, but sometimes a supermajority of both houses overriding a President's veto—from deciding that, in some instances, law-execution by someone not subordinate to the President provides the people with better government. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 n.21 (1994) (describing the "modern unitarian view"); *id.* at 41 (describing the alternative view, in which "some powers fall clearly within the domain of 'the executive' (and these [the Framers] constitutionalized), but the balance . . . they believed would be assigned pragmatically, according to the values or functions of the particular power at issue"). The discussion directed to the choice between *these* alternatives in Calabresi and Prakash's article is almost entirely textualist and structuralist, not originalist. See Calabresi & Prakash, *supra*, at 620-22. It produces a single quotation from the period of the Framing to support its conclusions. See *id.* at 622 (citing Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 921 (1989-1990) (quoting James Wilson)).

301. Calabresi and Rhodes's article is almost entirely textualist, although the authors occasionally throw in an off-hand reference to originalism. See, e.g., Calabresi & Rhodes, *supra* note 300, at 1189 (referring to a "formal, original construction of Article III"); *id.* at 1213 (referring to "a textualist originalist theory"). The authors revert to originalism in arguing that it is permissible for the courts to depart from settled interpretations to return to original understandings. See *id.* at 1213-14. Yet their substantive analysis turns almost without exception on text rather than original understanding. A subsequent article argues that "either the text or the relevant 'legislative' history, considered separately, demonstrates that the founding generation fully embraced [the unitary executive view]. . . . [T]he originalist textual and historical arguments for the unitary Executive, taken together, firmly establish the theory." Calabresi & Prakash, *supra* note 300, at 550.

We can consider the affinity between rigorous textualism and originalism by noting that Steven Calabresi and Kevin Rhodes support their argument for a unitary executive by asserting that “[i]f one reads the Article III Vesting Clause to mean ‘[t]he judicial Power . . . *must* be vested in one Supreme court, and in such inferior Courts,’ one is compelled to read the Article II Vesting Clause to mean ‘[t]he executive Power *must* be vested in a President.’”<sup>302</sup> They point out that “no one has argued for different interpretative approaches to the same word when it appears in analogous clauses of both Article II and Article III, and for good reason—such an argument cannot be sustained.”<sup>303</sup> This rigorous textualism commits what Walter Wheeler Cook called the “original sin” of interpretation, “[t]he tendency to assume that a word which appears in two or more legal rules, *and so in connection with more than one purpose*, has and should have precisely the same scope in all of them.”<sup>304</sup> The pejorative aside, Cook’s characterization illuminates the connection between rigorous textualism and originalism. While Cook would have analysts reason from purposes to textual meaning, rigorous textualism reasons from textual meaning to purposes. So, for example, Calabresi and Rhodes rely on their careful textual analysis to support the conclusion that the President is the unitary repository of all executive power. It is easy to redescribe this as an assertion that the text’s purpose is to create a unitary presidency. And from there the next move is easy as well. Texts do not have purposes; people do. So, the textualist may claim, the Constitution’s authors intended to create the unitary presidency their text reveals.<sup>305</sup>

Lawrence Lessig and Cass Sunstein have presented a broad challenge to Calabresi and Rhodes’s analysis on both originalist and functionalist grounds.<sup>306</sup> The bricoleur’s perspective is different, focusing on a tiny problem that nags at any account treating the Constitution’s construction of the presidency as a tightly integrated piece of work. The problem is this: What is the Opinion in Writing Clause doing in Article II? That Clause appears immediately after the obviously important provision stating that the President “shall be Commander in Chief,” and it reads, “he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”<sup>307</sup>

---

302. Calabresi & Rhodes, *supra* note 300, at 1178 (emphases added).

303. *Id.* at 1178-79.

304. Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333, 337 (1933) (emphasis added).

305. I use the word “authors” to avoid taking a position on whether the people with the relevant purposes were the drafters, the ratifiers, or the people of the new nation taken in the aggregate.

306. See Lessig & Sunstein, *supra* note 300, at 1.

307. U.S. CONST. art. II, § 2, cl.1.

As Justice Robert Jackson wrote, the Clause describes a power “inherent in the Executive if anything is.”<sup>308</sup> The Opinion in Writing Clause is an embarrassment to any theory that treats the Constitution’s construction of the presidency as tightly integrated.<sup>309</sup> Calabresi and Rhodes’s account emphasizes the structural unity of the executive branch. Would that unity be diminished if Article II lacked the Opinion in Writing Clause? Surely not. On their account, even without the Clause the President could ask a cabinet officer for an opinion in writing, backed up by the threat to discharge a recalcitrant officer.<sup>310</sup> As they put it, “The President could not possibly be said to have all of the executive power in order to be able to take care that the laws be faithfully executed if he could not tell his subordinates what to do.”<sup>311</sup>

What structure, then, is implied by the presence of the Opinion in Writing Clause? We could take Justice Jackson’s observation seriously. The power identified in the Clause is inherent in the Executive *if anything is*. So, we might conclude, there simply are no inherent executive powers. The President has the precise powers enumerated in the Constitution and nothing more.<sup>312</sup>

308. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 641 n.9 (1952) (Jackson, J., concurring).

309. Cf. Lessig & Sunstein, *supra* note 300, at 32 (stating that the Clause “raises an enormous puzzle” for the unitarian view); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 *YALE L.J.* 787, 799-800 (1987) (treating all of Article II as an embarrassment of this sort, because no more than its first sentence would be necessary if that sentence conferred the entire range of executive power).

310. The Opinion in Writing Clause does not even give the President clear shelter in the Constitution from criticism in such a case, because, on Calabresi and Rhodes’s account, the Constitution clearly shelters the President anyway. It is hard to see how a President could do any better in suppressing a firestorm by pointing to the Opinion in Writing Clause to justify firing the officer, instead of pointing to the Take Care Clause and the general unity of the executive branch that Calabresi and Rhodes say the Constitution creates. *But see* Calabresi & Rhodes, *supra* note 300, at 1196 n.216 (arguing that the Opinion in Writing Clause limits the President’s power to require opinions in writing, because of the Clause’s references to “principal Officer[s]” and “Subject[s] relating to the Duties of their . . . Offices”). I find it hard to believe that Calabresi and Rhodes think that a President could not fire a Secretary of Commerce who refused to give an opinion in writing on a matter clearly outside that department’s duties—for example, on whether the Department of Veterans Affairs should pay veterans’ health care costs attributable to smoking. (If that example fails because it involves a “commercial” matter, it nonetheless must be true that there are some subjects outside the duties of a particular Cabinet officer, lest Calabresi and Rhodes’s points become empty.) Calabresi and Prakash elaborate the argument by asserting that the Clause limits the President to demanding opinions “only . . . on governmental matters.” Calabresi & Prakash, *supra* note 300, at 585. But that is certainly not what the Clause says: “Governmental matters” is significantly broader than “Subject relating to the Duties of their respective Offices.”

311. Calabresi & Rhodes, *supra* note 300, at 1207.

312. See, e.g., Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 *HASTINGS CONST. L.Q.* 13, 14-15 (1974). This position is, of course, in tension with the common inference from the difference between the first words of Article I, Section 1 (“All legislative Powers *herein granted* shall be vested in a Congress” (emphasis added)) and the first words of Article II, Section 1 (“The executive Power shall be vested in a President” (emphasis added)). See Calabresi & Rhodes, *supra* note 300, at 1175-78 (drawing the inference

A more limited conclusion is available, but one equally damaging to the idea that the Constitution treats the presidency in a tightly integrated way.<sup>313</sup> The existence of the Clause suggests a concern that Cabinet officers might develop political support independent of the President.<sup>314</sup> The Opinion in Writing Clause is a way of enforcing a President's desire to unify the administration—a desire that we can expect presidents to have but that, the presence of the Clause suggests, the Constitution does not itself create. The Clause makes it possible for the President to insist that Cabinet members take responsibility for administration decisions. Unless the President can demand an opinion in writing, for example, the Cabinet officer might spread the word to her political supporters that a directive issuing from her department really did not conform to the Cabinet member's personal views. A President armed with a statement in writing that the Cabinet member supported the directive could impede the Cabinet member's quest for independent political support. As *The Federalist No. 70* put the point in defending the drafters' decision to create a single President, it makes sense to design a structure that allows the people to know who is responsible for what decisions: Where many decisionmakers are involved, "it may be

---

that the Clauses give the President all executive power but Congress only some legislative power). Calabresi and Rhodes argue that the significance of the list of powers in Article II, Section 2, lies in the fact that each clause *limits* an executive power that would otherwise be unlimited. *See id.* at 1197-98. The Pardon Clause, stating that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment," U.S. CONST. art. II, § 2, cl. 1, "explains that the President's pardon power reaches only 'Offenses against the United States' and does not reach 'cases of Impeachment.'" Calabresi & Rhodes, *supra* note 300, at 1196 n.216 (emphasis added). Calabresi and Rhodes, who are fond of posing alternative language to accomplish goals more directly, *see, e.g., id.* at 1177-78; *see also* Calabresi & Prakash, *supra* note 300, at 577 n.134, 581, do not suggest that this limiting purpose could have been achieved more directly by a provision stating that the President's pardon power (created by the Vesting Clause) "shall not extend to offenses against a state, or to cases of impeachment." For a discussion of the difficulties in making the argument that the Opinion in Writing Clause limits presidential power, *see supra* note 310.

313. Calabresi and Prakash conclude their discussion of the Clause by acknowledging the possibility that it is redundant, restating a power conferred in the Vesting Clause, and asserting that "[t]he Constitution is full of redundancies." Calabresi & Prakash, *supra* note 300, at 585. That, however, is to say that the Constitution is not a tightly integrated document, each word of which contributes something essential to its structure. *See also id.* at 594 nn.202 & 204 (discussing "imperfections" in the Constitution); *id.* at 622 n.352 (discounting expressions from "the founding generation" that the President's veto power was "a means of defending the President from congressional encroachments" on the pure policy ground that "the veto is a very imperfect defense" in light of Congress's power to override a veto or enact statutes with one President's agreement with which a later President disagrees).

314. Lessig and Sunstein make this point, though in slight different terms. They argue that a Constitution without the Opinion in Writing Clause would allow Congress to "mak[e] administrative departments wholly independent from the President." Lessig & Sunstein, *supra* note 300, at 34; *cf.* GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 43-44 (1997) (describing "the direct link . . . between the secretary [of the Treasury] and the Congress" created by the statute establishing the Treasury Department, and suggesting the important, and possibly independent, role played by Alexander Hamilton as the first Secretary of the Treasury).

impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.”<sup>315</sup> A written opinion makes the Cabinet member from whom it is received “chargeable” with the outcome.

Thus, the Opinion in Writing Clause plugs a hole in the Constitution.<sup>316</sup> In doing so, one might think, the Clause helps create the tightly unified structure Calabresi and Rhodes describe.<sup>317</sup> One might have the image of a jigsaw puzzle missing a small piece, supplied by the Opinion in Writing Clause. Even without the Clause, however, the big picture would be clear—a powerful presidency administering a unified government. There is, however, an alternative image available, suggested by the fear of independent political power in Cabinet members. We could see the Constitution as creating a loosely articulated network of relations within the executive branch.<sup>318</sup> Perhaps the network would fall apart without the Opinion in Writing Clause, or perhaps the Clause simply expresses something that happened to occur to the drafters as they were putting Article II together. In either case, its presence does no more than allow the

315. THE FEDERALIST NO. 70, *supra* note 293, at 428 (Alexander Hamilton).

316. See Froomkin, *supra* note 309, at 800 (arguing that the Clause exists “because it was not assumed, or at the very least not obvious, that the President had absolute power over Heads of Departments”); see also Calabresi & Rhodes, *supra* note 300, at 1184-85 (arguing that the Clause “suggests that the heads of departments . . . are a subordinate part of the executive department”). But see J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2134 n.240 (1989) (calling Froomkin’s analysis “silly,” without providing an argument in support of that description).

317. Calabresi and Rhodes struggle to offer “more plausible interpretations of the Clause.” Calabresi & Rhodes, *supra* note 300, at 1207. It might imply “that only the President, *and not Congress*, can obtain information from principal officers.” *Id.*; see also Neil Thomas Proto, *The Opinion Clause and Presidential Decision-Making*, 44 MO. L. REV. 185, 196-97 (1979) (arguing against the existence of congressional power to restrict presidential receipt of advice on demand). This, however, is inconsistent with their reading of the other provisions of Article II, Section 2, as limitations that would not otherwise exist on *presidential* power. See *supra* notes 310, 312. In addition, consider a constitution without this Clause, but with a President who can fire subordinates at will. Congress could not require a subordinate to refrain from delivering an opinion to the President under such a constitution either, because the President could fire the subordinate who followed Congress’s rather than the president’s direction. For the same reason, Congress could not require the subordinate to provide it with information over the President’s objection.

Calabresi and Rhodes suggest that the purpose might be “to enable [the President] to issue binding orders.” Calabresi & Rhodes, *supra* note 300, at 1207. Again, however, that power would seem to be a necessary part of the power to take care that the laws be faithfully executed, with what counts as faithful execution being identified by the orders. Or, finally, they suggest that it applies only to principal officers because only they “must be confirmed by the Senate and thus might not be wholly loyal to the President.” *Id.* I do not see where the *thus* comes from. Calabresi and Rhodes appear to believe that this interpretation supports the view that the President can fire a Cabinet officer at will “by giving the President the power to solicit opinions from Senate-confirmed officers precisely in order to decide whether to fire these officers for disloyalty.” *Id.* at 1207-08. I simply do not understand the point here. The President, they argue, clearly can fire at will anyone not confirmed by the Senate. Do they mean to suggest that, absent the Opinion in Writing Clause, the President could not fire a Cabinet member suspected of disloyalty for refusing to provide an opinion in writing?

318. See Lessig & Sunstein, *supra* note 300, at 74 (asserting that “the framers thought it enough to draw a few clear lines and leave the balance to Congress”).

loose network that, on this view, is the Executive to get on with the public's business.<sup>319</sup> Finally, if we think that most constitutions and constitutional structures result from compromises rather than carefully integrated design, we might think that the latter image conforms more to the designers' understanding than the former one.<sup>320</sup>

A comparison of constitutional framings suggests that the conditions under which the U.S. Constitution was developed might well produce a document that is unified by a few important principles but not tightly integrated. Two important conditions are that the Constitution was framed in a time of perceived crisis and by a group that believed itself to be under rather severe time constraints.<sup>321</sup> More generally, descriptions of recent constitutional framings regularly identify key compromises on central issues.<sup>322</sup> Sometimes, too, the presence of a political figure of great stature—such as Nelson Mandela in South Africa, Vaclav Havel in Czechoslovakia, and George Washington in the United States—structures the constitution-framers' vision of how the constitution they are designing will actually work.<sup>323</sup> A constitution designed when people know who the first national leader under it will be may well have different features from one designed under conditions of greater uncertainty.<sup>324</sup> The framers may

---

319. This undermines Calabresi and Rhodes's strongest point, that the Opinion in Writing Clause is too "nebulous a provision" to have such a large effect. Calabresi & Rhodes, *supra* note 300, at 1208. That is true only if one starts with the assumption that the Constitution is a tightly integrated document. But that is precisely what they are attempting to establish.

320. None of this is to say that some version of the unitary executive theory is incompatible with the original understanding. For example, I am persuaded by the originalist material I have read that the Constitution was understood to embody a general principle of unitary executive administration of the laws, in the important but limited sense that the framing generation understood it to be an important feature of a good government that, in general, law-execution should ordinarily be the province of officials subordinate to a single President. But this is a different general principle than the one Calabresi and his co-authors tried to establish through their rigorous textualism.

321. For a discussion of the significance of these conditions, see Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995). On the relation between these conditions and the Opinion in Writing Clause, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 646 n.312 (1984) (noting that the Constitutional Convention did not resolve issues of executive power "until the final days of the Convention, under pressures that produced understandably imperfect drafting").

322. See, e.g., A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 396 (1996) (describing the Polish "Little Constitution" of 1992 as "a compromise document" and quoting a prominent Polish political leader who called it "an 'imperfect act of compromise'").

323. See Jon Elster, *Introduction to THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM 12-13* (Jon Elster ed., 1996) ("In the process of bargaining over the presidency in Bulgaria, Hungary, and Poland . . . the presidency was designed to fit a particular candidate for the office."). Of course, the bargaining process between a party already holding power and an opposition, as in the former Soviet bloc countries and South Africa, differs from the process in the late 1780s, which involved divisions within an already successful revolutionary group.

324. Elster observes, however, that predictions about who the first president will be can be mistaken. See *id.* at 13 (asserting that "the calculations and expectations that went into the

have particular fears about the leader who is about to take the helm, and so may design an institution that will cabin her actions. Or, as may have been the case in the United States, they may have so much confidence in the leader that they devote relatively little attention to precise institutional details, leaving it to the leader and the government to be chosen soon to work out conventions that will guide later generations.<sup>325</sup> These roughly functional observations cast some doubt on the proposition that originalism and rigorous textualism are compatible.

Kim Lane Scheppele's analysis of what she calls Hungary's "accidental constitution" suggests how constitution-making can best be understood as bricolage.<sup>326</sup> Hungary's post-Communist constitution resulted from so-called round table negotiations among the governing Communist regime and various opposition groups. Unsurprisingly, the most contentious issues, the ones occupying the time of the key negotiators, involved questions of government structure. The negotiators knew, however, that any new constitution had to protect individual rights. They delegated the task of devising those protections to a small group of young lawyers, who were charged with presenting proposals to the round table for further consideration and discussion. The drafters went beyond their charge, and the negotiators had little time to deal with the individual rights proposals. In outline, the drafters simply assembled a set of individual rights provisions that seemed sensible to them, drawing on constitutional provisions they found in existing constitutions. They presented their proposals to the negotiators as something of a *fait accompli*, and the proposals were written into the new constitution.

Scheppele argues that this process was almost random. Little thought was given to delegating the task to the group of drafters, and to the extent that anyone did think about it, it seemed that there would be some supervision of the drafters' work. And the drafters themselves did not approach their task in an entirely systematic way either. The Hungarian Constitution's framers basically had no understanding of the provisions

---

bargaining and log-rolling were almost invariably proven wrong by later events"). A concrete example is provided by the expectation among the U.S. Constitution's drafters that the selection of a President regularly would fall to the House of Representatives. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 265 (1996) (asserting that "few of [the drafters] expected the electors [in the electoral college] to do anything more than nominate candidates").

325. See A.E. Dick Howard, *Constitution-Making in Central and Eastern Europe*, 28 SUFFOLK U. L. REV. 5, 7 (1994) (pointing out that "a constitution's provisions [may] reflect the place an important political figure has in the mind of the country at the time of the constitution's adoption. The leader may be admired and respected, he or she may be feared or distrusted.").

326. The discussion in this and the next paragraph relies on a presentation by Professor Scheppele at a symposium entitled "Contextuality and Universality: Constitutional Borrowings on the Global Stage." Kim Lane Scheppele, *The Accidental Constitution*, University of Pennsylvania Law School (March 21, 1998).

they accepted, except in the sense that they thought that having a set of individual rights roughly like those elsewhere in Europe was a good idea. Scheppele concludes that a Hungarian constitutionalist could not defend the claim that the constitution's individual rights provisions are binding law because they were endorsed by the constitution's framers. In this way, she decouples the constitution from the framers' understandings.

Scheppele's analysis can be extended by examining the experience in drafting South Africa's Constitution. There the process explicitly distinguished between large principles and smaller details, in the way one might expect if a constitution consisted of loosely organized strands of ideas and institutions. The structure of the drafting process was determined by the political confrontation between the African majority, represented by the Mandela-led African National Congress (ANC), and several political groupings that were represented in the official institutions of government in the Republic of South Africa when negotiations began.<sup>327</sup>

The initial negotiations were called the Convention for a Democratic South Africa (CODESA). During the CODESA stage, the ANC took the position that all of South Africa's governing institutions lacked democratic legitimacy. For the ANC, some new institution had to be created to develop the ground rules for a new regime. The opposing groups acknowledged the need for constitutional change but insisted that they have an important voice in that process. And, as they saw it, CODESA itself could be the venue for drafting a new constitution. The multiparty negotiations in CODESA would produce a new document, which the people of South Africa would ratify in a referendum. The ANC found this unacceptable, because treating CODESA as a drafting body implied that the government and its allies came to the table with some legitimacy. As Albie Sachs, a participant in the negotiations, put it: "In order to gain legitimacy, the body that drafted the constitution also had to be legitimate. Thus, it had to be a body mandated to act by the entire nation."<sup>328</sup>

The eventual solution favored the ANC position. General elections, with nondiscriminatory suffrage, would be held to elect a parliament consisting of a national assembly and a senate. As parliament, it would perform the ordinary operations of a legislature. But the two houses would sit together as a constituent assembly (to be called the Constitutional Assembly) to draft a new constitution, to be completed within two years, by April 30, 1994. Having been elected through essentially universal suffrage,

---

327. These groupings included the government itself, dominated by the Afrikaner National Party, and the Inkatha Freedom Party, the political organization of a faction of Zulu nationalists headed by Chief Mangosuthu Buthelezi. For a brief discussion of the political background, see Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669, 670-71 (1997).

328. *Id.* at 671.

the Constitutional Assembly would have the democratic legitimacy the ANC regarded as a precondition for the regime change. But the Constitutional Assembly would not be free to adopt any constitutional provisions it chose. Here, the other half of the compromise became relevant. The new constitution would have to satisfy certain broad principles agreed on at the CODESA stage. These principles included requirements for a bill of rights, separation of powers, and substantial power in provincial governments. The existing government and its allies reluctantly agreed that the enumerated principles would protect their interests sufficiently. The ANC did not regard the principles as major concessions, because, in general, the principles expressed values to which the ANC was committed.

Of course, it was possible, even likely, that the government and its allies would find some new institutions inconsistent with the broadly stated principles, while the ANC would not. The government clearly envisioned that the provinces under the new regime would have a fair amount of autonomy, holding out the possibility that one or more provinces might not be controlled by ANC governments. In contrast, the ANC was less interested in provincial autonomy. The principles referring to provincial government plainly left much open.<sup>329</sup> To avoid a steam roller in which the Constitutional Assembly simply asserted that its proposals satisfied the fundamental principles, the CODESA negotiators agreed that the parliament would create a Constitutional Court, one of whose functions was to certify that the proposed constitution did indeed do so.<sup>330</sup>

---

329. Consider, for example, Constitutional Principle XVIII (2) ("The powers and functions of the provinces defined in the Constitution . . . shall not be substantially less than or substantially inferior to those provided for in this Constitution."), or Constitutional Principle XXI (1) ("The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and rendering of the services, and such level shall accordingly be empowered by the Constitution to do so."). See Ex Parte Chairperson of the Constitutional Assembly: *In re* Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SALR 744, 913 (CC) (S. Afr.) [hereinafter *Certification I*]. The latter principle is generally called *subsidiarity*, and while there is widespread agreement that it states a sensible rule to guide policymakers, there is much less agreement that it can provide a legal standard of the sort the Constitutional Court was supposed to apply. For a discussion of the political and legal status of subsidiarity in the European Union, see generally George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

330. The Constitutional Court's initial certification decision is *Certification I*, 1996 (4) SALR at 744. The court certified the bulk of the constitution, but it held that a number of provisions were inconsistent with the fundamental principles. The proposed constitution did not provide sufficient independence to a number of high civil servants, for example. See *id.* at 824-25 (referring to the Public Protector and the Auditor General). Because it was not clear what the powers of an independent civil service commission were, the court was unable to conclude that the constitution provided an undiminished "basket" of powers for provincial governments, *id.* at 908. The proposed constitution also did not specify the structure of local government, as the fundamental principles required. See *id.* at 861. The proposed constitution allowed the bill of rights to be amended in the same manner as other constitutional provisions could be, and the Constitutional

There were a large number of fundamental principles the new constitution had to satisfy; conventionally, the number is given as thirty-four, although, as we will see, that number is misleading in an important way. The list of principles was obviously a compromise, and it would be difficult to contend that the list compelled the adoption of any particular constitutional arrangement. As the Constitutional Court put it in its decision on certifying the constitution, "Within the broad requirement of separation of powers and appropriate checks and balances, the [Constitutional Assembly] was afforded a large degree of latitude in shaping the independence and interdependence of government branches."<sup>331</sup> And the point could be made far more generally. The compromises in the list of fundamental principles strongly suggest that a rigorous textualist approach to the enacted constitution will in the end be inconsistent with an originalist interpretive method.

This is not to say that one cannot interpret a constitution satisfying all the principles to be a tightly integrated document. Indeed, the Constitutional Court's interpretive approach encourages such an outcome. According to the court: "All 34 CPs [constitutional principles] must be read holistically with an integrated approach. No CP must be read in isolation from the other CPs which give it meaning and context. It accordingly follows that no CP should be interpreted in a manner which involves conflict with another."<sup>332</sup> But the textualist interpretation may clash with the original understanding of the fundamental principles.

The precise way in which the principles developed shows this rather dramatically. The CODESA negotiations produced the basic idea of a proposed constitution whose compliance with a list of fundamental principles had to be certified by the Constitutional Court, and it produced a list of fundamental principles. The Inkatha Freedom Party and a number of white dissidents refused to participate in the constitution-drafting process. As the April 30 deadline approached, the ANC continued to negotiate changes that would, in the Constitutional Court's words, "encourage political formations which had refused to participate in the transition

---

Court held that the fundamental principles required that bill of rights provisions be entrenched more firmly than other constitutional provisions. *See id.* at 822-23. The Constitutional Assembly responded by redrafting the objectionable provisions, making changes that appear to an outsider to be relatively minor. *Cf. Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (2) SALR 97, 108, 112 (CC) (S. Afr.)*. As to the bill of rights, the new provision would allow amendment by the two-thirds majority required for amending other provisions, plus the agreement of six provinces in the National Council of Provinces, the new constitution's replacement for a senate in which the provinces were represented. *See id.* at 126-27. The Constitutional Court then certified the constitution, as amended, as consistent with the fundamental principles. *See id.* at 162.

331. *Certification I*, 1996 (4) SALR at 811.

332. *Id.* at 786. I should note that the Court gave purposive and teleological interpretation a higher priority. *See id.*

process to change their minds and to support the transition to a new political order.”<sup>333</sup> These changes were incorporated in the already developed list of fundamental principles. One important new fundamental principle at least strengthened, and may have transformed, the idea of provincial autonomy, stating that the principle of self-determination “of the South African people as a whole . . . shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage.”<sup>334</sup> It is barely possible that a tightly integrated constitution could track original understandings with respect to the initial list of fundamental principles, but it would be extraordinary if the same constitution, or one modified in the last few days of drafting, would continue to do so with respect to the augmented list.<sup>335</sup>

Jack Rakove’s analysis of the process by which the U.S. presidency was constructed at the Constitutional Convention is consistent with these accounts of constitutional experience elsewhere. Rakove summarizes the process in saying, “To derive a coherent theory of executive power from what Madison called these ‘tedious and reiterated’ debates is not easy.”<sup>336</sup> Having stripped executives of power during the Revolution and Confederation period, the Constitution’s drafters struggled to reconstruct a sufficiently energetic executive through painful steps, against opponents who continued to express suspicion of overpowerful executives. As Rakove sees it, the only unifying “first principle” was “the desire to enable the executive to resist legislative ‘encroachments.’”<sup>337</sup> The drafters went back and forth on fundamental design issues, and in the end the provisions dealing with the presidency were adopted *seriatim*. For example, the requirement that the President “take care that the laws . . . be duly and faithfully executed” entered the draft at a point when the Senate had the power to make treaties and remained there as the treaty power became divided between the President and a supermajority in the Senate.<sup>338</sup> Nor, Rakove’s presentation suggests, was the ultimate result the product of a gradual realization among the drafters of some overriding logic demanding a tight integration of the structures defining the presidency. Instead, what happened was that the Constitution’s provisions dealing with the presidency took their shape from a series of compromises. Had the drafters had more time, some issues that had been provisionally resolved might have been

---

333. *Id.* at 862.

334. *Id.* at 915.

335. See Howard, *supra* note 322, at 402 (noting through a section title that “[i]ndeterminacy results when drafters attempt, within the same constitution, to adopt competing norms or traditions”).

336. RAKOVE, *supra* note 324, at 244.

337. *Id.* at 259.

338. See *id.* at 262-63.

reopened. But, facing the need to get the job done, the drafters simply stopped when time expired.

The experience with constitution-drafting suggests a general conclusion, which I present in quasi-functional terms: The conditions under which constitutions are written makes it likely that they will be constitutions of principle with respect to broad themes, exemplified by the principles with which South Africa's permanent constitution had to conform, and constitutions of compromise with respect to the details. Under the pressure of time and the need for political compromise, a constitution's drafters are likely to latch on to whatever solution is near at hand to the immediate problems they face. They will not have sharp understandings that the institutions they are creating have some necessary characteristics flowing from the very nature of the institutions. With respect to details, they are, in short, bricoleurs.<sup>339</sup>

Thinking about constitution-making as a process of bricolage casts doubt on a form of textualism that attributes to the constitution's writers a purpose of creating a tightly integrated document governed by a form of conceptual determinism. The compromises and sheer randomness found in the constitution-making process suggest that it would be wrong to think of the writers as having so highly rationalized an understanding of their work as this form of textualism attributes to them.<sup>340</sup> Of course, *casts doubt* and *suggests* are the key terms here. It could be true that, whatever is the case with respect to other constitutions, a rigorous textualist interpretation of the U.S. Constitution is consistent with originalism. In addition, other forms of textualism remain available. Charles Black's textualism, for example, infers large principles from the Constitution's general structures as defined by the

---

339. Calabresi and Prakash correctly argue that constitutional interpretation should not turn on small differences in wording. See Calabresi & Prakash, *supra* note 300, at 628-31. Referring to such a difference to which Lessig and Sunstein, *supra* note 300, referred, Calabresi and Prakash say: "Throughout the Convention, individual participants had used any number of terms in discussing what we today call Secretaries. In this particular proposal, they happened to be labeled 'Heads of Departments.'" Calabresi & Prakash, *supra* note 300, at 630. This captures the randomness of bricolage. But a related principle, cautioning against making interpretation turn on small *similarities* in wording, seems equally appropriate, and for the same reason: Similarities as well as differences can result from bricolage.

340. It might be, of course, that one need not rely on the idea of bricolage or comparative constitutional law to see this. Domestic critics of this form of textualism might observe, for example, that the arguments made to establish the text's tight construction are too elaborate to have been readily available to people making decisions under serious time constraints. See Calabresi & Prakash, *supra* note 300, at 551 (asserting that the originalists' claim that "the text of the Constitution, *as originally understood by the people who ratified it*, is the fundamental law of the land" (emphasis added)). But see *id.* at 570 (referring to "hitherto-unnoticed provisions of the Constitution"). The critic would argue that it seems unlikely, and is unsupported in the material presented, that the people who ratified the Constitution understood the subtle textual arguments these authors present. If a provision of the Constitution has been unnoticed by scholars for a century, it seems unlikely that it was noticed in the relevant way by the people who ratified the Constitution, in support of the interpretation Calabresi and Prakash offer.

text.<sup>341</sup> And even rigorous textualism is unimpaired by the critique suggested by the idea of bricolage, as long as it is not connected to an intentionalist originalism.<sup>342</sup>

Lévi-Strauss's work suggests, however, a broader conclusion. Hamilton did describe the constitution-making process as one of "reflection and choice."<sup>343</sup> But, Lévi-Strauss might suggest, in doing so he was acting as a bricoleur. That is, the tool of presenting one's work as the product of reflection and choice was part of the accumulated cultural stock on which Hamilton drew and on which we continue to draw. In light of that cultural stock, saying that one is acting on reflection and choice need not be an assertion of some objective truth about one's activity. For Lévi-Strauss, it is simply another act of bricolage.

Finally, consider what might happen if we came to think that the criteria of rationality Hamilton invoked were themselves culturally contingent. We might then come to think that interpretation is not a process of rational choice among competing candidates but is rather a process in which existing legal materials are coopted and transformed to address a problem at hand.<sup>344</sup> Interpreters could not *use* the idea of bricolage to generate new interpretations, but this perspective would deprive critics of arguments in which the words *creative* or *activist* are pejorative. To a person who understands all interpretation as bricolage, creativity and activism simply describe interpretation and so cannot be used to criticize any particular act of interpretation.

### B. *The Limitations of Bricolage in Light of Functionalism and Expressivism*

Functionalism and expressivism also limit bricolage, understood as a process of constitution-making. Consider whether a new institution or interpretation can simply be dropped in to an otherwise unchanged constitutional system. Robert Bork has proposed a system by which legislatures could override Supreme Court decisions interpreting the

---

341. See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

342. Originalists have an account of the binding nature of the Constitution that links it to original understandings. That account is, of course, controversial. Once rigorous textualism is decoupled from originalism, even that account becomes unavailable. Still, one could defend rigorous textualism as the best method for interpreting the Constitution because it works better than any other method to constrain judges to accept the outcomes of democratic processes unless some objective criteria—for the rigorous textualist, the text's meanings—are satisfied.

343. THE FEDERALIST NO. 1, *supra* note 293, at 33 (Alexander Hamilton).

344. This perspective offers a slightly different understanding of my interpretation of Matsuda's argument. See *supra* text accompanying notes 262-263. Instead of seeing her as seeking to transform our national self-understanding, we would see her as engaged in the ordinary process of interpretation, which always involves the transformation of existing materials.

Constitution.<sup>345</sup> Bork's proposal is a more moderate version of a provision in Canada's Charter, which allows a legislature to override some constitutional protections even before the Supreme Court rules on the constitutionality of the legislature's substantive proposal.<sup>346</sup> It is yet more moderate than the provision in the Dutch Constitution stating that none of its provisions are enforceable in the courts.<sup>347</sup> But Bork's proposal has gotten nowhere in the U.S. political world.<sup>348</sup>

The reasons show how functionalism and expressivism limit the possibilities of learning through bricolage. Mark Graber has argued persuasively that judicial review serves the interests of political leaders often enough that they prefer to have the institution, even though it might sometimes produce rulings with which they disagree, than to eliminate it.<sup>349</sup> Graber points out that politicians sometimes find themselves facing issues that threaten to divide their political coalitions. They can avoid the difficulty of attempting to resolve the issue within the coalition by sending it to the courts for resolution. They can welcome a court decision that proves acceptable to enough members of the coalition, and they can denounce the courts for interfering with democratic decisionmaking if the court's solution proves unacceptable. An expressivist perspective adds to this functionalist point that proposals like Bork's are in substantial tension with the U.S. constitutional culture, which has grown up centering on judicial review.

It is easy to imagine what would happen if a ban on judicial review were suddenly inserted into the U.S. constitutional system. Congress would immediately pass a statute creating judicial review. The "new" institution of judicial review might differ in some details from the one we have now, but it would not be a dramatically different institution because functional and expressive concerns limit how much we can change in a short time. But, to revert to a point made in connection with the discussion of

---

345. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996) (proposing "a constitutional amendment making any federal or state court decision subject to being overruled by a majority vote of each House of Congress").

346. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33; *Attorney Gen. of Quebec v. La Chausse Brown's Inc.* [1988] 2 S.C.R. 712 (Can.) (interpreting section 33 to allow the legislature to override Charter rights before the Supreme Court has ruled on the substantive statute's constitutionality).

347. See NETH. CONST. art. 120. The Netherlands Supreme Court does invalidate legislation when it finds it to conflict with international law that is directly enforceable in Dutch courts. See *id.* art. 94.

348. Indeed, substantial opposition has developed to the very idea of amending the Constitution in any particular. For an expression of the reasons, see CITIZENS FOR THE CONSTITUTION, "GREAT AND EXTRAORDINARY OCCASIONS": DEVELOPING STANDARDS FOR CONSTITUTIONAL CHANGE (1997).

349. See Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993).

Matsuda's proposal,<sup>350</sup> proposals like Bork's are not designed for immediate adoption. They are taken seriously when there is already enough political support for them to make substantial changes in our self-understanding—and in the functions we ask our institutions to serve—not only thinkable, but even plausible.

### C. *Bricolage as Symptom*

The perspective developed in this Part should raise questions about one widely discussed topic in comparative constitutional studies written from a U.S. perspective, questions that in turn offer a different way of thinking about the utility of Lévi-Strauss's concept of bricolage. The topic is “the influence of the United States Constitution abroad,” as the subtitle of one collection has it.<sup>351</sup>

Undoubtedly, one can find in constitutional developments outside the United States citations to U.S. constitutional law and its institutional supports.<sup>352</sup> Imitation can occur for many reasons: a desire to satisfy external constituencies who seek reassurance that a new constitutional system is well-designed,<sup>353</sup> an attempt to “borrow” the prestige of U.S. institutions to shore up what otherwise might be the shaky foundations of new institutions, or a functionalist assessment of the new constitutional systems' perceived needs.<sup>354</sup> The term *influence*, however, connotes something else—adopting something used in the United States because there are good reasons for the U.S. rule or institution. Such influence may occur, of course, but we should not overlook the possibility that what we

350. See *supra* text accompanying notes 262-263.

351. CONSTITUTIONALISM AND RIGHTS, *supra* note 4.

352. It would be tedious to present a collection of citations, but two illustrations are *Morgentaler v. The Queen* [1988] 1 S.C.R. 30, 46 (Can.) (discussing *Roe v. Wade*, 410 U.S. 113 (1973)); and *Australian Capital Television Pty. v. Commonwealth of Australia* (1992) 177 C.L.R. 106, 111 (Austl.) (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

353. Recent constitutions of nations in the former Soviet bloc either explicitly or through early judicial interpretation ban capital punishment, which was a condition of entry into close political and economic relations with the signatories of the nominally optional Protocol 6 to the European Convention for the Protection of Human Rights abolishing capital punishment. For a compilation noting the connection between adoption of Protocol 6 and accession to the Council of Europe, see Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 526-27 (1997).

354. A.E. Dick Howard provides a helpful catalogue of these reasons:

A country's leaders may see a new constitution as the means of achieving international acceptance—the adoption of widely proclaimed norms as a measure of living up to international standards. Similarly, a country may hope to achieve admission into a regional arrangement, for example, the European Community. Moreover, a country, hoping to shore up its security interests, may seek to curry the favor of a powerful country or patron . . . . Drafters might also see a constitution as a way of attracting western trade and investment.

Howard, *supra* note 322, at 405-06.

observe is bricolage rather than engineering.<sup>355</sup> Most constitution designers today know something about the U.S. constitutional system; in Lévi-Strauss's terms, its features are "at hand" to them. They have to get a job done, and they may sometimes simply use what they find lying around—that is, features they know about from the U.S. system.

The idea of bricolage can enhance the analysis of constitutions as expressive as well. Consider what one might say *about*—not *to*—a judge considering whether to invoke constitutional experience in some other nation as part of her justification for a particular constitutional interpretation. The judge's willingness to do so tells us something about the nation's culture; it tells us that the culture is already open to learning from experience elsewhere. The expressivist could not say anything more than that if the judge goes ahead and relies on such experience. The perspective suggested in this Part, however, allows us to *describe* the judge as a bricoleur. We might then ask, what in the judicial culture of the late twentieth century placed comparative constitutional experience in the judge's tool kit, ready to be picked up for use when it seemed appropriate? In what follows, I use expressivism as the foil to develop the idea that references to comparative constitutional experience are symptoms of changes in the legal culture—that judges in their role as bricoleurs now find constitutional experience elsewhere to be part of the materials at hand. For those who describe what they observe as bricolage there is nothing unexpected about a judge using materials that happen to be at hand; the only interesting question may be: How did that particular tool happen to be at hand now, when it seems not to have been available earlier?

The very fact that a judge relies on experience elsewhere expresses the nation's culture, for the judge is a participant in, and builder of, that culture. Expressivism cannot support critical evaluation. To tell the judge that she should not have invoked experience elsewhere is to suggest that there are criteria from outside the culture that can be used to evaluate the judge's performance. But for the expressivist there are no such criteria. Nor can expressivism be used to recommend that a judge take any particular foreign experience into account. Recommendations are likely to be futile. If the culture is not receptive to them, they will go unheard. And if it is receptive to them, the recommendation can do no more than act as a catalyst, precipitating out of a diffuse legal culture a particular rule that was already there to be brought into view.

---

355. Cf. Rett R. Ludwikowski, "Mixed" Constitutions—Product of an East-Central European Constitutional Melting Pot, 16 B.U. INT'L L.J. 1, 64 (1998) (asserting that the work of constitution drafters in Europe's formerly Communist nations "resembles 'gardening' rather than 'engineering'").

Consider again the example of hate speech regulation. Perhaps the U.S. legal culture is deeply committed to the *macho* form of near-absolute protection of free expression I have described. If so, pointing to the Canadian experience will elicit a variety of deprecatory responses. For example, it might be said that Canadians are less confident of their society's ability to resist hate speech through counter-speech than we are in the United States. Or it might be said that *our* tradition of free expression is plainly superior to theirs, as demonstrated by the fact that we have had a First Amendment for over two hundred years while they have had a Charter of Rights and Liberties for less than two decades.

Alternatively, the U.S. legal culture might be ready to accept hate speech regulation because of some purely internal transformation, such as the rise of an identity politics that extends quite widely. If so, references to the Canadian experience are unlikely to do much work in the legal arguments. Proponents of regulation might point to that experience to counter assertions that regulation of hate speech leads inevitably to a highly repressive regime of thought control. But, on the assumption that the legal culture was already receptive to hate speech regulation, such assertions would already be heavily discounted and probably would not require empirical disconfirmation by reference to the Canadian experience.<sup>356</sup> References to the Canadian experience will matter only if the U.S. legal culture is almost ready to adopt such regulations, but needs some reassurance that thought control is not in the offing, that there are tangible benefits from adopting the regulations, or something else.<sup>357</sup>

Thinking about constitutional interpretation as bricolage can serve a diagnostic purpose, however. The very fact that Supreme Court Justices assert the relevance of comparative constitutional law to domestic constitutional interpretation and that other Justices find it necessary to

---

356. In this connection, the invocation in U.S. discussions of the Canadian experience with the regulation of pornography seems to me illuminating. Canada's Supreme Court adopted a version of one form of feminist argument supporting restrictions on the availability of pornography in *Butler v. The Queen* [1992] 1 S.C.R. 452 (Can.). Critics of U.S. proposals for similar restrictions regularly assert that the consequence of the *Butler* decision was the suppression of gay- and lesbian-oriented, sexually explicit material. See, e.g., NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 230-39 (1995); Jeffrey Toobin, *X-Rated*, NEW YORKER, Oct. 3, 1994, at 70. The evidentiary base on which those assertions rest is fiercely contested. For observations critical of these assertions, see *The First Amendment, Under Fire from the Left*, N.Y. TIMES, Mar. 13, 1994, § 6 (Magazine), at 42, which contains comments of Catharine MacKinnon, and Valerie Fortney, See *No Evil*, CHÂTELAINE, June 1996, at 62, available in LEXIS, News Library, Arcaws File. The empirical evidence matters much less than the consistency of the critical claim with the prevailing version of the U.S. culture of free expression.

357. Advocates of reliance on experience elsewhere may take the position that we cannot know whether a particular legal culture is far away from, or on the verge of, some shift until we try. Drawing attention to constitutional experience elsewhere might be part of a reasonable strategy for testing the waters.

respond to such assertions shows that the legal culture is different from what it was when such assertions were rare or were made only by those on the margins of the mainstream legal culture. It seems clear that interest in learning from experience elsewhere is part of the wider phenomenon that goes under the clichéd label *globalization*. Constitutional experience in other nations has become relevant to U.S. legal culture because of the tighter connections between legal practice in the United States and elsewhere that have developed in the past few decades.<sup>358</sup> A few decades hence, constitutional lawyers may find it as natural to invoke constitutional experience elsewhere in support of their arguments for interpretations of the U.S. Constitution as today's lawyers arguing a tort case in New York find it natural to invoke developments in Michigan or California tort law to support their arguments for what New York tort law should be.<sup>359</sup>

## VI. CONCLUSION

According to Laurence Sterne, "*an English man does not travel to see English men.*"<sup>360</sup> His traveler Yorick describes the varieties of travelers, including the "[i]nquisitive" traveler who seeks to learn lessons from foreigners.<sup>361</sup> Yorick clearly prefers the sentimental traveler, who empathizes with the distinctive—and initially seemingly peculiar—practices of the people he meets. But Sterne manages to show us that Yorick is so unself-conscious that he empathizes *as an Englishman*, which is to say that he is less sentimental than he believes.<sup>362</sup>

358. I can report that some law clerks for Justices in 1973 regarded Justice William O. Douglas's reference to press censorship in Brazil in *CBS v. Democratic National Committee*, 412 U.S. 94, 158 n.9 (1973) (Douglas, J., concurring), as confirmation of his eccentricity rather than of his legal acumen.

359. If that occurs, it would then also be natural for a practice of critical comparative constitutional law to develop. In such a practice, a critic might point out that a functionalist has failed to take crucial differences between the systems into account and, more broadly, that the very idea of functionalism rests on a contestable claim that different legal systems nonetheless have the same functions to perform. Or the critic might point out that appropriating institutions or doctrines from other legal systems, no matter how carefully done, might have unintended ideological consequences. I should note as well that the perspective developed in this Section allows us to see how this Article is itself a symptom of change in the legal culture. See, e.g., Riles, *supra* note 4.

360. LAURENCE STERNE, A SENTIMENTAL JOURNEY THROUGH FRANCE AND ITALY (1768) reprinted in MEMOIRS OF MR. LAURENCE STERNE 537 (Douglas Grant ed., Harvard Univ. Press 1951). Günter Frankenberg's influential article uses the metaphor of tourism to describe some forms of comparative law scholarship. See Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 411-12 (1985).

361. STERNE, *supra* note 360, at 535.

362. Cf. 2 LITERATURE CRITICISM FROM 1400 TO 1800, at 372 (Dennis Poupard ed., 1985) (referring to Sterne's "facility for taking an ironic view of his most intense feelings"); Keryl Kavanagh, *Discounting Language: A Vehicle for Interpreting Laurence Sterne's A Sentimental Journey*, 22 J. NARRATIVE TECH. 136, 136 (1992) (describing the "problem[] of interpretation" in determining "[h]ow far is Sterne separate from his narrator").

Throughout this Article, I have emphasized the ways in which arguments to which comparative experience might direct our attention are themselves available from within the U.S. constitutional order. In doing so, I have perhaps fallen into one of the traps Sterne identifies: In seeking to learn from comparative constitutional law, U.S. lawyers, academics, and judges run the risk of going abroad only to meet ourselves.<sup>363</sup> As an expressivist might put it, we necessarily see experience elsewhere as Americans. And yet, the need for a license to refer to comparative experience shows that this risk is actually a requirement. Comparative experience is legally irrelevant unless it can connect to arguments already available within the domestic legal system.

In what way, then, can we learn from comparative constitutional law? The famous opening line of *A Sentimental Journey*—"—They order, said I, this matter better in France—" <sup>364</sup>—suggests one answer, which I have done my best to avoid.<sup>365</sup> That answer would be that we can learn by directly appropriating better ways of ordering the matter that other constitutional systems have discovered. My discussions of functionalism and expressivism identified the difficulties with direct appropriation. Particular institutions serve complex functions in each constitutional system, and there is little reason to think that directly appropriating an institution that functions well in one system will produce the same beneficial effects when it is inserted into another.

I have argued that constitutional experience in other nations can inform the interpretation of the U.S. Constitution, but only if one holds a theory of interpretation that licenses reliance on that experience, and that not all theories of interpretation provide such a license.<sup>366</sup> In addition, I have argued that each of the three ways of using comparative constitutional experience might have its own distinctive license. Functionalism, for example, is licensed by an interpretive theory in which constitutional institutions serve purposes that can be identified at a middle level of generality and will be useful to the extent that the interpreter has a theory about institutional development that allows the interpreter to generalize from one nation's institutions to another's without requiring comprehensive comparisons.<sup>367</sup> Expressivism, by contrast, is licensed by an interpretive theory in which the Constitution is an expression of a distinctive national character and will be useful to the extent that the interpreter understands

---

363. Cf. HELENE MOGLEN, *THE PHILOSOPHICAL IRONY OF LAURENCE STERNE* 102 (1975) ("[Sterne] suggests the potentially solipsistic nature of all empathic experience.").

364. STERNE, *supra* note 360, at 529. The leading and concluding dashes are important parts of the quotation.

365. For essays adopting this answer (though reversing the teacher and the learner), see, for example, *CONSTITUTIONALISM AND RIGHTS*, *supra* note 4.

366. See *supra* Part II.

367. See *supra* Part III.

that the precise content of that character is always subject to renegotiation and revision.<sup>368</sup> Finally, the interpretive perspective suggested by the idea of bricolage receives its license from an interpretive theory that sees insistence that the Constitution is a highly rationalized document as only one, historically contingent view of the Constitution.<sup>369</sup>

These alternatives suggest a different answer to the question of what we can learn from constitutional experience elsewhere. That answer is suggested by an imbalance readers will undoubtedly have noticed in my presentation. The discussion of U.S. law is more substantial than that of foreign constitutional law.<sup>370</sup> As I have developed this Article's argument, constitutional experience elsewhere passes through the medium of the three analytic approaches I have described, before that experience becomes useful for U.S. constitutionalists. I intentionally use the metaphor of filtration here, to suggest that we can learn from experience elsewhere only to the extent that we avoid too much detail about that experience. For example, if we identify a complex set of functions closely tied to particular institutions elsewhere, we will be unable to learn about how we might alter or understand our institutions as they perform their somewhat different set of functions, and if we insist that a constitutional provision expresses the entire body of another system's constitutional culture, all we will be able to say is that our constitutional arrangements similarly express our constitutional culture.<sup>371</sup> This accounts for this Article's imbalance between U.S. and foreign constitutional law. We can learn from experience elsewhere by looking at that experience in rather general terms, and then by seeing how those terms might help us think about the constitutional problems we confront.

We might contrast the examples I have developed in this Article with other forms of "comparative" learning. Imaginative literature, particularly utopian science fiction, frequently offers models of constitutional design. And anthropology, both historical and contemporary, describes small-c constitutional orders.<sup>372</sup> I believe that we would find efforts to learn from

---

368. See *supra* Part IV.

369. See *supra* Part V.

370. It may be, of course, that the imbalance results from my personal limitations as a scholar more familiar with U.S. constitutional law. I believe, however, that it may have a different source, discussed in the remainder of the paragraph.

371. In thinking about a particular domestic institution or rule, we may discover that as we consider new details about another system's institution or rule and ignore others we had previously thought important, we refine our understanding of the domestic institution or rule.

372. Historical anthropology has been the source of the controversial assertion that the federated institutions of the Iroquois confederation influenced the development of U.S. federalism. Compare Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323 (1989), with Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295 (1990).

those sources to have a rather different feel from the examples I have used in this Article. They would seem, I believe, simply *too* foreign to be useful in even the indirect way I have suggested. Perhaps, then, we can identify a limitation inherent in the constitutionalist enterprise itself on the breadth with which we can look for knowledge to inform our constitutional thinking. If the requirement of a license limits our search in one way, perhaps constitutionalism itself limits our search to systems falling roughly within the constitutionalist tradition that is our own.

And yet, perhaps not. Justice Louis Brandeis taught us that “if we would guide by the light of reason, we must let our minds be bold.”<sup>373</sup> We can find that guidance virtually anywhere. We can learn from comparative constitutional experience, then, just in the way we learn from anything else. Thinking about that experience can be part of the ordinary liberal education of thoughtful lawyers. That may be enough to justify Judge Calabresi’s reliance on constitutional experience elsewhere to inform his, and our, understanding of U.S. constitutional law.

---

373. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting).

