

# THICK INSTRUMENTALISM AND COMPARATIVE CONSTITUTIONALISM: THE CASE OF GAY RIGHTS

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## ABSTRACT

*The article intervenes in the burgeoning field of comparative constitutionalism. Adopting comparative constitutional research on gay rights as a case study, it addresses the scholarship that comparative constitutionalists are producing, including the methodology and underlying assumptions about constitutions. It criticizes the mainstream comparative work on gay rights for its methodological thinness. Such research views constitutions as rule-based, privileging the judgments of constitutional courts over the practice of constitutionalism in other sites of governance. Foreign*

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*examples are pressed into service to bring about change in a designated place. From the vantage of an activist or advocate, the comparative constitutional work on gay rights that is prevalent now may prove misleading. Undue emphasis on courts as the site of constitutional change directs efforts to litigation, away from other forms of activism. The literature also exaggerates the transferability of constitutional precedents by abstracting them from their discursive and cultural context. Moreover, the consistent selection of a handful of “success” stories from pioneering jurisdictions distracts from the potential lessons waiting in the “failures,” where reform efforts have foundered. From a scholar’s perspective, the work is also unsatisfactory. By accepting the debates as currently framed, comparative constitutionalists fail to imagine transformations beyond same-sex marriage litigation and, consequently, fall short of their distinctive power as scholars. The article argues for thick instrumentalism as a mode of comparative constitutional scholarship. Thick instrumentalism combines commitment to a justice project for gay rights with a richer, more discursive and culturally sensitive understanding of the multiple sites in which constitutional rights are respected—and infringed.*

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## I. INTRODUCTION

Scholars write with enthusiasm (and many syllables) about the “globalization of the practice of modern constitutionalism,”<sup>1</sup> the “rise of world constitutionalism,”<sup>2</sup> “judicial globalization,”<sup>3</sup> and the “cosmopolitan character of modern constitutionalism.”<sup>4</sup> Whether or not they exaggerate the novelty of the phenomenon, significant interest and activity are evident. Increasing numbers of scholars are investing in a transnational project of constitutional scholarly discourse. A number of topics show perennial appeal, among which judicial independence and freedom of expression are staples. This decade, constitutional accommodation of emergency powers has attracted substantial attention, as has constitutional protection and recognition of what can be called, in shorthand, gay rights.

This article seizes on the mainstream of comparative constitutional work on gay rights. In taking this research as its object of inquiry, it brackets important questions such as the general health of the discipline and judges’ citation of international and foreign sources. Two streams course through the contemporary literature. One has an unmistakably American flavor. It debates the invocation of foreign sources by a majority of the U.S. Supreme Court when invalidating the State of Texas’ prohibition of sodomy.<sup>5</sup> The other, less nationally rooted, treats the judicial, and secondarily legislative, responses to constitutional claims for recognition of same-sex relationships.<sup>6</sup> The two streams are not fully distinct, and scholars have mooted the implications of *Lawrence* for same-sex marriage in

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1. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819, 821 (1999) (footnote omitted). See generally David S. Law, *Globalization and the Future of Constitutional Rights*, 102 Nw. U. L. Rev. 1277 (2008).

2. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771, 772 (1997).

3. Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int’l L. 1103, *passim* (2000).

4. Donald P. Kommers, *Comparative Constitutional Law: Its Increasing Relevance*, in *Defining the Field of Comparative Constitutional Law* 61, 62 (Vicki C. Jackson & Mark Tushnet eds., 2002).

5. *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003).

6. See, e.g., Kenneth McK. Norrie, *Constitutional Challenges to Sexual Orientation Discrimination*, 49 Int’l & Comp. L.Q. 755, 760 (2000); Wade K. Wright, *The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales*, 20 Int’l J.L. Pol’y & Fam. 249 (2006).

the United States.<sup>7</sup> This article emerged from the ambivalence that this scholarship stirs in me. Many of the developments recounted in the literature appear progressive. I have worries, however, about the research's method and its consequences for activism and scholarship.<sup>8</sup>

I scrutinize this literature and how it serves, disserves, or reshapes the projects espoused by various seekers of justice. I argue that the kind of comparative scholarship usually undertaken is unsatisfactory. The mainstream comparatists' orientation and method, including what they code, explicitly and implicitly, as relevant to constitutions' operation, have strategic and political consequences. Some of these consequences are probably intended, and some not, but they pass virtually without discussion in the comparative work on gay rights. I address several effects of these underlying choices. From the vantage of gay rights advocates, the scholarship's method and assumptions can be misleading. From the perspective of the scholar, the research questions are less worthy

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7. See, e.g., Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 Minn. L. Rev. 1184 (2004).

8. The lexical choice in speaking of gay rights, not queer ones, is deliberate. While it is hazardous to attempt a definition of *gay* and *queer*, let me say that the identity label *gay* is often associated with a somewhat fixed and stable identity and connected to a liberal legalist, equality-seeking project based on the idea that gays and lesbians are (more or less) like heterosexuals and consequently entitled to the same rights and relationship recognition options that they enjoy. By contrast, queer theorizing is associated with a rejection of all fixed identities and is built on a social constructivist foundation. It typically rejects rights claims for state recognition. See, e.g., Joe Rollins & H.N. Hirsch, *Sexual Identities and Political Engagements: A Queer Survey*, 10 Social Politics 290, 290–293 (2003); David L. Eng with Judith Halberstam & José Esteban Muñoz, *Introduction: What's Queer about Queer Studies Now?*, 23 Social Text 1 (2005). The work on same-sex marriage concerns a gay rather than a queer agenda. See, e.g., Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* 76–80 (1999). Even *Lawrence*, the central text for the stream respecting judicial citation practices, may seem strikingly un-queer despite its focus on the freedom to engage in non-normative sexual practices. Contrary to queer celebrations of the random and fleeting encounter, Justice Kennedy connected sexuality's "overt expression in intimate conduct with another person" to "a personal bond that is more enduring." *Lawrence*, 539 U.S. at 567. See also Teemu Ruskola, *Gay Rights versus Queer Theory: What Is Left of Sodomy after Lawrence v. Texas?*, 23 Social Text 235 (2005). That said, demarcations between gay liberal enterprises and queer ones are unstable: see, e.g., the discussion of "queer liberalism" in Eng et al., *supra*, at 10–11.

than they might be. Consequently, the pursuit of “alternative” projects for sexual and family justice—ones not centering on litigating for gay marriage—appears increasingly forgotten, even unspeakable.

The argument develops in four parts. Part II, borrowing from law and society literature, investigates whether the instrumental thrust of comparative constitutional research on gay rights poses a problem. Distinguishing scholars’ view of constitutions from their objectives in undertaking research, it introduces *thick instrumentalism* as a neglected but promising mode of scholarship in this area. Part III identifies methodological criticisms that might arise from the comparative constitutional work on gay rights: the case selection is unsystematic, the view of constitutions, thin. Given the pressing importance of gay rights for those affected, this part rejects such concerns insofar as they relate only to scholarly merit. For proponents of gay rights to care, more than the good of a scholarly discipline must be at stake. Part IV argues, however, that the defects of the mainstream comparative constitutional research on gay rights matter for those seeking change. The prevailing focus on constitutional judgments exaggerates the importance of courts as the site where constitutions operate and where activists can contest that operation. Attention to the rights claims advanced in constitutional courts may encourage overinvestment in litigation, relative to other strategies. Furthermore, the typical case selection forecloses potentially fruitful inquiry into failed efforts at reform. Turning from advocates to scholars, and adopting a more speculative register, Part V suggests that the mainstream studies on comparative constitutionalism and gay rights fall short of scholars’ distinct institutional capacity to re-imagine social life and law, to dream of alternative worlds. Narrow comparative inquiry into the fate of constitutional rights claims for state marriage postpones fundamental scrutiny, comparative and otherwise, of the state’s role regulating adult relationships. My goal, adopting comparative constitutional research on gay rights as a case study, is to contribute to broader reflections on the relationship of method to activism and to scholarship, as well as on the relationship between these enterprises.

As a gay man, I assess the comparative literature on gay rights cautiously. I share the “considerable diffidence” with which a prominent comparatist criticizes the method of the majority judgment of the U.S. Supreme Court in *Lawrence*, given its positive

effects for gay Americans.<sup>9</sup> I proceed gingerly, less because the outcome in *Lawrence* newly inclines me to holiday in the Lone Star State than because in my own country, Canada, I have benefited from liberalizing constitutional judgments—if less demonstrably from comparative scholarship. Might this article, by identifying weaknesses in gay rights comparativism, harm progressive political movements? A reader of a draft warned me that “[t]hey would love your arguments in Singapore,” and that conservative judges, legislators, and cabinet ministers could use my arguments to justify ignoring constitutional decisions from other countries. I cannot judge the likelihood of Singaporean officials perusing this article, though the odds seem slim. Still, my critic was undoubtedly sincere. He was warning me of the risk of co-optation, that enemies on the right might mobilize my critique of comparative work on gay rights. Does this risk call for suppressing doubts about the scholarly project unfolding in the law reviews? Are some worries better buried than aired? I am not persuaded that the difficulties raised in this article are best suppressed. My reader’s comment foreshadows a distinction, underlying Parts IV and V, between the respective roles of the advocate and of the scholar. Dissolving that distinction serves neither, and honest scholarship may address uncomfortable matters that an advocate would downplay. I draw comfort from the notion that “critique is not equivalent to rejection or denunciation, that the call to rethink something is not inherently treasonous but can actually be a way of caring for and even renewing the object in question.”<sup>10</sup> It is in a spirit of hope that this intervention seeks a renewal of comparative constitutional work on gay rights.

## II. SCHOLARLY ENDS AND VIEWS OF CONSTITUTIONS

### A. Criticizing Thinly Instrumentalist Research

The comparative constitutional scholarship on gay rights inclines markedly towards direct constitutional reform within a given jurisdiction. One typical objective is the reversal of a judgment seen

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9. Pierre Legrand, *Comparative Legal Studies and the Matter of Authenticity*, 1 J. Comp. L. 365, 407 (2006).

10. Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* x (2005) [hereinafter Brown, *Edgework*]. Moreover, critique might be a means “of foreseeing co-optation and doing something about it.” Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* 318 (2006).

as inimical to gay rights. For close to two decades, a key goal in the United States was the overruling of *Bowers v. Hardwick*.<sup>11</sup> Another objective is extending a line of cases so as to embrace gay couples. Perhaps a right to intimate association or privacy recognized for opposite-sex couples also extends to same-sex intimacy, or perhaps a right to equality, interpreted robustly, calls for the dismantlement of rules disadvantaging same-sex couples.<sup>12</sup> Now that courts in some Western democracies have accepted constitutional claims for same-sex marriage, comparison is typically harnessed to that end.<sup>13</sup> In such debates, the “apolitical sensibility”<sup>14</sup> prevalent in much comparative law is absent.

Prominent in such studies is an instrumental view of law. Law is understood as “a tool for sustaining or changing aspects of social life.”<sup>15</sup> Much of the research reflects “the belief that legal doctrine, until now an endogenous (or dependent) variable can, in the light of gender, race and class analysis”—and in the case at hand, sexual orientation—“be transformed magically into an exogenous (or independent) variable.”<sup>16</sup> Comparative constitutionalists writing on gay rights often endeavor “to expand or rework the formal legal categories that overtly carry the power of gender, class, and homosexuality.”<sup>17</sup> They assume that social forces have historically

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11. 478 U.S. 186 (1986). See, e.g., Charlene Smith & James Wilets, *Lessons from the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws*, 24 Seattle U. L. Rev. 49 (2000).

12. See, e.g., Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 Colum. Hum. Rts. L. Rev. 1, 2 (2005); Mark E. Wojcik, *The Wedding Bells Heard around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage*, 24 N. Ill. U. L. Rev. 589 (2003–2004); David A. J. Richards, *The Case for Gay Rights: From Bowers to Lawrence and Beyond* (2005).

13. E.g., Marilyn Sanchez-Osorio, *The Road to Recognition and Application of the Fundamental Constitutional Right to Marry of Sexual Minorities in the United States, the Netherlands, and Hungary: A Comparative Legal Study*, 8 ILSA J. Int'l & Comp. L. 131 (2001). See also sources collected *infra* note 70.

14. David Kennedy, *The Methods and the Politics*, in *Comparative Legal Studies: Traditions and Transitions* 345, 345 (Pierre Legrand & Roderick Munday eds., 2003).

15. Austin Sarat, *Pain, Powerlessness, and the Promises of Interdisciplinary Legal Scholarship: An Idiosyncratic, Autobiographical Account of Conflict and Continuity*, 18 Windsor Y.B. Access to Just. 187, 196 (2000).

16. Roderick A. Macdonald, *Still “Law” and Still “Learning”?*, 18 Can. J. L. & Soc’y 5, 11 (2003).

17. Brown, Edgework, *supra* note 10, at 129.

determined law's content so as to disadvantage gay men and lesbians, but that changing law's content will aid in overcoming or redeeming those oppressive forces. The literature radiates confidence in its correct identification of the next step for the gay movement, and that comparative study of foreign developments is useful in achieving it. British domestic courts and the European Court of Human Rights hearing spousal recognition claims would find the "arguments, reasoning and results" from Canadian, South African and Vermont sexual orientation discrimination cases to be "valuable lessons."<sup>18</sup> Similarly, the U.S. Supreme Court might glean "helpful insights" from European human rights decisions and international human rights conventions.<sup>19</sup> The same-sex spousal recognition cases under the Canadian Charter of Rights and Freedoms are "powerful tools" for accessing spousal benefits in the United States.<sup>20</sup> If the U.S. Supreme Court ever adjudicates a claim for same-sex marriage, drawing attention to Ontario's same-sex marriage case would be "helpful."<sup>21</sup> Comparative treatments of same-sex marriage would furnish advocates within the United States with "an additional resource."<sup>22</sup>

In fairness, nontrivial variations are detectable. The more discursive ways of understanding foreign sources are consistent with the idea of dialogical interpretation, in which judges are understood as engaging with arguments, rather than simply counting heads.<sup>23</sup> By contrast, the lexicon of tools and resources reifies foreign constitutional judgments. A tool is, among other things, "a device designed for some particular mechanical function in a manual activity, as a hammer, a saw, a fork; an implement"; it is also "[a] thing (concrete or abstract) used in the carrying out of some occupation or pursuit; a means of effecting a purpose or facilitating

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18. Norrie, *supra* note 6, at 760.

19. Samar, *supra* note 12, at 2.

20. Deborah Gutierrez, *Gay Marriage in Canada: Strategies of the Gay Liberation Movement and the Implications it Will Have on the United States*, 10 *New Engl. J. Int'l & Comp. L.* 175, 215 (2004).

21. Samar, *supra* note 12, at 85 (referring to *Halpern v. Canada* (2003), 65 O.R.3d 161 (Ont. C.A.), in which the Court of Appeal for Ontario held that the traditional opposite-sex definition of marriage derived from the common law discriminated, unjustifiably, on the basis of sexual orientation, contrary to the equality right in Section 15 of the Canadian Charter of Rights and Freedoms).

22. Anjali Willis McReynolds, *What International Experience Can Tell U.S. Courts about Same-Sex Marriage*, 53 *UCLA L. Rev.* 1073, 1105 (2006).

23. See, e.g., Choudhry, *supra* note 1.

an activity.”<sup>24</sup> The hammer, the saw, and the fork have no purpose independent of their mechanical function, nor does the abstract thing have a freestanding existence outside its carrying out a purpose or facilitating an activity. The lexicon of utility attributes an ease of transport to foreign authorities and assumes a controlled deployment of foreign sources. The metaphor of resources and tools conveys scant sense of the potential unruliness of foreign judgments. The implication is that the tools and resources stand inertly ready for use. Characterizing a foreign judgment as a tool implies, with some disregard for its place in the jurisprudential tapestry into which a domestic court stitched it in its country of origin, that it owes its existence to its utility for the task at hand. The metaphor becomes complicit in a ripping away of a foreign judgment from its context and from its place in the discursive fabric of the foreign constitution’s construal over time. Constitutional judgments, in their domestic context, likely speak to each other—here again metaphor seems unavoidable—considerably more than do the tools in a toolbox. The foreign-judgment-as-resource metaphor is similarly mechanical.<sup>25</sup>

In the gay rights comparative literature, there is little contemplation that invocation of foreign sources might yield unexpected results and unintended consequences.<sup>26</sup> Might they not challenge or transform the understanding and agenda of those who invoke them? Though an open-ended “spirit of inquiry” is sometimes regarded as crucial to comparison,<sup>27</sup> presumably one by which the result of inquiry might surprise and unsettle the inquirer, little sign of such a spirit is discernable in much of this research. If the advocate succeeds, the foreign source may influence a domestic judge, but it is not expected to change the advocate who cites it.

Many scholars writing comparatively about constitutions and gay rights agree on a practical use to knowledge of the events they study. They concur on the function of their own scholarly productions as transmitters of that knowledge. If knowledge is power, favorable foreign judicial texts, and the periodical articles that disseminate

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24. 2 The New Shorter Oxford English Dictionary 3337 (Lesley Brown ed., 1993).

25. A resource is, among other things, “[a] means of supplying a deficiency; a stock or reserve which can be drawn on when necessary.” *Id.* at 2565.

26. “Hammer” may imply the risk of bashing a finger, but that is peripheral in most hammer talk.

27. Geoffrey Samuel, *Taking Methods Seriously (Part One)*, 2 J. Comp. L. 94, 118–19 (2007).

them to new audiences, are part of the relevant knowledge. Are foreign judgments primary resources to be processed and transformed for use by constitutional comparatists? If the foreign treatments of gay rights claims are resources, what is the comparatist who locates, gathers, and distributes them: a miner?<sup>28</sup>

The instrumentalism patent in this body of scholarship calls to mind research in the law and society tradition that castigates legal scholarship for its instrumental orientation. Arguably, insisting that legal scholarship cash out in policy prescriptions “deeply circumscribes the legal imagination and the permissible boundaries of legal scholarship.”<sup>29</sup> It directs legal scholarship too narrowly towards legal practice and policy science and may consequently narrow legal research’s “range of vision.”<sup>30</sup> Similarly, Paul Kahn criticizes the “scholarly compulsion to point the way toward reform.”<sup>31</sup> He associates that compulsion with comparative constitutional scholarship’s pursuit of a “liberal ideal of world governance under the rule of law.”<sup>32</sup> These criticisms are not, of course, exclusive to law and society research.<sup>33</sup>

Admittedly, commentators who object to scholars’ prescribing outcomes to policy-makers do themselves urge alternative programs. Austin Sarat suggests that seceding from the policy audience may encourage research that takes as point of departure, not a predetermined legal policy, but “the social and cultural processes in which legality is embedded and in which legality operates.”<sup>34</sup> Against

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28. Compare, in a rich exploration of technoscientific metaphors, analysis of the lawyer and legal scholar who are sometimes “likened to a kind of mechanic or engineer.” Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 *Buff. L. Rev.* 973, 1002 (2005).

29. Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *Yale J.L. & Human.* 155, 175 (2006).

30. Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 *L. & Pol’y* 97, 141 (1988).

31. Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* 6 (1999).

32. Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 *Mich. L. Rev.* 2677, 2679 (2003) [hereinafter Kahn, *Comparative Constitutionalism*].

33. See, e.g., the view that “[r]elevance to politics . . . is an accidental characteristic . . . judged from the only point of view open to an academic—the pursuit of knowledge.” Richard H.S. Tur, *The Dialectic of General Jurisprudence and Comparative Law*, 22 *Jurid. Rev.* 238, 244 (1977).

34. Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 *Yale J.L. & Human.* 129, 149 (2000) [hereinafter Sarat, *Redirecting Legal Scholarship*].

instrumentalism in the service of a liberal ideal, Kahn prescribes a “powerful antidote,” what he calls a *cultural approach* to comparative constitutionalism.<sup>35</sup> Kahn’s cultural approach does not defend an alternative normative vision. Nor, he says, does it argue for diversity against uniformity. It does not argue for any position at all, its sole ambition being “to show that the field upon which the reformers act is more complex than they imagine.”<sup>36</sup> He writes that within a cultural approach the “aim cannot be to determine the most efficient or efficacious constitutional practices, nor can it be to advance a conception of justice.”<sup>37</sup>

Culture’s recurrence in the work of Sarat and Kahn, who differ on other points,<sup>38</sup> is not coincidence. It figures in other efforts to reorient comparative constitutional scholarship. The constitution-as-culture may lead comparative constitutional scholars to “transgress the borders of an instrumental understanding” and encounter the neglected “symbolic dimension.”<sup>39</sup> Constitutional comparatists might emulate the legal anthropologist who, it is said, would never suppose improving domestic law to be the point of studying foreign law.<sup>40</sup> This common turn to culture testifies to dissatisfaction with the abstract, positivist comparison of constitutional texts. Invocations of a reflective, non-reformist comparative constitutionalism resonate with some interventions, by scholars less embedded in law and society, on the general aims of comparative constitutional law.<sup>41</sup>

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35. Kahn, *Comparative Constitutionalism*, *supra* note 32, at 2679.

36. *Id.*

37. *Id.* at 2678–79.

38. Though irrelevant for present purposes, Sarat is annoyed that Kahn’s project of a cultural study of law ostensibly ignores an established field of legal studies already occupied less with reform than with legal culture. Sarat, *Redirecting Legal Scholarship*, *supra* note 34.

39. Günther Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, 4 *Int’l J. Const. L.* 439, 449 (2006) [hereinafter Frankenberg, *Comparing Constitutions*].

40. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law I*, 39 *Am. J. Comp. L.* 1, 8 (1991).

41. See, e.g., T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 *Tex. L. Rev.* 1989, 1989 (2004) (arguing comparative constitutional law is suitably viewed, non-instrumentally, as part of a liberal education); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 *Int’l J. Const. L.* 269, 295 (2003) (arguing comparative constitutional analysis is possibly the best way to understand the “legal character of what we are and what we can be as the

Yet is doing comparative scholarship in furtherance, instrumentally, of a gay rights agenda problematic? Many scholars bring self-consciously political commitments to their research. Indeed, in some views, ideals of “scholarly neutrality, detachment, and depoliticization” entail “tedium and bad faith.”<sup>42</sup> Frankly, is it realistic to expect members of an oppressed group to approach their research indifferent to its effects and to the future developments directly or indirectly affecting them? Respecting gay rights and the rights of other historically vilified minorities, it seems improbable to enjoin politically unengaged comparative constitutionalism solely to promote contemplation and heightened self-understanding. *Pace* Kahn and others, the question should not be engagement versus detached, neutral pursuit of understanding for its own sake. More salient questions concern in whose allegiance a scholar is engaged, and what view of law underwrites and propels that engagement. As one comparatist argues persuasively, an aspiration for value-transparency should replace one for value-neutrality: such a move respects “modern norms of academic objectivity” and acknowledges “that all comparative law scholarship and every scholar are fundamentally political.”<sup>43</sup>

#### B. Unbundling Thick and Thin Methods

Rereading their criticisms of instrumental scholarship, it appears that the law and society critics mingle ideas that are analytically distinct. They assume too much about the wrongs of instrumentalism and the merits of non-instrumental scholarship. Two overlapping dichotomies can be usefully separated. One is between *instrumental* and *non-instrumental* research: the contrast

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creators of law and as its subjects”); Norman Dorsen, Michel Rosenfeld, Andrés Sajó, & Susanne Baer, *Comparative Constitutionalism: Cases and Materials* 8 (2003) (arguing comparative constitutionalism enhances knowledge of one’s own system); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109, 128 (2005) (arguing that constitutional comparativism is “a tool for better reflection” on the constitution’s meaning for its national community); Frank I. Michelman, *Reflection*, 82 Tex. L. Rev. 1737, 1738 (2004) (Comparative constitutional analysis may “help us to see ourselves clearly.”).

42. Halley, *supra* note 10, at 314.

43. Ahmed A. White, *Max Weber and the Uncertainties of Categorical Comparative Law*, in *Rethinking the Masters of Comparative Law* 40, 56 (Annelise Riles ed., 2001). *See also* Barbara Herrnstein Smith, *Belief and Resistance: Dynamics of Contemporary Intellectual Controversy* ch. 1 (1997).

between research that pursues a change to the law in the service of a particular objective or conception of justice and research that aims only to deepen understanding. Non-instrumental stances include the view of a cultural study of law as constituting a practice of freedom,<sup>44</sup> as well as the idea of legal scholarship as a creative endeavor that is itself an act of social justice.<sup>45</sup> Emphasis on the hedonics of legal scholarship, “the rush that occasionally comes from doing something very well which is very hard to do at all,” represents another.<sup>46</sup>

The other dichotomy is between *thin* and *thick* understandings of constitutions. The thin understanding regards them as utilitarian, rule-based, and represented satisfactorily by their texts. It takes their principle site of operation to be the constitutional or highest court.<sup>47</sup> By contrast, the thick understanding apprehends constitutions as symbolic, cultural, discursively embedded, and operative in multiple sites. It may reject a strict division between legislation and interpretation, emphasizing constitutional culture as formal and informal interactions between citizens and officials.<sup>48</sup> A thick view of constitutions may regard them not only as mediating between cultures, but as constituting one (or more).<sup>49</sup> Law and society scholars hold up contrasting views of law, including one often referred to as a “constitutive” view of law. Such a view understands legality to be sustained not “solely by the formal

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44. Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, in *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* 154, 183 (Austin Sarat & Jonathan Simon eds., 2003).

45. Nicholas Kasirer, *Of combats livrés and combats livresques*, 19:1 *Can. J. L. & Soc'y* 153, 157 (2004).

46. Arthur A. Leff, *Afterword*, 90 *Yale L.J.* 1296, 1296 (1981).

47. This view is widespread and persistent, although cases challenging it are common. Think of the United Kingdom's unwritten constitution, or indeed of the unwritten dimensions of any constitutional order, including the American one. See Benjamin L. Berger, *White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text*, 3 *J. Comp. L.* 249 (2008). The limits of text also emerge in the case of any constitution which, because it has official versions in more than one language, always exceeds a single document. See Robert Leckey, *Prescribed by Law/Une règle de droit*, 45 *Osgoode Hall L.J.* 571 (2007).

48. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *Cal. L. Rev.* 1323, 1324 (2006).

49. See, e.g., Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4 (2003); Benjamin L. Berger, *The Cultural Limits of Legal Tolerance*, 21 *Can. J. L. & Juris.* 245 (2008).

law of the Constitution, legislative statutes, court decisions, or explicit demonstrations of state power such as executions.”<sup>50</sup> It adopts instead the assumption that “legality is embedded in and emerges out of daily activities.”<sup>51</sup> Law and society research is a reminder that “laws have—in addition to their specifically intended import—other, unintended capacities or uses.”<sup>52</sup> This constitutive view of law may be one component of the thick understanding of constitutions. The thickness of this understanding of constitutions comes from the breadth of practices and sites it encompasses.<sup>53</sup>

In short, Sarat’s and Kahn’s interventions bundle together thin understandings of constitutions with instrumental views of scholarship. It is thus possible to plot out a matrix of four cells. A matrix is helpful for the sake of clarity, but the graphic presentation exaggerates the separateness of the tendencies.

thin view of constitutions; instrumental view of scholarship	thin view of constitutions; non-instrumental view of scholarship
thick view of constitutions; instrumental view of scholarship	thick view of constitutions; non-instrumental view of scholarship

Figure 1

The mainstream comparative constitutional research on gay rights inscribes itself in the upper left cell. The view of constitutions prevailing in the mainstream comparative work on gay rights is thin and text-based. It abstracts constitutional texts and judgments from their social, political, historical, and discursive contexts. The studies downplay constitutions’ symbolic, cultural, and constitutive power.

50. Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (1998).

51. *Id.* at 17.

52. Susan S. Silbey & Egon Bittner, *The Availability of Law*, 4 L. & Pol’y 339, 423 (1982).

53. The thickness I mean here does not refer to the scope of constitutional law relative to the broader field of political justice. For an exploration of constitutional law’s thinness in the sense of its failure to take economic injustice and historic injustice as within its purview, see Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993). For recent exploration of the disjuncture between the written text of the Constitution of the United States and constitutional practice, see Bruce Ackerman, *The Living Constitution*, 120 Harv. L. Rev. 1737 (2007).

As for Kahn and the law and society and cultural critics, they would position themselves in the lower right cell.<sup>54</sup> They seek, contemplatively, to understand the constitution as cultural practice, as the site of the production of meaning, but not to intervene in its operation. There is undoubtedly space for legal scholarship that presents itself as primarily contemplative, but such a self-understanding need not colonize the field, nor represent a particular scholar's final word on a matter. Cultural studies of law, or law and society or law and the humanities explorations, need not be neutral towards law's future. Indeed, much of the best law and society work has emerged from strong ideological commitments to effecting legal and social change in the interests of access to justice or gender or class justice.<sup>55</sup> Especially where people's lives and their life choices are at stake—here the gay rights example sharpens the focus—insistence on entirely detached scholarship risks seeming unattractively quietistic.

Unqualified criticism of instrumental scholarship papers over two cells in the matrix. The upper right cell, which combines a thin view of constitutions with a non-instrumental view of scholarship, is unlikely to draw many adherents. By contrast, the lower left cell, featuring *thick instrumentalism*, represents an attractive and underpopulated site. Thick instrumentalism combines a commitment to the advancement of a conception of justice with a complex understanding of constitutions as phenomena that exceed a constitutional court's authoritative interpretation of a written text. It aims to attend to a legal system's "hidden richness" concealed behind "a reductive appearance" of positivist discourse.<sup>56</sup> To be plain, thick instrumentalism, as understood by this article, is a mode of scholarly inquiry. Though research resulting from such a mode has, I argue, potential use for activists, it is not itself a mode of advocacy.

The elements in thick instrumentalism might gesture towards a reflexive relation between the thick view of law and the

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54. It does not matter for my purposes that scholars might disagree on that characterization of the work of others. Sarat, for example, criticizes Kahn's view of culture as unduly thin, unitary, and focused on "High Culture." See Sarat, *Redirecting Legal Scholarship*, *supra* note 34, at 143–49.

55. Austin Sarat, *Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship*, in *The Blackwell Companion to Law and Society* 1, 3–4 (Austin Sarat ed., 2004).

56. Horatia Muir Watt, *La fonction subversive du droit comparé*, 52 *Rev. Int'l Droit Comp.* 503, 509 (2000).

scholar's instrumental engagement. That is, the objectives pursued in the service of her commitments to justice might themselves require revision in light of what she learns from her thick view of constitutions and where and how they operate. The thick view of constitutions might well prompt self-critical reflection and skepticism about the rightness of her project, humility regarding law's limits, recognition of the unpredictability and uncontrollability of legal processes, and acceptance of the plurality of sources of legal normativity and the sites of its working. The thick instrumentalist might revise her strategies as a consequence of what her comparative studies reveal. She would not, as it seems the thin instrumentalists do (more on this shortly), suppress difficult counter-cases as mistaken or irrelevant. In my understanding, thick instrumentalism can include a measure of speculation and agnosticism as to the best means of making change. The adjective, and its entailments as I understand them, is an essential part of the term. In a sense, as the scholar's understanding of constitutions and the means of changing their operation becomes thicker, the instrumentalism becomes less certain. What distinguishes it from the thick, non-instrumental work, for which Kahn is the standard bearer, is that the scholar who adopts thick instrumentalism seeks ultimately to advance a conception of justice, committed to the belief that change is possible.

What is the relation of thick instrumentalism to the stances represented in the other cells of the matrix? In one view, it is unstable because forces push it towards the top left or the bottom right. In other words, the imperatives of advocacy push from the bottom left to the top left, as the gaze on the constitutional text and its interpretation by the constitutional court detracts attention from other sites of constitutional praxis. Technical difficulties in viewing a constitution in its multiple modes of operation may direct the advocate to texts alone. In addition, the attraction of scholarly contemplation unharnessed to any justice project may pull towards the lower right. A full defense of the lower left cell—of thick instrumentalism—must confront both tendencies. To the extent this article proselytizes, it seeks to convert scholars committed to laboring for a more just world for gays and lesbians to move from a thin instrumentalism to a thicker one. Scholars set entirely on contemplation are much less likely converts.

Pull of contemplation ⇒			
		<b>Instrumentalism</b>	<b>Non-instrumentalism</b>
↑ Pull of advocacy	<b>Thin view of constitutions</b>	Mainstream comparative constitutional research on gay rights	Few adherents
	<b>Thick view of constitutions</b>	Thick instrumentalism	Law and society, cultural critics

Figure 2

Admittedly, an alternative view holds that movement from lower left to lower right may well be productive. Once scholars adopt a thick view of constitutions and of law, they may, consciously or not, shift their emphasis from instrumental to non-instrumental work. It may be valuable for a scholar with a firm commitment to some justice project to suspend that commitment's instrumentalization, through prescriptions for specific reforms, in order to make space for thick, non-instrumental scholarship. The suspension of instrumentalism—as opposed to its outright rejection—may open space for reflection that deepens understanding of a legal problem's complexity. The scholar may return from that thick, non-instrumental reflection to more reformist endeavors. Time spent working non-instrumentally, with reform ambitions bracketed, may nourish the eventual taking up of thick instrumentalism.<sup>57</sup>

The law and society scholars are right to direct attention to the thinness of the understanding of constitutions prevailing in much of the mainstream comparative constitutional scholarship. It is unhelpful, however, to entrench as a corollary the view of the legal scholar as contemplatively external to political debates.<sup>58</sup> The dispute

57. I am indebted to Benjamin Berger for discussion on this point.

58. In addition to the general sense in the social sciences and the humanities that objectivity and value-neutrality are chimerical, a further worry attaches to comparative law. The legacy of colonialism renders especially unseemly any pretension to scholarly neutrality in this area, obscuring as it does the imbrication of modern comparative law in imperial projects. See L. Neville Brown, *A Century of Comparative Law in England: 1869-1969*, 19 *Am. J. Comp.*

between instrumentalist reformers and more contemplative cultural proponents is helpfully understood as turning less on the presence or absence of some idea of how law and the world might be better than on the assumptions about legal phenomena. In this reading, the debate between instrumentalist and non-instrumentalist comparatists turns not on the presence or absence of an imagined better way, but on the presence or absence of certain components in the scholarly process. The deeper critical preoccupation is not the usefulness of legal scholarship, but the reflexivity in the research and the skepticism with which the scholar envisages the means-end relation in which law reform unfolds.<sup>59</sup>

### III. METHODOLOGICAL COMPLAINTS

Comparative constitutional scholarship has provoked a number of methodological criticisms. The fact is unsurprising since, according to Annelise Riles, today “everyone is a methodologist.”<sup>60</sup> She elaborates: “to be a comparativist today is to worry about the proper terms, categories, scale, methods, and data to be used in comparison.”<sup>61</sup> Here I sketch objections to the gay rights literature derived from the methodological criticisms increasingly levied against comparative constitutional law. Two criticisms are relevant: one concerning unsystematic case selection, and the other, the impoverished understanding of law.

#### A. Case Selection

Comparatists have drawn criticism for failing to engage with the central questions of comparability and justification of case selection.<sup>62</sup> Specifically, it has been suggested that legal academics

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L. 232, 235–37 (1971); Upendra Baxi, *The Colonialist Heritage*, in *Comparative Legal Studies: Traditions and Transitions*, *supra* note 14, at 46.

59. Roderick A. Macdonald & Hoi Kong, *Patchwork Law Reform: Your Idea Is Good in Practice, But It Won't Work in Theory*, 44 *Osgoode Hall L.J.* 11, 11 (2006). *See also* Lon L. Fuller, *Means and Ends*, in *The Principles of Social Order: Selected Essays of Lon L. Fuller* 61 (Kenneth I. Winston ed., rev. ed. 2001).

60. Annelise Riles, *Introduction: The Projects of Comparison*, in *Rethinking the Masters of Comparative Law*, *supra* note 43, at 1, 2.

61. *Id.* (footnote omitted).

62. *See, e.g.*, David Nelken, *Comparing Legal Cultures*, in *The Blackwell Companion to Law and Society*, *supra* note 55, at 113, 113 (arguing there is an alarming indifference to central questions of comparability); Roger Cotterrell,

producing comparative constitutionalism overlook or are ignorant of “basic methodological principles of controlled comparison, research design, and case selection.”<sup>63</sup> Exemplifying the first stream of gay rights comparative constitutionalism, William Eskridge, Jr., takes the citation of foreign precedents in *Lawrence* as a point of departure for discussing the “imperative of comparative constitutionalism.”<sup>64</sup> He identifies three roles that the foreign precedents might have played in the majority’s opinion. They may have been “focal points suggesting an emerging normative consensus”; they may, in a spirit of comity, have signaled respect for foreign courts; and they may have evidenced an “evolving tradition.”<sup>65</sup> His analysis neither addresses the selection of comparator cases, nor does it placate worries that a careful selectivity operates in the approval of some foreign authorities. Indeed, he takes for granted that only “progressive” foreign authorities will count. In another intervention, Vincent Samar aims to justify the use of international human rights principles for construing the American constitution.<sup>66</sup> He contends that European human rights decisions and international human rights conventions can provide helpful insights for domestic interpretation of the U.S. Constitution. Samar attempts to obviate methodologically suspect cherry-picking by imposing a normative condition “to prevent constriction or devaluation” of rights already recognized by American constitutional law.<sup>67</sup> This move disqualifies a vast sample set.

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*Comparatists and Sociology*, in *Comparative Legal Studies: Traditions and Transitions*, *supra* note 14, at 131, 142 (stating that questions of comparison are “epistemological and ontological puzzles” that persistently “haunt” comparative law).

63. Ran Hirschl, *On the Blurred Methodological Matrix of Comparative Constitutional Law*, in *The Migration of Constitutional Ideas* 39, 39 (Sujit Choudhry ed., 2006). *See also, e.g.*, Ran Hirschl, *The Questions of Case Selection in Comparative Constitutional Law*, 53 *Am. J. Comp. L.* 125 (2005).

64. William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 *Int’l J. Const. L.* 555, 555 (2004).

65. *Id.* at 556–59. *Compare with* a similar enumeration of uses of foreign law in William D. Araiza, *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law?*, 32 *Wm. Mitchell L. Rev.* 455, 476–80 (2006) (examining foreign law as empirical input and social context).

66. Samar, *supra* note 12, at 98–100.

67. *Id.* at 3. If the objective of comparative constitutionalism were better understanding—as it is sometimes said to be—why impose a floor to prevent downwards revision? If one is open to knowledge, the inquiry should not be so

The choice of jurisdictions whose recognition of same-sex relationships is studied by comparatists hints at an unexplained selectivity. The question is not one of selecting the materials of liberal states over those of authoritarian or fundamentalist ones. Rather, comparative work on gay rights singles out as “illuminating”<sup>68</sup> judicial materials from only some liberal polities committed to the equal moral worth of every subject, not all. What typically passes without explication is the basis for determining which understandings of the entailments of liberalism and equal moral worth are “illuminating,” and which ones—even in ostensibly liberal states—are benighted (in keeping with the persistent metaphor of light) and need themselves to be illuminated.

More concretely, the issue raising suspicion is the persistent presence of pioneer or outlier jurisdictions such as Canada and South Africa, which both punch above their weight. For example, Kenneth Norrie examines constitutional challenges that have led to increased legislative recognition of same-sex couples in three jurisdictions: Canada, South Africa, and Vermont.<sup>69</sup> He draws lessons from those cases for possible challenges to English law under the Human Rights Act 1998. Canada, Vermont, and South Africa were not, despite their presentation in the paper, selected to provide a representative snapshot of a widely crystallizing global norm or emerging consensus.<sup>70</sup> They were chosen to illustrate a progress narrative.

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constrained. Cases where constitutional rights seem to conflict—freedom of expression and equality in the case of racist speech (*R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992)), or an accused person’s right to a fair trial and a rape complainant’s privacy and equality (*R. v. Mills*, [1999] 3 S.C.R. 668)—indicate that a sincere intention to pursue a better understanding might call for narrowing the scope of one right as the entailments of another, best understood, become clearer.

68. Eskridge, *supra* note 64, at 560.

69. Norrie, *supra* note 6.

70. See also Eskridge, *supra* note 64, at 556–57; Samar, *supra* note 12, at 9–14. For other comparative studies seizing on the successful Canadian constitutional litigation for same-sex marriage, see generally Nicholas Bamforth, *Same-Sex Partnerships: Some Comparative Constitutional Lessons*, 2007 Eur. Hum. Rts. L. Rev. 47 (2007) (arguing that excessive judicial deference is inappropriate); Wright, *supra* note 6 (considering whether English courts will facilitate the legal recognition of same-sex civil marriage, like their Canadian counterparts); McReynolds, *supra* note 22 (examining how three common approaches to the judicial use of international materials would apply in same-sex marriage cases); Wojcik, *supra* note 12, at 636–45 (2004) (surveying developments in the legal recognition of same-sex marriage).

While Norrie's selected examples model a temporal and substantive progression, each going "substantially further than the one before,"<sup>71</sup> a comparatist differently disposed could selectively craft a less happy narrative from failed gay rights claims.<sup>72</sup>

More thought is likely needed on the evaluations that designate some jurisdictions as holding lessons for neighbor states and others as needing instruction. The good examples radiate influence towards the bad. But the good examples are not understood as having anything to learn, in a spirit of reciprocity or comity, from the bad examples. What are the criteria for identifying good cases, from which other jurisdictions should learn, and bad ones, the reasoning and outcomes of which other jurisdictions should eschew? What is the basis for rejecting some precedents announcing respect for the equal moral worth of the individual from others also doing so? While some sophisticated accounts of the place of foreign authorities call for a process of bringing different arguments together in dialogue, the gay rights comparatists rarely engage in such a polyphonic enterprise. It is less a multivalent dialogue than a monologue, and suspicions of "opportunistic advocacy"<sup>73</sup> cannot be dismissed out of hand as illiberal or homophobic.

#### B. Thinness and Positivist Abstractness

The second relevant package of criticisms relate to the methodological thinness of constitutional comparison. While comparative law makes it "necessary to extract" the "comparatively

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71. Norrie, *supra* note 6, at 759.

72. Once it seems plain that the cases are selectively chosen, inclusion of a "Counterpoint: An English Case," *id.* at 766, becomes crucial. Norrie discusses *Fitzpatrick v. Sterling Housing Association* (1999), [2001] 1 A.C. 27 (H.L.). The English example shows that the upward trajectory of gay rights across jurisdictions is not constant. Yet in his reading, the English case holds no lesson for judges in other jurisdictions. Instead, he criticizes it and argues that it merits a short life as a binding precedent. *Id.* at 766. The assumption that recourse to foreign sources by American courts "can only redound to the benefit of gay rights advocates, given that foreign nations, foreign opinion, and the world community as a whole have largely superseded the United States as leading protectors of the rights of gays and lesbians," Araiza, *supra* note 65, at 508, is predicated on a somewhat selective definition of what counts as part of "foreign nations, foreign opinion, and the world community." See *infra* notes 147–151 and accompanying text.

73. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69, 80 (2004).

few basic ideas” from the “mass of details,”<sup>74</sup> comparison provokes recurring charges of shallowness and abstraction. Comparative constitutionalists are seen as following too closely comparatists of other stripes in their “pathetically narrow focus on legal norms and cases, legal processes and institutions.”<sup>75</sup> The focus on judgments in comparative treatments of same-sex marriage reveals the notion “that law exists first and foremost as written text.”<sup>76</sup> Admittedly, the difficulties of accessing less official materials and emblems of law’s functioning from foreign places, often in a language unfamiliar to the comparatist, are formidable. Nevertheless, in the research on gay rights, to take up once more the lexicon of the law and society critics, the culture against which constitutions operate is often strikingly absent.<sup>77</sup> The gay rights work exemplifies the risk that comparative constitutional law might be “insufficiently sensitive to national differences that generate differences in domestic constitutional law.”<sup>78</sup>

Responses to the thinness and abstraction of comparative constitutionalism sometimes emerge as enjoinders to interdisciplinarity. It is worth specifying the kinds of interdisciplinarity typically undertaken already and discussing ones that might productively be pursued. Some comparative constitutionalism is influenced by political science. Such work is typically *functionalist*. The functionalist approach to comparative constitutional law tries to identify things that happen in every constitutional system. The functionalist belief is that examining the different ways that democratic nations organize certain processes can help determine which processes are better and worse.<sup>79</sup> Comparative work on judicial

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74. Hannis Taylor, *The Science of Jurisprudence*, 22 Harv. L. Rev. 241, 247 (1909).

75. Frankenberg, *Comparing Constitutions*, *supra* note 39, at 451 (footnote omitted).

76. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harv. Int’l L.J. 411, 423 (1985).

77. For the general criticism, *see, e.g.*, Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 Conn. L. Rev. 649 (2004) (identifying reasons for caution about the use of transnational comparative law in interpreting domestic constitutions).

78. Mark Tushnet, *Comparative Constitutional Law*, in *The Oxford Handbook of Comparative Law* 1225, 1256 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

79. Mark Tushnet, *Some Reflections on Method in Comparative*

reception of claims for same-sex relationship recognition—how do constitutional polities recognize same-sex couples?—may resonate of functionalism. Other work, influenced by political philosophy, pursues *normative universalism*. The product of a dialogue between those who study comparative constitutional law and those who study international human rights, universalist work emphasizes the similarity of constitutional challenges and functions across relatively open polities committed to the rule of law. Universalists study comparative constitutional law to identify how particular constitutional orders instantiate universal principles, such as equality.<sup>80</sup> Some comparative explorations of the best understandings of liberty and equality for gays and lesbians may reflect normative universalism. Methodologically, though, such comparative studies of gay rights often show a thin understanding of constitutions as autonomous, rather than as socially, politically, historically, and discursively embedded.<sup>81</sup> These criticisms could be more fully fleshed out. It might be, though, that the interdisciplinarity that might yield a thicker view of constitutions needs to move beyond political science and political theory. Comparative constitutionalists working on gay rights might, for instance, engage more with anthropology and cultural studies of law, socio-legal studies, and feminist legal studies.<sup>82</sup>

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*Constitutional Law*, in *The Migration of Constitutional Ideas*, *supra* note 63, at 39, 72–74 [hereinafter Tushnet, *Some Reflections*]. See generally Michele Graziadei, *The Functionalist Heritage*, in *Comparative Legal Studies: Traditions and Transitions*, *supra* note 14, at 100. For examples of functionalist comparative constitutionalism, see Bruce Ackerman, *The Emergency Constitution*, 113 *Yale L.J.* 1029 (2004) (examining emergency responses to terrorism); Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000) (considering whether an American-style separation of powers should serve as a model for other countries). For stringent criticism of functionalism, see Legrand, *supra* note 9 (critiquing aspects of comparative legal studies orthodoxy).

80. Tushnet, *Some Reflections*, *supra* note 79, at 69. For examples, see Dorsen et al., *supra* note 41 (taking a universalist approach to the subject); David M. Beatty, *The Ultimate Rule of Law* (2004) (examining forms of interpretation, liberty, equality, fraternity, and proportionality).

81. Care is required in clarifying that many of the single-country studies of same-sex marriage do undertake thick inquiries. A particularly fine example is Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* (2002). It is the comparative legal work that is so often disappointingly confined and thin.

82. See, e.g., Thérèse Murphy & Noel Whitty, *A Question of Definition: Feminist Legal Scholarship, Socio-Legal Studies and Debate about Law & Politics*, 57 *N. Ir. Legal Q.* 539 (2006) (arguing for a broader definition of

These methodological criticisms stir up a number of matters, relating to the desirability of following the modes they implicitly or explicitly prescribe and the feasibility of doing so. Undertaking thick investigations into constitutions in a domestic setting, let alone comparatively, is not easy. A respected comparatist has warned that “lawyers risk appearing out of their intellectual depth the moment they venture outside formalistic positive law.”<sup>83</sup> For present purposes, however, the preoccupation is not the traction of these methodological criticisms.

### C. Beyond the Good of the Discipline

The key issue arising from these methodological criticisms is the scholarly economy in which they operate. What is the upshot of these criticisms? As the vast (some would say bloated) literature on judges’ use of foreign sources establishes, charges that judges are unprincipled and inconsistent in selecting comparative sources have, as their consequence, the illegitimacy of the resulting judgments.<sup>84</sup> What is at stake in scholarly work, though, is not the legitimacy or illegitimacy of comparing, but the quality and respectability of the resulting scholarship. The methodological charges levied against comparative scholars—of unjustifiably partial case selection, of thinness—invoke a dichotomy by which scholarship is good or bad (or better or worse). Sometimes other adjectives are used; some methodological criticisms adopt a lexicon by which inquiry is neutral

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scholarship relevant to the question of the relationship of law and politics); Brenda Cossman, *Migrating Marriages and Comparative Constitutionalism*, in *The Migration of Constitutional Ideas*, *supra* note 63, at 209 [hereinafter Cossman, *Migrating Marriages*]. Another rich interdisciplinary encounter may lie between comparative constitutionalism and international law. For a compelling call for interdisciplinary comparative and international law scholarship, see Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 Colum. J. Transnat’l L. 759 (2007). See also Geoffrey Samuel, *Is Law Really a Social Science? A View from Comparative Law*, 67 Cambridge L.J. 288, 314 (2008) (“Comparative legal studies is obliged, in other words, to be interdisciplinary and this implies that comparatists must be social scientists and not ‘theologians.’”) (footnotes omitted).

83. Samuel, *Taking Methods Seriously*, *supra* note 27, at 96.

84. See, e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich. L. Rev. 1555, 1581 (2004) (criticizing the *Lawrence* court for understanding itself “free to pick and choose” decisions it liked “to use them as justification or at least decoration for its own ruling, and to ignore decisions that are to the contrary”).

(good) or biased (bad), thick (good) or thin (bad), or rich (good) or impoverished (bad). At bottom is a metric of scholarly merit. So long as the criticisms remain framed in terms of good/bad, all that is at stake is the quality of the scholarship, and more globally the flourishing and prestige of comparative constitutionalism as a discipline. Scholars advancing methodological criticisms arbitrate between an existing world of comparative constitutional literature that is not, in their view, up to snuff, and an imagined, better world of comparative constitutional research reflecting the rigors of the social sciences. As a scholar, I embrace the objective, for its own sake, of generating better scholarship. Here, however, the specificity of gay rights as a constitutional question linked to an identity politics comes into play.

Some readers may care little about the methodological defects of comparative constitutional treatments of gay rights. They may dismiss such worries as the luxury of privileged scholars whose own rights are secure. Charges levied against Critical Legal Studies in the eighties by women and racialized minorities for the deconstruction of rights come to mind.<sup>85</sup> Worrying about the niceties of rigorous case selection and thick description is fine in the ivory tower, might run the objection, but does it really matter? How does it connect to those whose lives the apparatuses of constitutional, administrative, criminal, and private law make unlivable? Is not the neglected symbolic and cultural dimension of a constitution remote from the daily worries of gay men and lesbians, those from whom laws withhold the liberty to engage in the consensual sexual relations of their choosing, without fear of persecution, arrest, torture, and death? In less illiberal places, the stakes include health benefits, inheritance rights, adoption rights, and formal relationship recognition. Making explicit another level of concern is thus critical.

Beyond the good of the discipline, the absences in comparative constitutional research on gay rights—the unstudied examples, the neglected dimensions of a constitution's life—augur badly, even for the scholarship's use to reform-minded justice-seekers. Reliance on a thin view of constitutions in comparative constitutional scholarship results in omissions and errors. The point

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85. See, e.g., Patricia J. Williams, *The Alchemy of Race and Rights* (1991); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301 (1987).

is not the aesthetics of a richer view of law,<sup>86</sup> but its potential for sharper understanding of law as a social phenomenon with concrete, often painful, effects. The thin instrumentalism prevalent now should worry advocates for gay rights on several accounts.

#### IV. PROBLEMS FOR THE ADVOCATE OF CHANGE

##### A. Designating Relevant Sites

A risk of error accompanies the assumption that the constitutional court, at the heart of a federal system, is the prime site for declaring and altering constitutional law. Rights in the federal constitution tend to attract much greater attention than the interactions of states' varying recognition of same-sex couples.<sup>87</sup> The gay rights literature exemplifies the larger pattern of comparative constitutionalism's attending to transnational rights discourse at the expense of adequate attention to federalism.<sup>88</sup>

The terms in which comparative constitutional scholarship operates take for granted the value of constitutional rights as a form of ordering, discourse, and action. The fusion of a rights discourse, constitutional formalism, emphasis on judges, and identity claims

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86. On the risk that thick description render all domains aesthetic, see Russell Jacoby, *Thick Aestheticism and Thin Nativism*, in *Theory's Empire: An Anthology of Dissent* 490, 492–94 (Daphne Patai & Will H. Corral eds., 2005). Though it is impossible to develop the idea here, it may be that the aesthetics of law do connect directly to law's social effects and the possibilities for altering them. See Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (2000).

87. Emphasis on federal developments over state or provincial ones implies a preference for political action in central rather than local forums. William N. Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* 116 tbl.3.2 (2002) presents in a chart the dates of major gay rights developments in twenty-two countries. The arrangement assumes that, in a federation, the category "First Big Sexual Orientation Anti-Discrimination Law" refers only to federal laws, not those of subsidiary states. The Canadian entry references 1996, the year the Parliament of Canada amended the Canadian Human Rights Act, R.S.C. 1985, c. H-6, to prohibit sexual orientation discrimination. But since most of the private sector falls under provincial jurisdiction, the "big" Canadian news in this column ought to have been the pioneering prohibition of sexual orientation discrimination in Quebec's Charter of Human Rights and Freedoms, R.S.Q. c. C-12, in 1977 (a mere eight years after Stonewall).

88. See Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 *Int'l J. Const. L.* 91 (2004).

parallels what Duncan Kennedy identifies as a “third globalization” of law and legal thought.<sup>89</sup> Critiques of rights generally are noticeably absent.<sup>90</sup> Specifically, comparatists do not confront the unnerving possibility that rights, “though universally distributed, often yield *greater* inequalities in societies in which individuals are unequally situated.”<sup>91</sup> The embrace of rights leads, in turn, to an emphasis on those forms of political action that seek to alter the authoritative interpretation of rights by constitutional courts. The view of constitutional law—focusing on authoritative texts such as written constitutions and the judgments of constitutional courts—promotes suppositions about where constitutional law operates and the means of contesting it. The text-based, instrumental understanding of constitutions and their operation privileges constitutional litigation over political and social protest. Comparative constitutional research often assumes, but rarely explores, the priority of litigious avenues over others. It may induce overinvestment in litigation relative to other strategies such as political protest and lobbying.

Constitutional litigation by social movements may have unintended consequences for them, including the latter’s “political demobilization.”<sup>92</sup> Court decisions may mobilize opponents of social movements more readily than their supporters.<sup>93</sup> Cross-jurisdictional comparison of the upshot of litigation provides little occasion for exploring such ramifications. The point of present interest is less the outcome of debate over various avenues of social change and the

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89. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *The New Law and Economic Development: A Critical Appraisal* 19, 21, 65–66 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Three Globalizations*].

90. See Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *Left Legalism/Left Critique* 178 (Wendy Brown & Janet Halley eds., 2002).

91. Wendy Brown, *Politics Out of History* 12 (2001).

92. Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 *Va. L. Rev.* 1537, 1560 (2004). *But see* the account of a complicated, dynamic relationship between activism and litigation in Emily Zackin, *Popular Constitutionalism’s Hard When You’re Not Very Popular: Why the ACLU Turned to Courts*, 42 *L. & Soc’y Rev.* 367 (2008).

93. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* 341 (1991). For observers of American gay rights litigation, the backlash after *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), is emblematic. See generally Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 *Wm. & Mary Bill Rts. J.* 1493 (2006).

optimal tactics by social movements than it is the measure in which comparative constitutional scholarship typically assumes the superiority and salience of the courts. The material constraints of litigation, in turn, privilege centrally organized, well-funded lobby groups over more grass-roots organizations.<sup>94</sup> The resulting fundraising imperatives may lead to policy positions that tend disproportionately to reflect the interests of donors, who are themselves likely to be disproportionately white middle-class men.<sup>95</sup> A focus on litigation also favors objectives that can be framed in terms of the relatively blunt remedies available from a court.<sup>96</sup> More generally, constitutional litigation encounters structural constraints: it seems unable to achieve substantial redistribution and substantive equality.<sup>97</sup>

Comparative reading of the judgments of constitutional courts emphasizes the judiciary as the site of a constitution's operation, whereas the executive branch of government affects individuals much more in their daily lives. Contrary to the implication of the repeated comparisons of high court judgments, constitutional meaning is appropriately understood as found and invented in a variety of locations and practices. Taking constitutional courts as the crucial site of constitutional action, and their judgments as the primary texts for scrutiny, may misrepresent the state of constitutional rights on the ground. The comparative constitutional scholarship on gay rights seems to assume that changes in constitutional interpretation by the highest court change the constitution's operation. Put bluntly, however, constitutional judgments do not represent the state of rights in practice. Textual

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94. See, e.g., Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in *Cause Lawyers and Social Movements* 145 (Austin Sarat & Stuart A. Scheingold eds., 2006).

95. On the increasingly corporate character of the largest American gay rights advocacy groups, and its connections with the pursuit of marriage, see Warner, *supra* note 8, at 76–80 (1999).

96. A challenge to a definition of marriage (under which a couple is married or not) accords better with the range of constitutional remedies available than does an effort to achieve recognition of unmarried couples sensitively calibrated to the shifting normative content of their relationship. See Robert Leckey, *Family Law as Fundamental Private Law*, 86 *Can. Bar Rev.* 69, 78–79 (2007).

97. See, e.g., Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 *Can. J. L. & Juris.* 31 (2004).

analysis of constitutional judgments may exclude “the actual political practices” and the “concrete political impact” of homophobic laws on “the real, live, flesh-and-blood bodies of the empirical individuals to whom those laws are addressed.”<sup>98</sup> It has been intriguingly argued that for feminists—and, one might fairly add, gay or queer justice-seekers—“to engage with the discursive power of Constitutions, it is strategically imperative to identify both the external local and global forces that make up the whole of the discursive frame.”<sup>99</sup> Those authors argue for “an embedded approach to constitutional rights, one that acknowledges all of the diverse ways in which rights are filtered, translated, upheld, or undermined.”<sup>100</sup> A fuller understanding of the operation of constitutionally protected freedoms may require a focus, not on the judiciary, but on the executive branch of government.<sup>101</sup>

Two Canadian examples are instructive. First, in 2005, following a string of court decisions striking down the opposite-sex definition of marriage as unconstitutional,<sup>102</sup> the Parliament of Canada enacted legislation so as to apply a new definition of

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98. Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1498 (1992).

99. Isabel Karpin & Karen O’Connell, *Speaking into a Silence: Embedded Constitutionalism, the Australian Constitution, and the Rights of Women*, in *The Gender of Constitutional Jurisprudence* 22, 46 (Beverly Baines & Ruth Rubio-Marin eds., 2005)

100. *Id.*

101. For a rich collection of studies that resist the thin view of the rule of law and its effects, see *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Erik G. Jensen & Thomas C. Heller eds., 2003). See also Berger, *supra* note 47, at 280 (“[A]n inordinate focus on the written arrangements of the constitution privileges attention to certain institutional actors and acts and obscures others in the discussion of ‘constitutions’.”).

102. The judgment cited most frequently is that of the Court of Appeal for Ontario: *Halpern v. Canada (Attorney General)* (2003), 65 O.R.3d 161 (Ont. C.A.). See also *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.); *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506 (Qc. Sup. Ct.), *aff’d*, *Ligue Catholique pour les Droits de l’Homme v. Hendricks*, [2004] R.J.Q. 851 (Qc. C.A.); *Dunbar v. Yukon* (2004), 122 C.R.R. (2d) 149 (Y. Sup. Ct.); *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (Man. Q.B.); *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (N.S. Sup. Ct.); *N.W. v. Canada (Attorney General)* (2004), 255 Sask. R. 298 (Sask. Q.B.). For the Supreme Court of Canada’s advisory opinion on the Parliament of Canada’s proposed legislation, in which the Court abstained from pronouncing on the constitutional necessity of same-sex marriage, see *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 723.

marriage uniformly across the federation.<sup>103</sup> Marriage, “for civil purposes,” is henceforth “the lawful union of two persons to the exclusion of all others.”<sup>104</sup> More than a year after the legislative introduction of same-sex marriage by the Parliament of Canada, immigration officials continued to use a handbook predating the change, one distinguishing same-sex from opposite-sex relationships in a way inconsistent with the new statute.<sup>105</sup>

Second, scrutiny of administrative practices by Customs officials underscores that an ostensible victory in a constitutional law judgment may not secure the end of unlawful bureaucratic conduct. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*<sup>106</sup> addresses the disproportionate seizure by customs officials of erotic materials destined for a gay bookstore. The bookstore won a partial victory, having the Customs’ actions declared discriminatory.<sup>107</sup> It would be a mistake, though, to trumpet a victory for gay rights in the comparative rights law reviews in optimistic reliance on the Court’s judgment. The case wound up a second time in the Supreme Court of Canada because, seven years after its partial defeat in that forum, Customs had not yet rectified its discriminatory practices.<sup>108</sup> This example recalls the law and society observation that “the meaning of any specific law, and of law as a social institution, can only be understood by examining the ways in which it is actually used.”<sup>109</sup> The differences between the majority and minority judges arguably enact the different understandings of laws and of constitutions. Justice Binnie, writing for the majority, rejected the bookstore’s request to strike down parts of the customs legislation.<sup>110</sup> He held that, while Customs officials had repeatedly and systemically applied the law discriminatorily, such administrative action did not indicate a problem with the law.<sup>111</sup> The

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103. Civil Marriage Act, S.C. 2005, c. 33.

104. *Id.* at § 2.

105. Private e-mail correspondence with Immigration Link, December 13, 2006 [on file with author].

106. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 1127.

107. *Id.* at 1185.

108. *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38.

109. Silbey & Bittner, *supra* note 52, at 400. Crucially, identifications of these uses “are not extraneous to the law; they describe the law.” *Id.*

110. *Little Sisters*, [2000] 2 S.C.R. at 1122.

111. *Id.* at 1125.

law could, in theory, be applied evenhandedly.<sup>112</sup> By contrast, the minority, Justices Iacobucci and Arbour, took repeated discriminatory implementation of the law to signal a constitutional defect in the law and the need for a more robust remedy.<sup>113</sup> The importance of these administrative practices—their ability to eviscerate a constitutional judgment—hints that public administration, sociology, and criminology likely have insights to offer comparative constitutionalism. Those committed to enhancing justice for vulnerable minorities ignore, at their peril, evidence of the complexity of constitutional operation and change.

A further danger for the constitutional comparatist bent on reform through litigation is the exaggeration of the transferability of constitutional precedents. The thin view of constitutions likely leads to an overblown sense of the transferability of constitutional “solutions” from one system to another, even though comparatists have generated a rich literature on the perils and difficulties of legal transplants.<sup>114</sup> It is from a view of constitutions insensitive to cultural and other contextual factors that interpretations of an equality right in one place—such as Canada—are thought transferable to interpretations of an equal protection guarantee elsewhere. A Canadian same-sex marriage case, *Halpern*, is underscored for its finding that excluding same-sex couples from marriage violated their human dignity,<sup>115</sup> but is the conception of dignity and its place in constitutional discourse the same in Canada and the United States?<sup>116</sup> Judgments may be regarded as transferable “tools” without attention to the development of social movements that laid the discursive foundations for those judgments.<sup>117</sup>

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112. *Id.* at 1125–26.

113. *Id.* at 1127.

114. *See, e.g.*, *Adapting Legal Cultures* (David Nelken & Johannes Feest eds., 2001) (regarding whether legal transplants are possible, and if so, to what degree).

115. Samar, *supra* note 12, at 85.

116. On the various meanings attributed dignity in different constitutional contexts, *see* Rory O’Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 *Int’l J. Const. L.* 267 (2008). *See also* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 *Colum. J. Eur. L.* 201, 238–248 (2008) (comparing American conception of dignity with European conception of dignity).

117. Political scientists seem to have done a better job than constitutional comparative lawyers at broadening the perspectives. *See, e.g.*, Miriam Smith,

The thin comparative studies of constitutions collaborate in sustaining the view of constitutions as autonomous from other fields of domestic law. I have argued elsewhere that there is a troubling thinness to the comparative treatments of Canada's rather spectacular path towards same-sex marriage.<sup>118</sup> Comparative scholars abstract the interpretation of the Canadian equality guarantee from its constitutional and social context, including private law. Thus, most comparative studies of the interpretation of the equality guarantee in the Canadian Charter of Rights and Freedoms, which led to recognition of same-sex marriage, make no mention of the functional approach to family regulation developed over decades by legislatures and courts in Canadian private law.<sup>119</sup> The thin view of comparative constitutionalists contrasts with thicker views on the part of some family law scholars. Comparative family law specialists are likelier than are constitutional comparatists to observe the imbrication of constitutional law and family law.<sup>120</sup> Perhaps it is because constitutional law, especially in the United States, is so central in legal discourse that a family law scholar who studies same-sex marriage as a problem within family law cannot but be aware of its simultaneous resonance as a civil rights issue. Constitutional scholars show much less awareness of relationship recognition as also playing out in family law. Strategies for achieving the constitutional right to marry may thus become disconnected from the private law consequences of marriage.<sup>121</sup> What

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*Framing Same-Sex Marriage in Canada and the United States: Goodridge, Halpern and the National Boundaries of Political Discourse*, 16 Soc. & Legal Stud. 5 (2007) (discussing same-sex marriage cases in the United States and Canada in order to explore the interaction between law and social movement struggles).

118. Robert Leckey, *Private Law as Constitutional Context for Same-Sex Marriage*, 2 J. Comp. L. 172, 176–77 (2007).

119. *Id.* at 177. See, similarly, Jenni Millbank, *The Role of “Functional Family” in Same-Sex Family Recognition Trends*, 20:2 Child & Fam. L.Q. 1 (2008).

120. See, e.g., Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. Rev. 1555, 1580 (2004); Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (2008) (arguing family law reform should focus on providing all families with equal rights rather than solely emphasizing marriage).

121. See Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *Legal Recognition*

is the discursive terrain that makes possible the acceptance of a constitutional rights claim? Might it not require some prior acceptance of gay couples as families?<sup>122</sup> Neglect of judgments' discursive background affects the presumed value of foreign precedents as tools. Moreover, comparison of what are understood as equivalent constitutional provisions may foreclose consideration of whether the issue is even framed in relation to the most promising constitutional right.<sup>123</sup>

Admittedly, simply enlarging the set of state institutions and fields of state law coded as relevant to gay rights may reproduce the jurisdictional error by maintaining the focus on the state. Perhaps social conduct and cultural forces not characterizable as direct emanations of the state also limit the freedoms often associated with constitutional liberal democracies. Might not the conduct of private citizens affect the enjoyment of constitutional rights? The gay rights example is perhaps particularly revealing. A "complex division of labor between public officials and private citizens" may be relevant to the operation and effect of constitutional rights and principles.<sup>124</sup>

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of Same-Sex Partnerships: A Study of National, European and International Law 97, 110 (Robert Wintemute & Mads Andenæs eds., 2001) (discussing marriage's overlooked operation as a "private welfare system").

122. It is likely not a causal factor, but probably not an entirely irrelevant discursive indicator that the most path-breaking gay rights judgment by the U.S. Supreme Court, *Lawrence*, still uses the term "homosexual," whereas Canadian Supreme Court judges favorable to gay rights claims have, since the mid-nineties, used the term "gays and lesbians." Cf. *Lawrence v. Texas* 539 U.S. 558, 566 (2003); *Egan v. Canada*, [1995] 2 S.C.R. 513, 522. A further signal that discursive comfort with gays and lesbians may affect receptiveness to their constitutional rights claims is found in a comparison of the majority and dissenting reasons in the landmark Canadian judgment *M. v. H.*, [1999] 2 S.C.R. 3. Justices Cory and Iacobucci, writing for the majority, to recognize spousal support obligations for same-sex couples, as required by the Charter, speak of "gays and lesbians." *Id.* at 58. Justice Gonthier, dissenting, retains the clinical language of "homosexuals." *Id.* at 124. Compare the comment that *Bowers* "from a cultural perspective . . . could not have been entirely unexpected in the mid-1980s," given the sparse rhetorical materials from which to fashion a defense of gay equality. Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. Rev. 1, 42 (2006).

123. Thomas argues persuasively for reframing the constitutionality of sodomy prohibitions in light of constitutional protection from cruel and unusual punishment rather than of privacy. Thomas, *Beyond the Privacy Principle*, *supra* note 98, at 1435. See also his re-reading of *Romer v. Evans*, 517 U.S. 620 (1996), in terms of the Guarantee Clause. Kendall Thomas, *The Supreme Court, Sexual Citizenship and the Idea of Progress*, 4 Widener L. Symp. J. 201, 209 (1999).

124. Thomas, *Beyond the Privacy Principle*, *supra* note 98, at 1507.

Brenda Cossman argues that constitutional comparison needs to adopt a lens of cultural studies.<sup>125</sup> That is, the sources relevant to the interpretation of constitutions, and to the material and discursive production of citizens and of their liberty and autonomy, appropriately include cultural ones. Cultural resources may influence how courts regard constitutional rights claims. They may also influence the course that constitutional rights take in the practice of ordinary life. A view of constitutions as socially embedded may make visible new sites, not necessarily governmental, where constitutional rights are constrained.

Kenji Yoshino argues that the explicit and often tacit signals to minorities to *cover* their minority status by not performing it too prominently can collectively constitute a “hidden assault” on civil rights.<sup>126</sup> Complex—at times contradictory—demands made of members of minorities come into view through his paradigm of covering. It follows that “law is incomplete in the qualitative remedies it provides.”<sup>127</sup> Turning attention from the idea that lawyers and law can achieve the work of civil rights, he argues that the “real solution” lies with citizens generally.<sup>128</sup> Conversations forcing the articulation of the basis for demands to cover are, in his view, a crucial vehicle for giving assimilation and authenticity their proper due, and for revealing and advancing “the true dimension of civil rights.”<sup>129</sup> Yoshino’s rich text contributes several critical points. First, his elaboration of the demand to cover, and his convincing argument for the concept’s vigorous life, testifies to the discriminatory remainder that survives change—by enactment or judicial reinterpretation—to the texts guaranteeing or protecting rights. Second, the site where this remainder operates is one normally viewed as beyond the purview of constitutional law of the mainstream variety. Third, the means to combat the demand to cover are, again, not ones conventionally associated with legal, and often specifically litigious, efforts to bring about civil rights. Whether one

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125. Cossman, *Migrating Marriages*, *supra* note 82.

126. Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* xi (2006).

127. *Id.* at 193. An important nuance: Yoshino writes that perhaps every individual experiences covering demands of one kind or another, but the ones associated with the groups recognized by anti-discrimination law are some of the most repressive.

128. *Id.* at 194.

129. *Id.* at 195.

embraces Yoshino's challenge to the borders between state action and private conduct in scrutiny of civil rights, or sticks, more cautiously, with the disjuncture between the Canadian Supreme Court's pronouncement and the persistent violation of gay rights by administrative officials, the hollowness of reliance on judgments alone is unmistakable. The portraits of constitutional gay rights produced by the thin comparative work are not just under-inclusive, but positively misleading. A thicker view of constitutions would yield more probative information about the life of constitutions. But it is not only the sites demarcated as relevant that should concern the advocate for gay rights who looks to comparative constitutionalism. The selection of samples is important, and it too militates for a thicker instrumentalism.

#### B. Case Selection Troubles

Case selection determines what gets studied and what does not. Even from the vantage of advocates eyeing pending or future constitutional litigation, current practices of case selection merit revision. In keeping with the commitment to value-transparency, not value-neutrality, the worry is not the blunt one that comparatists have politics and that their selection fails some standard of neutrality. Criticisms raised by political scientists of the non-random selection of comparative examples, primarily targeted at judges and, secondarily, at scholars, probably miss the mark. They speak to a failure to achieve scientific neutrality, though the judicial and scholarly actors in the rhetorical enterprise of law may never aspire to such neutrality in the first place. It is possible—though this article cannot explore the matter fully—that judges and comparative scholars are contentedly self-conscious that, when they undertake comparative inquiry, they are searching for useful resources to support a provisional position. Jurists referring to foreign constitutional sources are perhaps better viewed as engaged in a brainstorming session or a rhetorical exercise rather than a rigorous quest. Foreign judgments may function, like domestic constitutional text, history, and jurisprudence, as “empirical aids, being deposits of experience; . . . sources of inspiration, instigators of reflection, producers of mood.”<sup>130</sup> It may be that one can learn from comparative constitutional experience “just in the way we learn from anything

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130. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 236 (2d ed., 1986).

else.”<sup>131</sup> Judges occasionally quote Shakespeare, but nobody would wonder whether the quotation was randomly selected and it would be odd if it were. A number of reasons call for interrogating the standard charges of biased case selection. But this article’s worry about case selection is different.

Translating pro-gay rights politics directly into case selection forecloses potentially fruitful avenues of inquiry. Progressive scholars committed to a gay rights justice project may ignore valuable lessons in the cases underrepresented in the existing studies. Comparative constitutional scholarship may constructively move beyond the compass of current studies, which focus on the judicial interpretation of constitutional rights and on the success stories. The prominence of the pioneer jurisdictions testifies that they are regarded as “successes” to be emulated. Recall the instrumental view of the Canadian same-sex constitutional judgments as useful tools. The view of judicial “successes” as tools to be deployed and resources to be exploited entails the shadow idea of “failures” as hindrances or impediments to be sidestepped as quickly as possible. The tool/impediment binary calls for a crude characterization of judgments as victories or defeats, though so categorizing complex judicial texts may be unproductive.<sup>132</sup> I have elsewhere suggested that “the richness of judgments generically as rhetorical performances” militates against categorical binary classifications of cases, that “victories” are suitably regarded as “contingent and potentially ‘uncomfortable,’” while “defeats” should perhaps be read as “more complex, equivocal, and provisional than is current practice.”<sup>133</sup> For example, if the majority judgment in *Lawrence* is undoubtedly preferable to the *Bowers* judgment it overturned, it is

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131. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1309 (1999).

132. Feminists and queer critics are ambivalent about the effects of a number of key Charter judgments in Canadian constitutional law. See, e.g., Diana Majury, *The Charter, Equality Rights, and Women: Equivocation and Celebration*, 40 Osgoode Hall L.J. 297, 314–32 (2002) (discussing differing reactions to cases decided under the Charter involving reproduction, violence against women, family, employment, and socio-economic claims); Brenda Cossman, *Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms*, 40 Osgoode Hall L.J. 223, 245–48 (2002) (contrasting the advances for lesbians and gay men in achieving formal equality rights with the lesser successes in achieving the right to sexual freedom).

133. Robert Leckey, *Contracting Claims and Family Law Feuds*, 57 U. Toronto L.J. 1, 41 (2007) (footnote omitted).

fairly viewed as equivocal in some respects. A further reason to be wary of selecting jurisdictions on the basis of outcome alone is that, at least in common law systems, defeats sometimes arrive with passionately argued dissenting reasons, the arguments and influence of which merit scrutiny and may influence later cases.<sup>134</sup> But even accepting, for the sake of argument, that it is possible to label outcomes as victories or defeats, advocates for gay rights might benefit from thinking more deeply about the jurisdictions where efforts at reform have stalled or failed. What are the contours of inertia and resistance? Might there not be important lessons waiting in the jurisdictions—not the Canadas and the South Africas—where constructive efforts have encountered obstacles?

Sometimes the exclusion of “failures” from study in the mainstream comparative work may not represent a conscious rejection of the possibility that they hold lessons. Often enough, it seems to follow simply from the framing of the research questions. The framing of the research questions drives the case selection. Research adopting functionalism—“How does a particular constitutional order address the problem of recognizing same-sex relationships?”—directs a researcher towards a highly selective set of national examples. Once recognition of same-sex relationships is cast as a commonly occurring problem to be solved, states that have taken no positive action cease to be candidates for comparison. That said, scholars working in the field seem more selective than warranted by a search for affirmative steps to recognize same-sex couples.

It is notable how little attention comparative constitutionalism on gay rights grants to France. In France, admittedly, reform in the late 1990s proceeded legislatively, rather

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134. The dissenting reasons of some of the earlier, unsuccessful gay rights cases in Canada seem to have influenced subsequent adjudication. *See, e.g.*, *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R.3d 658 (Ont. Div. Ct.) (Greer, J.) (reasoning that applicants were being denied equal recognition at law and that adverse effect discrimination was recognized by the Supreme Court); *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (L’Heureux-Dubé, J.) (reasoning that the Human Rights Tribunal’s interpretation of “family status” in the Canadian Human Rights Act was not unreasonable and warranted deference). The strategic importance of “defeats” is also studied in the family law setting. *See* Kimberly D. Richman, *Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Cases*, 16 *L. & Sexuality* 77 (2007) (discussing the relevance of the dissent in practical, symbolic, and ideological terms, in the particular context of gay and lesbian parents’ custody and adoption cases).

than through constitutional litigation.<sup>135</sup> Yet unless one is bound to the idea of the judge as “hero figure,”<sup>136</sup> the legislative interpretation of constitutional and republican equality from the nation that produced the Declaration of the Rights of Man should count for something. Significantly, the legislature understood the constitutional equality of each citizen of the Republic to be fully consistent with withholding access to marriage and supplying instead the *pacte civil de solidarité* (pacs).<sup>137</sup> France shows a developed Western liberal democracy, in the recent past, deliberately reserving marriage and the institutions of family law for opposite-sex couples.

Which arguments prevailed there, and how would one committed to a different outcome counter them? Dismissing justifications for the French legislation out of hand as illiberal is tenuous. An eminent French family law scholar grounds his criticism of even the limited 1999 law in the idea of France as an “open society.”<sup>138</sup> Republican marriage, says Gérard Cornu, is one and indivisible, like the Republic itself.<sup>139</sup> Irène Théry, a leading sociologist of the family prominent in the French debates, articulates a widely held view.<sup>140</sup> It challenges an understanding that is the new orthodoxy in some places, such as Canada, and that is axiomatic for some liberal scholars: that an opposite-sex requirement for marriage excludes the identity group of gays and lesbians. Théry argues that it is mistaken to regard France’s marriage regime as excluding

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135. See L. no 99-944, 15 nov. 1999 (J.O. 16 nov.), J.C.P. 1999, III, 20172; D. 1999, L. 515.

136. Kennedy, *Three Globalizations*, *supra* note 89, at 65; see also Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 100–02 (2004) (examining the role of judicial review in the protection of individual rights and liberties).

137. Jean Carbonnier, *Droit civil*, Tome 2, *La famille, l’enfant, le couple* 733–48 (21st rev. ed., 2002). On the parliamentary debates, see Daniel Borrillo & Pierre Lascoumes, *Amours égales? Le Pacs, les homosexuels et la gauche* 84–91 (2002). See also Joëlle Godard, *Pacs Seven Years On: Is It Moving Towards Marriage?*, 21 *Int’l J. L. Pol’y & Fam.* 310, 312 (2007).

138. Gérard Cornu, *Droit civil: La famille* 116 (9th ed., 2006).

139. Marriage is a “dénominateur commun et lieu d’accueil de tous les citoyens qui le veulent bien, quelles que soient leur origine, leurs opinions, leur religion, leur ethnique, leur situation.” The legislature and the public authorities are duty bound to respect this marriage “comme l’un des plus forts symboles de notre société ouverte.” *Id.*

140. See Irène Théry, *Couples de même sexe, mariage et filiation: Quel rôle du droit dans le débat social?*, 24 *Recherche Droit & Justice* 7 (2006).

homosexuals.<sup>141</sup> The Republic, she says, recognizes no identity groups, heterosexual or homosexual, and the issue is simply that marriage requires partners of the opposite sex, irrespective of their sexual orientation.<sup>142</sup> One rare discussion of the French approach in an English-language comparative law review takes from France, not universally applicable understandings of the appropriate instantiation of republican equality, but a lesson that France's regime can and should be improved.<sup>143</sup> Yet can views framed in terms of protecting an open society and ensuring the equality of all citizens be rejected out of hand as unworthy of contemplation and critical engagement?

In the United Kingdom, recent change followed, likewise, from parliamentary innovation and not constitutional litigation. The Civil Partnership Act 2004 provides a status similar to marriage.<sup>144</sup> This new regime, which preserves the sanctity of marriage, or at least its exclusivity, for opposite-sex partners must be understood as expressing Parliament's interpretation of the quasi-constitutional right to equality enshrined in the Human Rights Act 1998.<sup>145</sup> What might those legislative judgments teach comparatists and advocates? Even scholars who are determined that constitutional litigation is the best means to pursue their conception of justice for gays and lesbians would benefit from methodologically richer comparative constitutional work. They might acquire, for example, a better understanding of why arguments succeeded or failed in particular contexts. Moreover, the focus on "successes" in pioneering jurisdictions is unlikely to attend to the possibility that failed reform efforts—litigious or other—may transform social attitudes, despite their immediate unsuccessful outcome.<sup>146</sup>

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141. *Id.* at 7.

142. *Id.* For a sharp dismissal of the possibility that France would be substantially more homophobic and intolerant than the majority of European countries, *see id.*

143. Claudina Richards, *The Legal Recognition of Same-Sex Couples—The French Perspective*, 51 *Int'l & Comp. L.Q.* 305, 324 (2002).

144. Civil Partnership Act 2004, 2004, c. 33 (U.K.) (creating a civil partnership as a legal relationship between persons of the same sex and describing the rights and obligations of the parties with respect to property, children, finances, etc.).

145. Stephen Cretney, *Same Sex Relationships: From "Odious Crime" to "Gay Marriage"* 43–44 (2006).

146. *See* Scott Barclay and Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in *Cause Lawyers and Social Movements*,

Case selection by judges and comparatist scholars has a further worrisome effect. Comparative constitutionalists are alert to the effects of courts' citation of foreign judgments. Eskridge suggests that judicial citation of foreign judgments signals comity, indicating reciprocal "cooperation and respect."<sup>147</sup> When a judge cites another court, she denotes that court as an interlocutor in the international conversation of contemporary constitutionalism. When scholars study another state with an eye to what its practices can teach their own country—as opposed to studying it with a conviction that it is pathological—they validate it as part of a community. What are the boundaries of community discernable in the comparative constitutional work? Whom do they exclude?

The gay rights debates in the United States periodically invoke ancient Western European practices around homosexuality. Invocations of the "history of Western civilization," whether understood as supporting "state intervention" to counter homosexual conduct,<sup>148</sup> or, by underscoring the Greek history of same-sex love, undermining such efforts,<sup>149</sup> entrench the European genealogy of the contemporary American constitution.<sup>150</sup> By contrast, Native American traditions relating to "two-spirited" persons are not usually understood as part of the conversation.<sup>151</sup> It is not that Native

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*supra* note 94, at 84. This article's call for scholars committed to sexual justice to scrutinize failures in the constitutional law field parallels efforts by scholars in the history of science to excavate scientific failures. *See, e.g.*, Ian Wills, *Instrumentalizing Failure: Edison's Invention of the Carbon Microphone*, 64 *Annals of Sci.* 383 (2007). Wills writes of Edison "exploring failures, not with the scientist's objective of developing theories, but in order to use the knowledge gained from such exploration to change the device for the next attempt, or—at times—to identify new phenomena to exploit in new inventions." *Id.* at 399. *See also* Gerd Gigerenzer, "I Think, Therefore I Err," 72 *Soc. Res.* 195 (2005).

147. Eskridge, *supra* note 64, at 558.

148. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

149. *See, e.g.*, Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 *Va. L. Rev.* 1515 (1994).

150. For the observation that the use of foreign law in *Lawrence* cannot be justified by customary international human rights law because the discussion was confined to conceptions of freedom in Western jurisdictions, *see* Andrew R. Dennington, *We Are the World? Justifying the U.S. Supreme Court's Use of Contemporary Foreign Legal Practice in Atkins, Lawrence, and Roper*, 29 *B.C. Int'l & Comp. L. Rev.* 269, 291 (2006).

151. *See, e.g.*, Will Roscoe, *Changing Ones: Third and Fourth Genders in Native North America* 99 (1998); Richard C. Trexler, *Sex and Conquest:*

American practices are a depository of evidence militating, unmediated, for gay rights, such as same-sex marriage. Historians of sexuality rightly insist that transposing past sexual conceptions into present contexts is risky, and efforts to uncover homosexual identities and same-sex unions in the past are methodologically suspect.<sup>152</sup> The point, rather, is that some historical societies giving rise to controversial evidence are regarded as more relevant to contemporary constitutionalism than others, and the selection of sources can have exclusionary effects beyond the information that it highlights and obscures. Comparative practices can implicitly label some communities as irrelevant. This erasure is arguably especially pronounced where, as in the case of Native Americans and the Constitution of the United States, the communities are present within national borders.

The value of comparative constitutional research for advocates as a consequence of researchers' methodological choices does not exhaust this article's objections to the mainstream literature. A thicker instrumentalism on the part of comparative constitutionalists studying gay rights would not only benefit advocates. As the next part argues, it would also align scholars more closely with the role for which their institutional capacities equip them uniquely.

## V. RE-CENTERING THE SCHOLAR'S VOCATION

### A. The Scholar's Institutional Specificity

Comparative constitutionalists often examine the separation of powers under differing national arrangements. They study the distribution of functions of governance and assess that distribution against their understanding of the respective institutional capacities of different branches of government: legislature, judiciary, executive. In the civil law tradition, where doctrine is, if controversially, a

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Gendered Violence, Political Order, and the European Conquest of the Americas 60 (1995); Andrew Gilden, *Preserving the Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition*, 13 Mich. J. Gender & L. 237, 240 (2006–2007). But see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419 (1993) (listing evidence demonstrating the recognition of same-sex unions in Native American cultures). I am grateful to Kenji Yoshino for this point.

<sup>152.</sup> See, e.g., David M. Halperin, *How to Do the History of Homosexuality* (2002).

secondary source of law, scholars cannot avoid the question of their place in the legal order.<sup>153</sup> It is much rarer, in contrast, for comparative constitutional scholars trained in the common law to situate themselves on the map of governance. Such reticence is perhaps the predictable effect of the common law idea that learned opinion on the law has no official status.

One exception to this unselfconsciousness on the part of comparative constitutionalists is a statement by Bruce Ackerman. He writes: “We have a serious responsibility here. There are astonishingly few places outside America where law professing is a well-paid job, allowing the would-be scholar to avoid the mind-crushing hustle of endless consulting. If we fail to contribute our fair share to the analysis of world constitutionalism, it will be tough for others to fill the vacuum.”<sup>154</sup> He distinguishes law professors in the United States from those elsewhere. The worry that American legal scholars might not be pulling their weight in contributions to the global output of legal scholarship on world constitutionalism—might not be discharging the American constitutionalist’s burden—can be swiftly quelled. However well-intentioned, the passage risks appearing to exemplify the assumption of American ideological centrality—i.e., that the U.S. Constitution is the legal world’s “theoretical pivot point”—which can irk comparative constitutionalists elsewhere.<sup>155</sup> It is possible, though, to reread Ackerman’s exhortation as a contrast, not between American law professors and scholars elsewhere, but between law professors *tout court* and jurists in other roles, such as advocates and judges. Such a rereading invites reflection on the special capacities of the law professor, and here Ackerman’s text rightly implies that such capacities may entail responsibilities. “Fair share” can be constructively interpreted not quantitatively, but qualitatively. What are the distinctive attributes of legal scholars? What is the vacuum that practitioners and others cannot fill, or could fill only with difficulty, if legal scholars do not live up to their potential in the field of comparative constitutional research on gay rights?

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153. See Philippe Jestaz & Christophe Jamin, *La doctrine* 193–217 (2004).

154. Ackerman, *The Rise of World Constitutionalism*, *supra* note 2, at 774.

155. The phrase is from Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 *L. & Soc’y Rev.* 389, 392 (2004). Now is not the time to scrutinize the disjuncture between America’s progressiveness in its elucidation of constitutional rights in many respects and its relative sluggishness on gay rights.

A key characteristic distinguishing the scholarly life from the life of advocates and judges is freedom. Judges engage in persuasion, and they construct worlds,<sup>156</sup> but they also decide. The judge must designate a winner or a loser, but in any event, she must rule and press on. She denies parents access to their children; refuses bail to accused persons, keeping them in custody; condemns convicted persons to jail or, in some places, to the gallows or the electric chair; orders unsuccessful defendants to pay, potentially bankrupting them or ruining them.<sup>157</sup> Legal scholars, for their part, are spared the awful responsibility of legal judgment. They are also unshackled by the constraints of the advocate, who must work for her client, in service of the client's objectives and confined by the client's resources. What Robert Cover calls law's "jurispathic" effects, the coercive shutting down of legal meaning,<sup>158</sup> are surely lesser in the activities of scholarly reflection and speculation.

Perhaps it is helpful to suppose, in legal discourse, an inverse relationship between force and fancy. The scholar, on whose words no immediate outcome hangs, has space for imagination. In the way that a liberal education in the law may require shelter from the professional imperatives of the law school,<sup>159</sup> the most creative legal thinking may require freedom from the burdens of adjudication and advocacy. A recent exploration of the place of legal academics states: "Scholars lack direct power . . . [T]hey are free to set their own agenda, to criticize and subvert, to be curious, and to develop dreams and visions of a better law. They may adopt the role of critic or expositor, explorer, innovator, or conscience of the profession."<sup>160</sup> Scholars are, of course, responsible to their peer communities and, most importantly, to themselves.<sup>161</sup> Those who conduct research related to specific groups or communities may also, appropriately, sense a responsibility towards them. Emphasis on the lack of direct

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156. See, e.g., James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* 223 (1990).

157. None has traced the violent, awful weight of judgment better than Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986).

158. Robert M. Cover, Foreword, *Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 40 (1983).

159. Douglas J. Goodman & Susan S. Silbey, *Defending Liberal Education from the Law*, in *Law in the Liberal Arts* 17, 17 (Austin Sarat ed., 2004).

160. William Twining, Ward Farnsworth, Stefan Vogenauer & Fernando Tesón, *The Role of Academics in the Legal System*, in *The Oxford Handbook of Legal Studies* 920, 929 (Peter Cane & Mark Tushnet eds., 2003).

161. I am grateful to Nicholas Kasirer for reminding me of this point.

power and the possible roles of critic, explorer, innovator, and conscience hint that the legal scholar's role may mirror that, not of the majority appellate judge, but of the dissenter. Dissents figure differently in the calculus of utility than do majority reasons: they are forceless but fanciful. Kenji Yoshino underscores the dissenter's "greatest permission" as that "to imagine a better world, to be the prophet of eternities."<sup>162</sup>

This idea of imagination in judicial dissent and in scholarship resonates in accounts of the scholar's role. On one view, the academic's "central concern" is not to "make an immediate impact," and supposing otherwise would "miss the point of any scholarship, including legal."<sup>163</sup> It has been said that university life should be all about "the politics and ethics of dreaming, dreaming a better future and dreaming a new world."<sup>164</sup> Dreaming and imagining do not always, of course, yield comfortable and familiar ideas. Louis Menand argues that the scholar's task is to pose "the questions the public does not want to ask, by investigating the subjects it cannot or will not investigate, by accommodating the voices it fails or refuses to accommodate."<sup>165</sup> Like political theory, legal scholarship may give "presence to what may have a liminal, evanescent, or ghostly existence."<sup>166</sup>

Researchers whose comparative constitutional work thinly documents the successful litigation towards same-sex marriage in pioneering states may fall short of the finest potential of the scholar's vocation. Comparative constitutionalism as a scholarly endeavor can be more than a technique harnessed in the service of a fixed political agenda, more than one litigation strategy among others. Bluntly put, the scholar's role is not coextensive with the advocate's. In the context of comparative constitutional study of gay rights, what might

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162. Kenji Yoshino, *Of Stranger Spaces* (unpublished manuscript, on file with the author).

163. Twining et al., *supra* note 160, at 929.

164. Henry A. Giroux, *Liberal Arts Education and the Struggle for Public Life: Dreaming about Democracy*, in *The Politics of Liberal Education* 119, 123 (Darryl J. Gless & Barbara Herrnstein Smith eds., 1992). In a similar vein, Marjorie Garber calls teaching and writing at a college or university a "job for optimists and idealists." Marjorie Garber, *Academic Instincts* xi (2001).

165. Louis Menand, *The Marketplace of Ideas*, Occasional Paper No. 49 (Am. Council of Learned Societies, New York, NY) 2001, [http://archives.acls.org/op/49\\_Marketplace\\_of\\_Ideas.htm](http://archives.acls.org/op/49_Marketplace_of_Ideas.htm).

166. Brown, *Edgework*, *supra* note 10, at 81.

taking seriously the scholar's freedom and responsibility to dream and imagine other worlds entail?

#### B. Space for Other Inquiries

A return to thick instrumentalism is in order. Stuart Hampshire argues that it is erroneous "to confuse commitment . . . with single-mindedness," to assume "that scholarship ought generally to issue in some advocacy of a program of action."<sup>167</sup> His point is that narrow focus on policy prescription can "put the will in the place of the imagination."<sup>168</sup> A similar sense that intellectual inquiry must, at times, suspend its concern with immediate political imperatives appears in work by Wendy Brown. She contrasts intellectual life's submission "to existing political discourses and the formulation of immediate political needs" with "the air of independence that it must have in order to be of value *as* intellectual work for political life."<sup>169</sup> Brown argues that theory's capacity to open "a space of potential renewal for thought, desire, and action" may be sacrificed by "capitulating to the demand that theory reveal truth, deliver applications, or solve each of the problems it defines."<sup>170</sup> In her account, it is precisely imaginative, independent scholarship that is valuable for political action. Thick instrumentalism emerges from a scholar's commitment to justice, not to detached contemplation, but it does not necessarily result in a precise program. Moreover, to the extent that it advocates a program, its prescriptions remain provisional, subject to revision in light of what the scholar learns as she attempts to see the dispersed, complex, and refractory thickness of constitutional law's operation. Thick instrumentalism, like the scholarly imagination more broadly, may deal "in conflicts and contradictions, in dubious meanings, and not in definite conclusions and in unambiguous assertions."<sup>171</sup> The comparatist who undertakes research with an engagement to achieving a more just future must remain open to surprises along the way.<sup>172</sup>

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167. Stuart Hampshire, *Commitment and Imagination*, in *The Morality of Scholarship* 29, 43 (Max Black ed., 1967).

168. *Id.*

169. Brown, *Politics Out of History*, *supra* note 91, at 43.

170. Brown, *Edgework*, *supra* note 10, at 81.

171. Hampshire, *supra* note 167, at 44.

172. Some comparatists speak of their discipline as potentially subversive. See, e.g., George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 *Am. J. Comp. L.* 683 (1998). The potential for subversion is dampened considerably

Menand's call for scholars to accommodate the voices that society fails or refuses to accommodate<sup>173</sup> finds purchase in the gay rights setting. Studies collecting and making available to activists and courts the success stories of recognition of same-sex relationships achieved through constitutional litigation obscure the cleavages within queer communities exacerbated by such advocacy efforts. Opposition to gay marriage comes not only from the right, but also from the queer left.<sup>174</sup> A gender difference between gay men and lesbians is salient. If some male voices articulate concerns about the unintended consequences of securing same-sex marriage,<sup>175</sup> a number of critiques ground themselves explicitly in feminist, specifically lesbian feminist, analyses of marriage. Marriage, in such views, is an institution that rests on "profoundly hierarchical social and economic relations"; recognition of marriage-like gay and lesbian relationships may conserve the hierarchies that are ideologically embedded within marriage.<sup>176</sup> If such criticisms appeal to large structural factors, such as patriarchy, more concrete and material points are also marshaled. For example, depending on the distributive schemes operative in a jurisdiction, aggregating members of same-sex relationships as a household or marriage-like unit may alter their eligibility for social welfare benefits, something disproportionately likely to affect lesbian as opposed to gay couples.<sup>177</sup> Is it fair to ask comparative

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when a scholar undertakes comparison with the sole goal of finding support for a fixed agenda.

173. Menand, *supra* note 165 ("The academic's job in a free society is to serve the public culture by asking the questions the public does not want to ask, by investigating the subjects it cannot or will not investigate, by accommodating the voices it fails or refuses to accommodate.").

174. See, e.g., Warner, *supra* note 8.

175. See, e.g., *id.*; Carl F. Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* 103–11 (2003) (arguing that legal reforms that offer greater recognition of same-sex partnerships often come with a requirement that same-sex partnerships conform to an idealized model of heterosexual romance based on monogamy, cohabitation, and interdependency).

176. Claire F.L. Young & Susan B. Boyd, *Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada*, 14 *Fem. Legal Stud.* 213, 219 (2006) (footnote omitted); see also Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 *Temple L. Rev.* 709, 717 (2002) (arguing same-sex marriage coerces same-sex couples to assimilate to a set of normative standards set by heterosexuals).

177. Young & Boyd, *supra* note 176, at 221. Once aggregated as a household, some gay or lesbian couples may surpass income thresholds that render them ineligible for tax credits or subsidies. The gendered impact flows from the likelihood that a lesbian couple earns less than a gay couple—on the

constitutionalists to be more wary that the stories they disseminate may aggravate uneven distributions of resources within the minority communities they endeavor to serve? Is there scholarly space to explore the hypothesis that the rising “tide in favour of equality,”<sup>178</sup> so evident to some comparatists, might not lift all boats equally?

The framing of comparative inquiries tends to eliminate space for addressing two large and important questions. The first is the extent to which the pursuit, and eventual achievement, of consensual recognition of same-sex couples affects the pursuit of other objectives. A comparative focus on treatment of claims to official state recognition of same-sex relationships contributes to the increased normative status of marriage-like same-sex relationships. The argument that same-sex couples are the same as heterosexual couples, and thus should be entitled to marry, “leaves virtually no room for critical analysis of the institutions of marriage and family, and their relationship to the political economy and social relations of inequality.”<sup>179</sup> Comparative focus on attainment of the right to marry has already foreclosed consideration of “the incompleteness of marriage as a tool by which to achieve equality.”<sup>180</sup> It tends to reproduce a binary logic by which interpretation of a constitutional equality guarantee requires or does not require the assimilation of a class of relationships into marriage. Throughout, marriage remains the gold standard. To what extent does constitutionalizing marriage as a fundamental right attenuate marriage’s connection to larger debates of family justice more broadly?<sup>181</sup> How does it change the

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basis that individual women still earn less than individual men—and the greater likelihood of the presence of children, to whom some benefits attach, in lesbian households. For similar distributive concerns raised by the Civil Partnership Act in the United Kingdom, see Rosemary Auchmuty, *Out of the Shadows: Feminist Silence and Liberal Law, in Sexuality and the Law: Feminist Engagements* 91, 111 (Vanessa E. Munro & Carl F. Stychin eds., 2007). Such concerns highlight nicely the tensions between pursuit of recognition and of redistribution. See Susan B. Boyd, *Family, Law and Sexuality: Feminist Engagements*, 8 Soc. & Legal Stud. 369 (1999).

178. Wright, *supra* note 6.

179. Young & Boyd, *supra* note 176, at 227.

180. *Id.* at 231; Judy Fudge, *The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts, in Sceptical Essays on Human Rights* 335 (Tom Campbell, K.D. Ewing & Adam Tomkins eds., 2001).

181. See Alison Diduck, *Law’s Families* ch. 8 (2003). Young & Boyd, *supra* note 176, at 218, argue that same-sex marriage “raises a broader range of questions about family and gender than marriage alone.” Davina Cooper proposes that spousal recognition’s effects “on embedded, enduring social inequalities

legal imaginary's understanding of constructive relationships and possibilities for a valuable life? The push for recognition of conjugal same-sex relationships may also, simultaneously, contribute to a privatizing of sex. In the Canadian setting, a disjuncture is observable between the success of constitutional claims for relationship recognition and the limits of claims relating to non-marital sex.<sup>182</sup> The political focus on enlarging the judicial interpretations in favor of gay and lesbian claimants has channelled research efforts away from other debates and inquiries. Crucially, the mainstream comparative constitutionalism does not present itself as partial and fragmentary, as relying on previous limiting assumptions. It presents itself as telling, in selected places, the full story of same-sex relationship rights.

The second neglected question is whether it is even appropriate for the state to regulate adult conjugal couples as it does.<sup>183</sup> If scholars assess a constitutional court's work "exclusively or primarily on its own terms," as is often the case in this context, they may abnegate "the distinctively *critical* project of constitutional scholarship."<sup>184</sup> Comparative constitutional treatments of claims for same-sex marriage validate the binary framing of a so-called debate. The effect is to let the state's regulation of marriage pass largely unquestioned.<sup>185</sup> The focus on constitutional texts and judgments indicates little awareness of how regulation of couples and households connects matters of gender justice to larger

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appear ambiguous once we broaden the field of our enquiry away from a narrow, group-based conception of gay equality to incorporate wider social relations." Davina Cooper, *Like Counting Stars?: Re-structuring Equality and the Socio-Legal Space of Same-Sex Marriage*, in *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, *supra* note 121, at 75, 95.

182. Brenda Cossman, *Sexing Citizenship, Privatizing Sex*, 6 *Citizenship Stud.* 483, 485 (2002).

183. For a path-breaking study by an arm's-length government body, subsequently dissolved by a conservative government, see Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (2001), available at [http://www.samesexmarriage.ca/docs/beyond\\_conjuality.pdf](http://www.samesexmarriage.ca/docs/beyond_conjuality.pdf).

184. Thomas, *Beyond the Privacy Principle*, *supra* note 98, at 1435.

185. Edited volumes on same-sex marriage present articles "for and against" the idea, as if those are the sole positions. Rosemary Auchmuty, *Same-sex Marriage Revived: Feminist Critique and Legal Strategy*, 14 *Feminism & Psychol.* 101, 108 (2004).

configurations of the market and governance mechanisms.<sup>186</sup> The framing of a binary debate, for/against gay marriage, and then its empirical component, achieved/not yet achieved, ratifies the state institution as unquestioned premise. Might not the “alternative futures”<sup>187</sup> that comparative legal scholars imagine consist in more than the obtainment through litigation of the right to marry? What possibilities for relational autonomy and family justice, to pick up from Brown, have as yet only a “liminal, evanescent, or ghostly existence”?<sup>188</sup>

It may be worth extending Menand still further to discern a scholarly duty to ask questions, not only those the public does not want to ask, but also those distasteful in a milieu where the scholar lives and acts. Unafraid of uncomfortable questions, scholars might attend fruitfully to the similarities and differences between gay claimants and others within the larger group of equality seekers. It has been argued that one difficulty of deploying liberal antidiscrimination law is that disadvantage and oppression are not uniform, nor do they respond identically to a common mode of intervention: “formations of socially marked subjects occur in radically different modalities, which themselves contain different histories and technologies, touch different surfaces and depths, form different bodies and psyches.”<sup>189</sup> It cannot be assumed, for example, that a claim for the right to formal recognition of an intimate relationship on a consensual basis necessarily advances, or is merely neutral towards, other kind of claims, such as those based on economic vulnerability that downplay choice.<sup>190</sup> In Canada, a judgment hailed as presaging the success of constitutional demands for same-sex marriage<sup>191</sup> was simultaneously denounced by some feminists for reinscribing atomistic liberal ideas of choice in

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186. Kerry Rittich, *Engendering Development/Marketing Equality*, 67 Albany L. Rev. 575 (2003).

187. Cover, *Foreword: Nomos and Narrative*, *supra* note 158, at 9.

188. Brown, *Edgework*, *supra* note 10, at 81.

189. *Id.* at 129.

190. Anne Bottomley & Simone Wong, *Shared Households: A New Paradigm for Thinking about the Reform of Domestic Property Relations*, in *Feminist Perspectives on Family Law 39* (Alison Diduck & Katherine O'Donovan eds., 2006).

191. *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 (upholding constitutionality of legislative distinctions respecting property division between married and unmarried couples on the basis of the choice to marry).

Canadian constitutional and family law.<sup>192</sup> Comparative constitutionalists addressing gay rights likely encounter queries that, if pursued, may reveal some awkward truths. In keeping with the best understanding of the scholar's role, such truths may be better raised for reflection than suppressed.

## VI. CONCLUSION

I have argued in this article that comparative constitutionalists working on gay rights might productively thicken their mode of scholarly engagement, from thin to thick instrumentalism.<sup>193</sup> My intention has not been to urge scholars in pursuit of social or sexual justice to relinquish their aspirations, or to park them outside the academic office when they write. I have rejected the notion that scholars in this area should be criticized for having an instrumental wish to bring about what they understand as a more just state of constitutional affairs. My aim has been, rather, to expose the shortcomings of a thin view of constitutions that focuses on the authoritative interpretations of a written constitution by the highest court, as well as the assumption that only the "successes" merit scholarly attention, and not the failures, the trash.<sup>194</sup> I do not wish to diminish the difficulties in carrying out thickly instrumental research; in some respects the aspiration of thick instrumentalism is perhaps not fully attainable. Nonetheless, it matters whether a scholar understands herself to be following an aspiration to present a fuller picture of law, however partially and

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192. See Hester Lessard, *Charter Gridlock: Equality Formalism and Marriage Fundamentalism*, 33 Sup. Ct. L. Rev. (2d) 291 (2006). In a similar way, the obtainment of a consensual status for same-sex couples, in the form of the Civil Partnership Act, has undermined the claim that an emphasis on a choice-based model of relationship form discriminates against unmarried opposite-sex couples. See Lisa Glennon, *Obligations between Adult Partners: Moving from Form to Function?*, 22 Int'l J. L. Pol'y & Fam. 22, 29 (2008).

193. My sense is that the skepticism and awareness of the reflexive relationship between means and ends permits thick instrumentalism to escape, to I think a significant measure, the weight of the charges levied against instrumentalism by Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (2006). His argument turns in its conclusion on the imperative of legislators, officials, and judges—and not scholars—resisting the siren call of instrumentalism. *Id.* at 246–50.

194. Hints that echoes of the truth may be found in trash appear in *The Man on the Dump*. See Wallace Stevens, *The Man on the Dump*, in *Collected Poetry and Prose* 184–86 (Frank Kermode & Joan Richardson eds., 1997).

incompletely, or whether she takes the story she tells to be total and complete. The article has also argued for a scholarly role differentiated from the role of advocate: the comparative constitutionalist-as-scholar may explore questions and dilemmas that an advocate might bracket. She may also, more freely than the advocate, imagine transformation and new worlds.

Criticisms of comparative constitutionalism advanced by this article echo ones made of law and development literature. It has been argued that research in that field is unduly thin, abstract, and inattentive to the place of culture.<sup>195</sup> Some may worry that, instead of moving a field “to a higher level of awareness and sensitivity,” criticisms giving rise to a scholarly sense of “malaise” or “self-estrangement” may precipitate an exodus by more critical scholars.<sup>196</sup> In law and development, a “Second Moment” firmly fixed on law and neoliberal understandings of markets followed detection of flaws in the first wave of law and development scholarship.<sup>197</sup> The problems in the practice of comparative constitutional research on gay rights do not entail exit from the field. This article is a call, not to disavow and exit, but rather to undertake richer, more careful inquiry. Potential for such work lies in thick instrumentalism, an approach that retains the commitment to a particular justice project while combining it with a complex, culturally and symbolically sophisticated sense of the operating and meaning of constitutions and their effects on people’s lives. David Trubek’s plea from the law and development field applies: the failings of the past do “not mean we should abandon the commitment to emancipation: quite the contrary, it is a reason to renew that commitment.”<sup>198</sup> He writes: “What is needed now is a way to live with the knowledge we have gained without abandoning the commitment that led us to the enterprise in the first place.”<sup>199</sup>

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195. See, e.g., Lan Cao, *Culture Change*, 47 Va. J. Int’l L. 357, 371–74 (2007).

196. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062, 1102, 1064. I am indebted to Adelle Blackett for directing me to this issue.

197. David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *The New Law and Economic Development: A Critical Appraisal*, *supra* note 89, at 1, 5–6.

198. David M. Trubek, *The Owl and the Pussy-Cat: Is There a Future for “Law and Development”?*, 25 Wis. Int’l L.J. 235, 240 (2007).

199. *Id.* at 240–41.

Some ideas from which I have elaborated the scholarly mode of thick instrumentalism—such as the alertness to a multiplicity of legal sites and the “complex entanglement” of law and culture<sup>200</sup>—gesture towards a thicker view of law irrespective of the subject. They are consistent with a recent enjoinder for scholars to engage with the constitution-outside-the-Constitution.<sup>201</sup> It is thus worth underscoring the special pertinence of thick instrumentalism in the gay rights context. Thick instrumentalism is especially important for a minority group whose existence may be erased by judicial discourse,<sup>202</sup> and whose oppression by state actors is often unofficial and informal, diffused and tentacular. As Kendall Thomas has argued persuasively, the homophobic action authorized by the reading of the U.S. Constitution in *Bowers* far exceeded the judgment’s explicit boundaries.<sup>203</sup> Thick instrumentalism may be necessary in order to apprehend the practices of injustice prior to their eventual contestation. Furthermore, thick instrumentalism, including the reflexivity between means and ends, is especially suitable in a field where strategies may generate unexpected consequences. People making political and legal interventions should suitably tread carefully in this area, aware to the extent possible of the differential impact of strategies on members of the oppressed group. The assumptions about constitutions and the best means of altering them evident in the mainstream comparative work on gay rights direct reform efforts towards litigation; they also channel energies away from objectives that do not translate easily into constitutional rights claims.

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200. Naomi Mezey, *Law as Culture*, in *Cultural Analysis*, Cultural Studies, and the Law: Moving Beyond Legal Realism, *supra* note 44, at 35, 37.

201. Ernest Young argues that “constitutional scholars need to quit drawing rigid lines around the legal materials that interest them—and hence around their scholarly discipline.” Ernest A. Young, *The Constitution Outside the Constitution*, 117 *Yale L.J.* 408, 473 (2007).

202. For discussion of such an erasure, in which gay and lesbian families were deemed invisible, see Robert Leckey, *Contextual Subjects: Family, State, and Relational Theory* 92–94 (2008). There is a possible tension here: on Yoshino’s reading of *Lawrence* and the large movement in which it inscribes itself, it may be productive to pursue “a more universal register” in terms of universal liberty as opposed to equality rights for individual groups (Yoshino, *supra* note 126, at 188–89); the judicial vision must, however, be able to see a group and the unequal effect of laws on it. *Id.* I thank Scott Scambler for reminding me of this discussion.

203. Thomas, *Beyond the Privacy Principle*, *supra* note 98.

Addressing a possible exaggeration of the argument may be in order. The mainstream liberal interventions in comparative constitutional treatment of gay rights and their thin methodology do not *silence* alternative narratives. They do, however, make them less likely. They blunt the scholarly imaginary capacity to conceive of other stories. James Boyd White argues that “the languages we speak, and the cultural practices they at once reflect and make possible, shape our minds by habituating them to certain forms of attention, certain ways of seeing and conceiving of oneself and of the world.”<sup>204</sup> He continues: “when we speak our languages we cannot help believing them, we cannot help participating, emotionally and ethically and politically, in the worlds they create and in the structures of perception and feeling they offer us.”<sup>205</sup> White is talking about the language of economics. He contends that it is not just an analytical tool to be used without altering the user: the language of economics “affects what they say, what they see, how they think, what they feel, and what they are.”<sup>206</sup> The adoption of the thin methodology for comparative constitutional research similarly affects the vision and perceptions of those who undertake it. Even the liberal, personally committed to the advancement of gay rights through constitutional litigation, should care about the jurispactic nature of legal discourse when it shuts down worlds. The imaginary worlds in question—ones, say, that imagine sexual and family life outside the structure of marriage—are fragile ones, easily destroyed.

The practice of comparative constitutional scholarship, like other scholarly endeavors, is not one in which scholars simply transport the tools or resources from one place to another without thereby changing or reshaping the ideas altered, their readers, and ultimately the scholars themselves. If researching and telling certain stories does not make it impossible to research and tell others, it can nonetheless, after long enough, make it harder to imagine those others. It is not only a matter of priority, not the case that scholars can tell one story first, and then, if they have time and another research grant, tell another one. If we tell one story first, we may forget there was ever another one to tell. If it is possible to exaggerate the direct consequences of legal scholarship, of any stripe, it is still worth reflecting on the extent to which what we research

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204. White, *supra* note 156, at 50.

205. *Id.*

206. *Id.* at 56.

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and what we write influences whom we become and the possible worlds we can imagine.

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