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I would like to tackle one particular aspect of the relationship between comparative law and society — specifically, the impact of such forces as history in shaping the law. In particular, I am interested in exploring the tension between history and comparative law as modes of partisan argument on the one hand and as methods of scholarly analysis, on the other. Put differently, I would like to discuss the important and interrelated roles played by history and the comparative perspective in both the making and debunking of legal tradition.

Both history and the comparative perspective function as what we might call "tradition-makers." They serve to legitimize legal rules or institutions by anchoring them within a particular tradition, be this historical or comparative. In this sense, both history and the comparative perspective are modes of discourse deployed for strategic purposes—to justify the legal status quo or to demand its reform. The utility of both these modes of discourse stems from the fact that their point of reference lies outside the immediate context. In this way, history and the comparative perspective achieve a distance that endows them with a certain argumentative plasticity.

In the case of historical discourse, disputants point to (differing) facts from the past as a way of constructing alternative traditions in support of their conflicting strategic goals. One of

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the more obvious examples in the domestic American context is advocacy for the existence (or non-existence) of constitutional rights. Frequently this discourse takes the form of a debate over the historical origins and meaning of particular constitutional text. Thus, proponents of a constitutional right to bear arms insist that the Second Amendment must be interpreted in light of the existence of a longstanding historical tradition affirming such a right. Opponents, in turn, insist that there is no such tradition — and to the contrary, the tradition has been to deny any such private right to bear arms. Similarly, in the European context, we have seen advocates for the creation of a unified, transnational body of European civil law seek to justify its viability and desirability by pointing to its historical origins in the *ius commune* or common law of medieval and early modern Europe. Their opponents, in turn, deny any continuous historical tradition linking the *ius commune* to the present and depict the rise of national law from the late eighteenth century onward as a definitive break with the past.

Like history, the comparative perspective facilitates the strategic construction of a legal tradition by permitting a certain distance from the immediate context — though the distance is primarily geographic, rather than chronological in nature. The object of comparison is constructed as "the other"— as a foil against which to applaud or to decry domestic rules or institutions and thus to argue for their preservation or reform. For example, generations of American lawyers and legal scholars have pointed to the European legal tradition in order to highlight the supposedly distinctive, contrasting virtues of its American counterpart. In particular, they have emphasized European commitment to inquisitorial modes of process and to a bureaucratic judicial structure as a means of underlining the United States' determination to protect the individual from an overreaching state and to uphold such judicial values as creativity, common sense, and equity. In this way, American lawyers have long sought to shield their institutions from any meaningful threat of reform, while at the same time elevating the status of the legal profession by casting it as the natural guardian of virtuous domestic traditions.

History and the comparative perspective, however, are not simply modes of discourse subject to strategic deployment in the

argumentative field. As forms of academic discipline, they stand — or at least, in my view, should seek to stand—outside the realm of immediate, partisan pressures. In this capacity, history and the comparative perspective function to critique their strategic uses by helping us to reflect on the constructed nature of tradition as such. Deployed to achieve such academic goals, history and the comparative perspective function not as the makers of tradition, but instead, as its debunkers. Once again, it is the distance that history and the comparative perspective afford from the immediate context that is key to their success in this regard.

By reflecting back on the past, the historian can detect the strategic maneuvers underlying the construction of a particular legal tradition — the ways in which certain facts are given particular emphasis, while others are subtly occluded or ruthlessly cast aside. To take an example from recent work of mine,[1] consider the evolution of the now widely accepted view that the French judiciary (like that of continental European nations more generally) is structured as a civil-service bureaucracy. While this account is so established as to be essentially beyond cavil, even the briefest review of the contemporary French judicial landscape suggests that it is woefully incomplete, and thus misleading. The French judiciary includes numerous commercial and labor courts that simply do not fit this bureaucratic model. Judges in these courts lack formal judicial (and usually legal) training of any kind and are elected mid-career to serve temporary terms of office. The commercial and labor courts have thus been marginalized within the prevailing account of the French judiciary as a civil-service bureaucracy. The historian can help shed light on this odd state of affairs by tracing how the civil-service bureaucracy account of the French judicial tradition first came to be constructed in the early to mid-nineteenth century. Specifically, the historian can discover and examine the strategic purposes that the traditional account was designed to serve — namely, to distance allegedly modern French judicial institutions from a much-reviled corporatist past, and to elevate the power and status of a beleaguered legal profession by marginalizing those

1. *See generally*, Amalia D. Kessler, *Marginalization and Myth: The Corporatist Roots of France's Forgotten Elective Judiciary*, 58 AM. J. COMP. L. 679 (2010).

judicial institutions in which such professionals played little role.

Like the historian, the comparatist uses her distance from the legal culture under examination to illuminate the constructed nature of its traditions. To continue with the previous example, it is those outside the French legal system who are in the best position to observe the obvious, the somehow neglected fact that important French courts simply do not conform to the standard account of the French judiciary as a civil-service bureaucracy. While those inside the system have been indoctrinated with this traditional account from an early age through schooling, press reports, and the like, those outside can observe it with fresh eyes. Along these lines, it is telling that at the very same moment that nineteenth-century French jurists were first constructing an account of their judiciary that all but erased the existence of the commercial and labor courts, their American counterparts were emphasizing the important role played by these institutions in the French judicial system. In particular, as I have argued elsewhere, nineteenth-century American lawyers extensively debated the desirability of transplanting what they called "conciliation courts"— including the French commercial and labor courts — to American soil.[2] From their perspective as outsiders, these institutions were, in short, fundamental components of the French judicial landscape.

Where does this leave us? As suggested by the viewpoint of both history and comparative law, the French tradition of a civil-service bureaucracy is less solid and imposing than might otherwise seem to be the case. History and comparative law, in other words, teach that tradition is neither necessary nor inevitable, but instead the contingent outcome of a struggle in which particular groups seek to advance their own, strategic interests. In my view, that is precisely the point of the scholarly endeavor. By questioning the necessity or inevitability of tradition, it frees the present from the grip of the past and removes the blinders that inhere in an overly local and narrow perspective — thereby making change possible. This is not, of course, to suggest that the scholar can herself stand entirely

2. *See generally*, Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQ. L. 423 (2009).

outside of the argumentative field — that the attainment of truly neutral ground is possible. After all, most scholarly work is itself motivated by some kind of engagement with the immediate, domestic context. However, we can choose to embrace the *idea* of such neutral ground as our lodestar. Whether and to what degree we have succeeded can then be measured by the extent to which our efforts serve to generate, rather than to end discussion. As makers of tradition, history and the comparative perspective seek argumentative finality. As its debunkers, history and the comparative perspective aspire to nothing more nor less than to open the debate.