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ESTABLISHING COMPARATIVE LAW IN THE UNITED STATES: THE FIRST FIFTY YEARS

DAVID S. CLARK*

Most American comparative lawyers are familiar with the accepted history of *organized* comparative law in the United States. It is usually dated from 1951, when representatives from ten law schools and the American Foreign Law Association joined together as the first sponsor members of the American Association for the Comparative Study of Law (today the American Society of Comparative Law), which in 1952 began publishing the *American Journal of Comparative Law*.

Several of these representatives were immigrants who had fled Germany in the 1930s, which helped to set the scholarly agenda in the early years. Whatever one thinks about the subsequent success of comparative law as an academic discipline, it is clear that these professors created the organizational framework that would permit comparative law securely to establish itself in American legal education.

Today the Society has about 100 sponsor members (most are law schools with multiple representatives) and eighteen foreign corresponding institutional members. Its *Journal* has the largest worldwide circulation of any comparative law publication. Moreover, its members and others teach comparative law, private international law, and specific foreign law courses at most U.S. law schools, which often have their own student-run comparative and international law journal and maintain summer and even semester programs abroad.

Another version of comparative law history in the United States, proposed in my presentation today, takes the position that sustained scholarly activity, together with organized networks of communication, commenced early in the twentieth century, which I date from 1904. Largely associated with the successful effort to establish scientific teaching and research at mostly university law schools, marked by twenty-five of which in 1900 created the Association of American Law Schools

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(AALS), this new field of juristic inquiry emerged from both idealistic as well as practical concerns. Moreover, it was as successful in the United States as the much better-known contemporary national developments in Belgium, France, Germany, and Great Britain.

My thesis, therefore, is that the history of *organized* American comparative law began with the 1904 St. Louis Universal Congress of Lawyers and Jurists, the first international congress of comparative law in the United States, held only four years after the justly celebrated 1900 Paris *Congrès international de droit comparé*. The timeline for further developments, which I will try briefly to describe, includes the following.

First, organizational efforts to establish the Comparative Law Bureau began in 1905, which led the American Bar Association to create that entity as a section in 1907. Bureau members met annually at the ABA's summer meeting and published a 200 or so page *Annual Bulletin* from 1908 until 1914, when World War I disrupted cross-Atlantic connections. This was the first comparative law journal in the United States.

Second, the ABA, although organized in 1878, only started publishing a *Journal* in 1915. Established as a quarterly, the Bureau's editorial staff controlled the second issue each year, devoted primarily to the subjects previously handled in the Bureau's *Annual Bulletin*. Bureau members continued to meet annually, while the publishing arrangement with the ABA continued through 1929. After that date there were no more special Bureau issues of the *ABA Journal*, but comparative and foreign law articles still appeared with regularity, about five to ten per volume.

Third, since interest in foreign and comparative law was especially strong in New York City during the 1920s, Bureau members decided to organize a new entity in lieu of creating a New York branch of the Bureau in the manner that the International Law Association (London) created branches. Therefore, they established the American Foreign Law Association in 1925, which to this day has a special subscription relationship to the *American Journal of Comparative Law*.

Fourth, due to the Great Depression, the Bureau fell into financial difficulty in the 1930s. It published one more *Annual Bulletin* in 1933, 215 pages long, but neither it nor the Bureau could survive. The ABA Executive Committee sponsored a successful amendment to the ABA's constitution, which merged the Comparative Law Bureau with the International Law Section. From 1933, its name was the Section of International & Comparative Law. Providing useful publications and annual meetings for comparatists at the Comparative Jurisprudence Committee and the Teaching of International and Comparative Law

Committee, it levied section dues beginning in 1942. By the end of World War II, the Section had over 1,000 members.

Finally, in the early 1950s, members of the American Foreign Law Association (AFLA) and the ABA Section decided to make a sustained effort to support a more scientific comparative law and its teaching and research in American law schools. The AFLA had issued proceedings from its periodic meetings since 1926 (and some of the articles appeared in law journals) and it published bibliographies. In 1950, the AFLA began publishing a *Bulletin*, edited by Kurt Nadelmann, which the AFLA president, Phanor Eder, a New York City lawyer, later stated served as an example for the new *American Journal of Comparative Law* in 1952. In May 1951, the AFLA voted to establish the American Association for the Comparative Study of Law, which its directors incorporated in New York on June 15. The six directors listed on the Certificate, besides Eder, included professors Erwin Griswold (Harvard), Wesley Sturges (Yale), Hessel Yntema (University of Michigan), and Alexis Coudert, senior partner of the leading New York City law firm dealing with foreign law.

During the 1951 ABA annual meeting, representatives of twenty law schools met in September at New York University Law School to discuss joining the American Association for the Comparative Study of Law, which changed its name in 1992 to the American Society of Comparative Law. That first year, ten schools plus the AFLA joined as sponsor members: Harvard, Yale, Columbia (as the Parker School), NYU, Georgetown, Michigan, Chicago, LSU, Indiana, and Miami. Eder was President and Coudert Secretary; Hessel Yntema was Vice President and David Cavers (Harvard) Treasurer.

Now I would like to take a few minutes to put some flesh on these bare bones.

We begin with the 1904 St. Louis Universal Congress of Lawyers and Jurists, the first international congress of comparative law in the United States.¹ It resulted from a proposal that the “Louisiana Purchase Exposition Company” made to the ABA. After reciting the fact that President Thomas Jefferson purchased the Louisiana Territory for fifteen million dollars from France in 1803, the Company proposed to hold a centennial in St. Louis in 1903. The proposal noted: “The wilderness of 1803 has developed into fourteen States and Territories” and stated that the city of St. Louis, with the help of five million dollars from the U.S.

1. See David S. Clark, *Nothing New in 2000?: Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 888–92 (2001).

Congress and one million dollars from the state of Missouri, was willing to devote more than the purchase price, sixteen million dollars, to a celebration of its centennial. The Centennial Exposition contemplated a “World’s Fair greater and more wonderful than any ever held,” and “to gather together the learned men of the world in the several departments of arts and sciences, including the science of jurisprudence.”²

The ABA accepted the proposal, which it postponed until 1904 to further coordinate the preparations, and which would now celebrate the centennial of the official transfer of sovereignty from Spain to France to the United States. The World’s Fair was a great success, attracting twenty million visitors. St. Louis also hosted the third modern Olympics that same year. In 1903, the ABA president had appointed Simeon Baldwin of Yale to the ABA’s Executive Committee to implement the Congress, which occurred from September 28 to 30, 1904, immediately after the ABA’s annual meeting. Baldwin was one of the ABA’s founders, a former ABA and AALS president, a Yale law professor, and a member of the *Institut de droit comparé* in Brussels. He would later be Chief Justice of the Connecticut Supreme Court, Governor of Connecticut, and Director of the Comparative Law Bureau from 1908 to 1919.

The Congress’s aims

. . . were the consideration of the history and efficacy of the various systems of jurisprudence and the discussion of those questions of international, municipal and maritime law which concern the welfare of all civilized nations; the hope of contributing to greater harmony in the principles and the forms of procedure upon which the law of civilized nations should be based; the bringing of lawyers and jurists from all parts of the world into contact for the purpose of exchanging views on the principles and methods of the correct administration of justice.

Unlike the 1900 international comparative law congress in Paris, lawyers and judges organized and ran this one, with a smaller representation from academia. The Congress president was Associate Justice David Brewer of the U.S. Supreme Court, who was also an international law professor at George Washington University. Brewer was born in 1837 in Smyrna, Asia Minor (now Turkey), where his father worked as a missionary. His mother was Emilia Field, sister of Supreme

2. OFFICIAL REPORT OF THE UNIVERSAL CONGRESS OF LAWYERS AND JURISTS 315–18 (V. Mott Porter ed., 1905).

Court justice Stephen Field and the New York codifier, David Dudley Field. His experience in Asia came through in strong dissents in cases limiting the rights of Chinese and Japanese immigrants. His dissent in *Fong Yue Ting v. United States*³ illustrates the view that made him a natural favorite later to preside at a congress of comparative lawyers. In *Fong*, the Court determined that Congress's power to deport aliens was plenary and inherent in federal sovereignty. Brewer responded: "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius ask, Why do they send missionaries here?"⁴ Brewer was an anti-imperialist who believed that the United States should give the Philippines its independence and then guarantee its neutrality.

Of the fourteen Congress vice presidents, one from each of the Congress nations, most were judges or lawyers, but four were professors. These persons formed a Committee of Nations and voted on Congress propositions. The majority of the voting members were European: from Austria, Belgium, the British Empire, France, Germany, Italy, the Netherlands, Sweden, and Switzerland. The remaining Congress countries were Argentina, Brazil, China, Mexico, and the United States.

Delegates could present reports and discuss in any language, but Congress staff would make translations into English. Comparative law panels included: (1) the preferable method of regulating the trial of civil actions with respect to pleading and evidence; (2) a review of the four Hague Conferences on private international law; and (3) the extent to which local courts should recognize the judicial action of foreign country courts.

There were 481 registered delegates at the Congress, which was a huge number for such an event, even though the large majority was from the United States. Forty American law professors attended from almost thirty law schools, including Nathan Abbott from Stanford, James Barr Ames, and Samuel Williston from Harvard, Joseph Beale from Chicago, James Brewster from Michigan, William Draper Lewis from Pennsylvania, Charles Huberich from Texas, Eugene Gilmore from Wisconsin, James Brown Scott, and Munroe Smith from Columbia, James Henry Webb from Yale, and John Wigmore from Northwestern. William Curtis and William Keysor represented Washington University at St. Louis. The most famous

3. *Fong Yue Ting v. U.S.*, 149 U.S. 698, 732 (1893) (Brewer, J., dissenting).

4. *Id.* at 744.

foreign law professors in attendance were Georges Blondel from Paris, Josephus Jitta from Amsterdam, and Friedrich Meili from Zurich.

Soon after the 1904 Congress, the question of creating a comparative law society received its first organized recognition by the Pennsylvania State Bar Association in 1905. At the Association's annual meeting, the president appointed a committee to consider such a project. The committee's report considered the initiative too large for any one state and recommended bringing the matter before the ABA. The ABA created a committee to investigate and recommend the best method to accomplish the goals of comparative law. At its 1907 annual meeting, the ABA authorized the organization of the Comparative Law Bureau, which published its first *Annual Bulletin* surveying foreign legislation and legal literature in July 1908.

It is likely that the French *Société de Législation Comparée*, founded in 1869, which organized the 1900 Paris Congress, served as the model for the American Bureau. In 1896, Professor Henri Lévy-Ullmann (University of Montpellier, also *avocat* at the Paris *Cour d'appel*), wrote a report describing the French Society in the *Harvard Law Review*. Lévy-Ullmann served as the general reporter to section 4 (civil law) at the Paris Congress, which had five United States delegates, including Professor John Burgess of Columbia University, a specialist on comparative constitutional law. Lévy-Ullmann described several elements of the French Society that later came to parallel aspects of the American Bureau.

The Bureau's officers included Simeon Baldwin as director and William Smithers as secretary. Smithers was from Philadelphia, where the International Printing Company published the *Bulletin*, and he also served as the chairman of the *Bulletin*'s editorial staff. The Bureau's managers included James Barr Ames, dean at Harvard, George Kirchwey, dean at Columbia, William Draper Lewis, dean at Pennsylvania, and later the first director of the American Law Institute, and John Henry Wigmore, dean at Northwestern. In the *Bulletin*'s first issue, the Bureau presented its aims: (1) publish an annual *Bulletin* with foreign legislation and reviews of foreign legal literature; (2) translate and publish foreign legislation and relevant expert opinions; (3) hold an annual conference to discuss comparative law generally; (4) provide a more thorough means by which foreign laws can become available to American lawyers; (5) promote research in foreign law; (6) establish a list of foreign correspondents; and

(7) gather information on foreign law, including bibliographies, for the benefit of practicing lawyers, law teachers, and students.⁵

The *Bulletin* was circulated to all ABA members and to other subscribers. The editorial staff in 1908 included: Simeon Baldwin (Yale) for general jurisprudence; Ernest Lorenzen (George Washington) and Roscoe Pound (then at Northwestern) for Germany; Charles Wetherill for Great Britain; Masuji Miyakawa for Japan; Leo Rowe (University of Pennsylvania) for Latin America; William Hastings (University of Nebraska, dean in 1910) for Russia; Samuel Scott for Spain; and Gordon Sherman for Switzerland. There were foreign correspondents from fourteen countries, including Gaston de Leval from Belgium and Eugen Huber from Switzerland.

By 1910, the Bureau had entered into a publishing arrangement with the Boston Book Company for a foreign law series. This included Samuel Scott's translation of the Visigothic Code and the Swiss Civil Code. Boston also published the Civil Code of the German Empire, Korkunov's General Theory of Law (with Dean Hastings as translator), and the 35 volumes for the Commercial Laws of the World. The German Civil Code was a collaborative effort between the University of Pennsylvania and the Pennsylvania Bar Association. Walter Loewy translated, Smithers wrote an historical introduction, and Wetherill wrote reference notes referring to analogous provisions in other foreign codes. Charles Huberlich (now at Stanford) joined the *Bulletin's* editorial staff for the British Colonies and Edwin Borchard and Samuel Williston (Harvard) for Germany. Borchard would become law librarian at the Library of Congress in 1911, and then law librarian and professor at Yale in 1917. In 1910, the Bureau had five law libraries and seventeen law schools as institutional members.

In 1911, the United States Government began to support financially the comparative law movement by devoting resources to the Library of Congress "to collect the essential materials necessary for an accurate knowledge of the legal institutions of every civilized country." Edwin Borchard, Bureau editor and law librarian, was supervising the work. The Library also started to publish critical surveys of foreign country legal literature, beginning with Germany, with parts also printed in the *Bulletin*. This series, known as "Guide to the Law and Legal Literature" was very useful for academic comparatists. In 1912, the eleven volume Continental Legal History Series began to appear. John Wigmore was the chair of the

5. COMPARATIVE LAW BUREAU: OBJECTS, 1 ANNUAL BULLETIN OF THE COMPARATIVE LAW BUREAU OF THE AMERICAN BAR ASSOCIATION 2 (1908).

editorial committee for this series. By 1914, the Bureau had fourteen law libraries and twenty law schools as institutional members.

The 1920s and 1930s were decades during which American comparatists become actively involved in European legal research and European legal conferences, together with substantial interest in Asia and Latin America. *ABA Journal* special sections devoted to comparative law reflected this as well as American submissions to foreign legal publications. For instance, the 1925 *Journal* reported that foreign law had become increasingly important in the United States, both for the goals of comparative law as well as private international law.

In 1924, the Comparative Law Bureau adopted a resolution to create a New York section of the Bureau. That same year, during a visit of hundreds of American lawyers to the ABA annual meeting held in London, the *Société de Legislation Comparée* entertained a group of the lawyers who had traveled to Paris. At that meeting, some suggested that the Americans form a *Société* branch in the United States. There followed a meeting between the president of the New York City Bar Association, the chair of its special committee on private international law and conflicts of law, and the Bureau's chairman and vice-chairman. They decided to form an organization committee that led to the February 1925 founding of the American Foreign Law Association (AFLA).

Article II of the AFLA's Constitution reads:

The objects of the Association shall be the advancement of the study, understanding, and practice of foreign, comparative and private international law, the promotion of solidarity among members of the legal profession who devote themselves, wholly or in part, to those branches, the maintenance of adequate professional standards relative to members and active cooperation with learned societies, devoted to such subjects, like the Comparative Law Bureau of the ABA, the *Société de Legislation Comparée*, etc.

AFLA dues were set at ten dollars annually. The first elected president was William Smithers. The General Council included Manley Hudson (Harvard), Judge Otto Schoenrich (New York City), Charles Lobingier (former judge of the United States Court for China and a member of the *Bulletin's* editorial staff), Phanor Eder (New York City), and Arthur Kuhn (New York City).

It is also worth noting the significant relationship between comparative law and the founding of the American Law Institute (ALI) in 1923. William Draper Lewis, one of the managers of the Comparative Law Bureau since 1908, became the first director of the ALI. Among the forty-

person committee organizing the ALI were four persons with experience in foreign law: Ernst Freund, Roscoe Pound, John Wigmore, and Samuel Williston.

In 1932, John Wigmore wrote an article in the *ABA Journal* entitled "An American Lawyer's Pilgrimage on the Continent." His purpose was to interest lawyers in attending the upcoming international congress of comparative law at The Hague. In the notice following this article, he explained: "This is the first Congress of this kind to be held since the International Congress of Lawyers at the Louisiana Purchase Exposition in 1904 in St. Louis. It is organized by the International Academy of Comparative Law, of which the American members are Edwin M. Borchard, John Bassett Moore, Roscoe Pound, James Brown Scott, and Justice Harlan F. Stone." Wigmore added that forty countries had formed national committees. Those would designate national reporters for the topics in which they cared to participate. Attorney General William Mitchell headed the American committee, while forty state, county, and city bar associations appointed delegates.

At the end of 1932, Wigmore dutifully reported in the *ABA Journal* about the Hague Congress and the major American presence. Delegates represented thirty-one countries. Of the 305 delegates registered in attendance, seventy-two came from the United States. Of these, at least twenty-eight were professors who represented sixteen law schools or university faculties. The second largest contingent of fifty-two participants came from France.

After some comments about the admirable social arrangements for entertaining the delegates, Wigmore continued:

But the mechanical arrangements for facilitating the delegates' attendance at the meetings were strangely inadequate, and gave rise to much disappointment. No information desk (polyglot or otherwise) was provided. No programs were readily accessible. No signboards indicated the pending topics. No interpretation was provided, either written or oral; so that the French language prevailed; no hotel addresses of registrants could be ascertained; no name-badges of registrants, to identify them, were supplied; and most astonishing of all, no lists of registered delegates were seasonably distributed . . .; and another lamentable result was that, after the Congress was over, we found that we had missed dozens of persons whom we would have been gratified to meet or even to identify. In short, the arrangements for the actual deliberations were

of the lowest degree of efficiency. All of these defects were needless. . . .

The causes extenuating these defects were . . . the Academy's lack of funds for adequate clerical assistance; . . . the Executive Committee's lack of experience in such a Congress (the first in 30 years); and, lastly, the Committee's lack of acquaintance with modern methods of efficiency in conducting conventions of this sort. It cannot be doubted, however, that the Executive Committee learned its lesson. If the next Congress is organized by the same hands (as voted by the Congress), it will be a "sine qua non" to attach beforehand to the Committee some Anglo-American lawyer who will consider Anglo-American needs and will be experienced in applying the modern methods of efficiency that are required and usual at such deliberative assemblages.

It can only be added that the United States members in attendance accepted these shortcomings good-naturedly and submissively, as being presumably one of the incidents of foreign travel. . . . As a milestone of the world's juridical and professional progress, the Congress was emphatically a success beyond all expectation. . . . And as a demonstration of the capacity and willingness of the United States profession henceforth to take its proper part in such a movement, it was eminently encouraging.

Shortly thereafter, the ABA merged the Comparative Law Bureau in 1933 with the International Law Section. Near the end of his deanship at Harvard, Pound gave the address at the 1935 annual meeting of the newly constituted ABA Section of International and Comparative Law. In magisterial form, he surveyed the history of comparative law since the twelfth century, described its importance for development of law in the nineteenth century United States, and argued that current comparative law was one of five universalizing elements helping to break the cult of local law. He also supported comparison beyond mere legal rules to embrace legal systems, and described the utility of the functional method of comparison.

The Great Depression and World War II made serious comparative law research difficult. Much of that task now fell to the American Foreign Law Association. In 1939, William Draper Lewis at the ALI created a research position in Philadelphia for perhaps Europe's most famous comparatist, Ernst Rabel, the director until 1937 of the Kaiser Wilhelm Institut für ausländisches und internationales Privatrecht in Berlin.

The sun was setting on the first sustained period of organized comparative law in the United States. A new dawn waited at the creation of the American Association for the Comparative Study of Law in 1951. Thank you.