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The Rise and Decline of Legal Families†

The effort to group jurisdictions around the world into a handful of legal families based on common characteristics of their laws has traditionally occupied a central role in the comparative law literature. This Article revisits the intellectual history of comparative law and surveys the evolution of legal family taxonomies from the first efforts at classification in the late-nineteenth century to the influential categorizations advanced by René David and Zweigert and Kötz in the 1960s. The early taxonomies differed from their modern counterparts in important ways. Although the nineteenth century is usually viewed as the apex of the common-civil law dichotomy, this distinction was conspicuously absent from legal family classifications until the twentieth century. A number of economic and political factors—ranging from economic liberalism to anti-colonialist sentiment—likely played a role in minimizing the salience of legal traditions in nineteenth-century legal thought.

I. Introduction

The effort to group jurisdictions around the world into a handful of legal families based on underlying common characteristics of their laws has traditionally occupied a central role in comparative law. While comparativists have over time become increasingly sophisticated about the limitations of legal family categories—which are now widely understood as ideal types rather than precise depictions of reality —many, if not most, comparative law books and treatises continue to be organized around this framework.[1] And despite early

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1. *See, e.g.*, Mary Ann Glendon, Michael Wallace Gordon & Paolo G. Carozza, Comparative Legal Traditions in a Nutshell (2d ed. 1999) (devoting the "nutshell" to the distinction between the Romano-Germanic and the common law tra-

suspicions that the seminal works of René David or Konrad Zweigert and Hein Kötz might have exhausted the theme as the object of legal scholarship,[2] there have been a number of recent efforts to advance and refine, rather than abandon, legal family classifications.[3]

In the last fifteen years, two important but seemingly contradictory theoretical developments have brought the theme of legal families further into the spotlight. On the one hand, the continued utility of classifying jurisdictions as belonging to a handful of legal families has come under assault from a number of prominent comparativists. James Gordley has described the distinction between common and civil law as "obsolete,"[4] while Hein Kötz, co-author of one of the most influential of such taxonomies, has questioned whether the time has come to bid farewell to legal family classifications.[5] Some of the critiques were accompanied by proposals for alternative taxonomies, which aimed to supersede or complement existing categories.[6] But the principal driving force behind this recent backlash is the widespread perception that the rise of the European Union and pressure for legal convergence in a globalized world have rendered legal family distinctions increasingly outmoded.[7]

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dition); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 5 (4th ed. 2010) (focusing on the concept of legal traditions).

2. John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 547 (1995) (partially attributing the perceived decline in comparative law scholarship to the fact that the "taxonomic orientation of the founding generation largely spent itself").

3. *See, e.g.*, Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, *in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Vernon Valentine Palmer ed., 2001) (arguing that mixed jurisdictions constitute a new legal family of their own).

4. James Gordley, *Common law und civil law: eine überholte Unterscheidung* [*Common law and civil law: An obsolete distinction*], 3 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATERECHT 498 (2003). *See also* JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 43 (2006) (warning against the "danger of taking the difference in terminology too seriously and imagining that the common and civil law rest on fundamentally different concepts").

5. Hein Kötz, *Abschied von der Rechtskreislehre*? [*Farewell to the Theory of Legal Families?*], 6 ZEITSCHRIFT FÜR EUROPASCHES PRIVATRECHT 493 (1998).

6. For examples of recent proposals of alternative taxonomies, see James A. Whitman, *Consumerism versus Producerism: A Study in Comparative Law*, 117 YALE L. J. 340, 353 (2007) (arguing that "[g]ood comparative law should never claim to offer any single correct classification," and proposing the distinction of consumerism and producerism as categories that are "more revealing" than legal families in analyzing modern legal systems and informing social science inquiry); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 9 (1997) (arguing that "common taxonomies [of legal families] are outdated and should be replaced," and advancing a new classification of legal systems as belonging to the rule of professional law, the rule of political law, or the rule of traditional law). Mattei classifies Latin America as belonging to the rule of political law, together with other non-Western jurisdictions. *Id.* at 28.

7. The literature is now too voluminous to be cited in full. For a few recent examples, *see* Bénédicte Fauvarque-Cosson & Anne-Julie Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of Law*, 57 AM. J. COMP. L. 811, 829 (2009) ("the legal origins thesis bases its

On the other hand, legal families have come to occupy a prominent role in the growing literature that seeks to ascertain the economic consequences of legal rules, institutions, and traditions. Since the late 1990s, a series of economic studies by Andrei Shleifer and his co-authors has broken new ground by using comparativists' legal family classifications to test empirically whether a causal relationship exists between legal institutions and financial development.[8] Their efforts have given rise to the so-called "law-and-finance" literature, which has produced some of the most cited and controversial works in the social sciences in recent history, and whose sheer size and real-world influence are unprecedented in the field of comparative law.[9] In an ironic turn, economists embraced legal families just as comparative lawyers were abandoning the same classifications that until then had been one of the principal intellectual feats of their field.[10]

In assessing the current significance of legal families, comparative lawyers and economists have generally talked past each other and reached divergent conclusions. While comparativists have asserted the *decline* of legal families, a major strand of the economic literature has provided empirical evidence suggesting the *persistence* of legal family categories as a source of variation in legal and eco-

analysis on a classification of legal systems divided into legal families which is now by and large outdated"); Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 B.Y.U. L. REV. 1813, 1815 (2010) (describing the growing consensus among sophisticated comparativists that there are "there are few if any relevant differences between common and civil law today"). *But see* for the opposite view, Pierre Legrand, *European Legal Systems are Not Converging*, 45 INT'L & COMP. L.Q. 52, 91 (1996) (refuting the "convergence thesis" between civil and common law systems, and arguing that there continue to exist in Europe "irreducibly distinctive modes of legal perception and thinking").

8. For a representative exemplar of this large literature, see Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113(1998). *But see* Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 REV. FIN. STUD. 467 (2009) (finding numerous errors in the antidirector index that compromise the initial results obtained by the law-and-finance literature). For a review of this literature by its precursors, see Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008) (noting that while legal families were initially used as an instrumental variable to provide an exogenous source of variation in the country's legal systems, more recent studies have employed these classifications as explanatory variables).

9. Detlev Vagts, *Comparative Company Law—The New Wave* 595, *in* FESTSCHRIFT FÜR JEAN NICOLAS DRUEY ZUM 65. GEBURTSTAG (2002) (judging the recent developments in comparative corporate governance, inspired by the law-and-finance literature, as an "astonishing phenomenon" whose output "outdoes all of the publications in the rest of comparative law put together").

10. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 673 (2002) (citing legal families, together with knowledge of foreign law and the process of comparison itself, as the three main areas of achievement for comparative law scholarship in the twentieth century). For a critique of the use of legal families in econometric studies, see Mathias M. Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 MCGILL L.J. 55 (2007).

nomic outcomes across jurisdictions.[11] Nevertheless, despite their differences, the two camps share the assumption that legal family distinctions were stronger in the distant past than they are today. Indeed, it is telling that what comparative lawyers call "legal families" economists have come to term "legal origins," a phrase that highlights the purported historicity of these categories that is key to their proponents' purposes.[12]

This Article casts doubt on the professed historicity of legal family categories by examining the intellectual history of comparative law and surveying the evolution of legal family taxonomies from the first efforts at classification in the late-nineteenth century to the influential categorizations advanced first by René David and then by Zweigert and Kötz in the 1960s. Surprisingly, the early classifications differed from current legal family categories in a number of ways. First and foremost, the core distinction between civil and common-law regimes was conspicuously absent from most comparative taxonomies of legal systems until the twentieth century. While France and England were habitually classified as belonging to separate categories, Germany's classification remained highly contested: depending on the author, it was classified as belonging to the same group as England, to the same group as France, or to a separate category altogether. Moreover, early Latin American comparativists classified the countries in the region not as the offspring of European traditions, as they are commonly understood today, but rather as belonging to a *sui generis* category of original legal systems.

This degree of transformation in the conceptions and characterizations of legal families over time is startling. Legal families imply ancestry,[13] while legal traditions entail "pastness."[14] And yet, just a few generations ago, the prevailing conceptions about legal families looked significantly different from their modern-day counterparts.

At the outset, one caveat is necessary. This study focuses almost exclusively on scholarship that is self-identified as part of the discipline of comparative law or comparative legislation, and, more

11. Holger Spamann has attempted to reconcile these views by showing the persistence of strong diffusion patterns along legal families in the twentieth century. Spamann, *supra* note 7, at 1813 (stating that the continued importance of legal families as a source of legal materials in the periphery "raises the possibility that substantive differences between countries of different families around the world, such as those documented in the legal origins literature, continue to be the result of separate diffusion processes rather than of intrinsic differences between common and civil law").

12. *See supra* note 8 and accompanying text.

13. Jaakko Husa, *Legal Families*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 384 (Jan Smits ed., 2006) ("[t]he notion of legal family, in this sense, contains the idea of historical relationships between different systems of law").

14. The expression, in the context of legal traditions, comes from H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 5 (4th ed. 2010) ("[t]he most obvious and generally accepted element of tradition is what T.S. Eliot has called its 'pastness'").

specifically, on the Anglo-Saxon and Latin branch of that literature, including France and Latin America.[15] This is emphatically not to deny that the literature comparing legal systems is far broader and older. In particular, there is a long historical pedigree to the idea that English law is profoundly different from French and Roman law. Already in the fifteenth century, Sir John Fortescue described at great length the differences between English and civil law, and argued vigorously for the superiority of the former.[16] Nevertheless, the effort to extrapolate from these two countries and speak of legal families encompassing the entire world map is a far more recent one—and constitutes the object of this Article.

This Article is structured as follows. Part II describes how comparative lawyers' taxonomies of legal systems evolved over time, from nineteenth-century scholars' first efforts to the legal family classifications that are standard, though increasingly contested, today. Part III examines the shift in the content, method, and purposes of comparative legal studies in the nineteenth and twentieth centuries, showing how the lesser role of legal family categories in the nineteenth century legal imagination paralleled the more cosmopolitan orientation of early comparative efforts. Part IV speculates on the factors that contributed to the solidification of the notion of legal traditions in the twentieth century. Part V concludes.

II. Legal Family Taxonomies in Historical Perspective

Contemporary scholars typically associate legal family taxonomies with their most famous proponents—French comparativist René David and German legal scholars Konrad Zweigert and Hein Kötz.[17] Although the publication dates of their seminal works are well known—1962 for David's "*Les grands systèmes de droit contemporains*" and 1969 for Zweigert and Kötz's "*Einführung in die Rechtsvergleichung*"—the resulting groupings have come to be viewed as historically-rooted categories. While there is now a voluminous literature attesting to the declining significance of legal families, scholars have thus far paid insufficient attention to the timing and driving forces behind the rise of these conceptual categories.

Let us begin with the pioneering classification proposed by French scholar Ernest Glasson in 1880.[18] In his book on "Civil Mar-

15. The rich and influential nineteenth-century German literature is therefore excluded.

16. *See* Sir John Fortescue, De Laudibus Legum Angliae [In Praise of the Laws of England] 77 (Cambridge 1825) (1468).

17. Reimann, *supra* note 10, at 676 ("[t]oday, everybody in the field is familiar at least with the modern classics: René David's scheme and Zweigert & Kötz' widely accepted definition of families according to 'style,' both first published in the 1960s").

18. Before Glasson, Gumersindo de Azcárate, a Spanish scholar, proposed one of the first groupings of various jurisdictions in his treatise on comparative legislation of

riage and Divorce," a study on comparative legislation, Glasson devoted an entire section to a survey of the sources of private law in Europe.[19] It is in that section that he advances a classification of different jurisdictions based on common characteristics of their laws. Glasson's tripartite classification divides countries into the following three categories: (i) jurisdictions that are strongly influenced by Roman law, such as Spain, Portugal, Italy, and Romania; (ii) jurisdictions that are largely immune from Roman-law influence, such as England, Russia, and Scandinavian countries; and (iii) jurisdictions that combine Roman and Germanic (i.e., barbaric) influence, such as France and Germany.

There is very little, if anything, of David or Zweigert and Kötz, in this effort. The central criterion for Glasson was not the sources of a country's law or the style of its legal culture, but rather its proximity to Roman law. Strikingly, however, Glasson does not articulate an overarching distinction between civil-law and common-law jurisdictions. Moreover, England, Russia, and Scandinavia, each of which would have belonged to a separate family under contemporary schemes, were grouped as belonging to the same category. France and Germany were assigned to the same group but one distinct from that of Spain, Portugal, and Italy—jurisdictions that are today deemed to be part of the French tradition.

Glasson's taxonomy, though covering only European countries, travelled rapidly across the Atlantic. When Clóvis Bevilaqua—professor of Comparative Legislation at the Faculty of Law of Recife (*Faculdade de Direito de Recife*) in Brazil and later draftsman of the 1916 Brazilian Civil Code—wrote his own treatise on the subject in 1893, he relied heavily on Glasson's classificatory scheme.[20] But since the French scholar's categorization was limited to European countries, Bevilaqua undertook to complement it.

In this regard, it is highly revealing that Bevilaqua did not simply revise Glasson's scheme by pigeonholing Latin American countries into one of the pre-conceived European categories, as would become the norm in modern-day classifications. Rather, he created a

1874. He sorted jurisdictions according to the ethnicity of their people, hence resulting in five different groups: (i) Neo-Latin peoples, (ii) Germanic peoples (which included not only Germany and some of its neighbors, but also England and the United States), (iii) Scandinavian peoples, (iv) Slavic peoples, and (v) a residual categories for "other peoples of Christian-European civilizations," including Greece, Malta and the Jonic Islands. It is clear, however, that the sole purpose of his classification was to organize countries' descriptions in chapters. The author does not elaborate on the criteria he used for the classification, nor does he claim that the laws of the countries so ordered have much in common. *See* GUMERSINDO DE AZCÁRATE, ENSAYO DE UNA INTRODUCCIÓN AL ESTUDIO DE LA LEGISLACIÓN COMPARADA (1874).

19. ERNEST GLASSON, LE MARIAGE CIVIL ET LE DIVORCE DANS L'ANTIQUITÉ ET DANS LES PRINCIPALES LÉGISLATIONS MODERNES DE L'EUROPE (1880).

20. CLOVIS BEVILAQUA, RESUMO DAS LICÇÕES DE LEGISLAÇÃO COMPARADA SOBRE O DIREITO PRIVADO (2d ed. 1897) (1893).

fourth and separate category to describe the laws of Latin American countries, which, in his view, "could not logically be included in any of the three aforementioned categories"[21]—a move that is illustrative of how lawyers in peripheral legal systems viewed their countries' legal allegiances in the nineteenth century. For Bevilaqua, the laws of Latin American jurisdictions were *sui generis* because they combined a Spanish and Portuguese heritage with European (and notably French) legal influence while displaying a "strong boldness" typical of young nations.[22] The distinctiveness of these early categorizations raises the question whether, at least in the New World, legal traditions were to a surprising degree invented well into the twentieth century.[23]

Subsequent Latin American comparativists continued to employ Glasson's classification as amended by Bevilaqua. Candido Luiz Maria de Oliveira—a Brazilian jurist whom René David would later acknowledge as a true precursor in the field of comparative law[24] —employed a virtually unchanged version of Bevilaqua's taxonomy in his comparative legislation treatise of 1903.[25] Similarly, Argentinean scholar Enrique Martinez Paz relied on and expanded Glasson's categories as amended by Bevilaqua well into the 1930s.[26]

These studies show that the first attempts to group different countries based on the perceived common characteristics of their legal systems date back at least to the late-nineteenth century. It is important to recognize, however, that the main purpose of these emerging efforts seems to have been expositional clarity rather than the formulation of scientific hypotheses about different legal systems. Categories became headers of book chapters. It was not until the 1900 International Congress on Comparative Law (*Congrès international de droit comparé*) in Paris that taxonomies of legal systems would be elevated to a central feature of comparative law as the science that it aspired to become.

At the 1900 Congress, Gabriel Tarde, professor at the Collège de France, articulated a clear defense of legal family classifications as a central goal of comparative law. In his words, "under this new viewpoint, the task of comparative law is less to indefinitely collect exhumed laws than to formulate a natural—that is, rational —classi-

21. *Id.* at 74.
22. *Id.*
23. Legal traditions are, in this sense, similarly akin to "invented traditions,"—that is the notion that "traditions" that appear or claim to be old are often quite recent in origin and sometimes invented. *See* Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1 (Eric Hobsbawm & Terence Ranger eds., 1983) (noting that "[i]nsofar as there is such reference to a historic past, the peculiarity of "invented traditions is that the continuity with it is largely factitious").
24. RENÉ DAVID, LES AVATARS D'UN COMPARATISTE 191 (1982).
25. CANDIDO LUIZ MARIA DE OLIVEIRA, CURSO DE LEGISLAÇÃO COMPARADA (1903).
26. *See infra* note 40 and accompanying text.

fication of juridical types, of branches and families of law."[27] For Tarde, this framework, once discovered, would easily encompass all possible legal institutions "known or to be known."[28]

Tarde's paradigm for comparative law taxonomies borrowed heavily from linguistics and biology. He stressed that, despite the existing heterogeneity of language families, linguists had no trouble sorting newly-discovered languages into existing categories. The same was true, he argued, for botanical and zoological classifications, which remain unaltered by the discovery of new animals and plant species or the extinction of existing ones. Tarde argued that, so long as the classification is the right one, "the interest in completing the collection becomes secondary."[29] It does not take a major stretch of imagination to think that the very concept of a "family," for Tarde, was borrowed from biology's phylogenetic categories of kingdom, class, order, family, genus, and species.[30] In this light, René David's oft-cited admonition that legal families are a "didactic device, rather than a biological reality" looks more like a clear departure from his intellectual predecessors than a mere acknowledgment of the limitations of classificatory schemes, as the phrase has been usually construed.[31]

Tarde's contribution was an early articulation of an approach that would become entrenched in twentieth-century comparative law. Classifications were no longer meant simply to organize the exposition of different countries' legal systems. Instead, the formulation of a proper taxonomy became the primary task of comparative law as a discipline; the knowledge of the actual laws of a number of foreign countries, meanwhile, was written off as a matter of secondary importance. The goal of taxonomies was not to complement but to replace mere descriptions or juxtapositions of foreign laws.

While Tarde himself did not propose a criterion to classify different systems, Adhémar Esmein, a law professor at the University of Paris, filled in the gap in his own contribution to the Paris Congress. For Esmein, sensible classifications were crucial for advancing sensible comparisons. He argued that comparativists should refrain from taking their national legislation as the center of the legal universe

27. G. Tarde, *Le droit comparé et la sociologie* 439-440, *in* CONGRÈS INTERNATIONAL DE DROIT COMPARÉ TENU À PARIS DU 31 JUILLET AU 4 AOÛT 1900, PROCÈS-VERBAUX DES SÉANCES ET DOCUMENTS (1905) [hereinafter PROCEEDS OF PARIS CONGRESS].

28. *Id.*

29. *Id.*

30. Tarde speaks of *embranchements* ("branches"), a word used in French to describe, among other things, biological taxonomies.

31. RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 21 (3d ed. 1985).

and treating other legal systems as mere satellites.[32] At the same time, he claimed that a random choice of legislations to be studied would be equally inappropriate. Instead, he proposed to

> classify the legislations (or customs) of different peoples, by reducing them to a small number of families or groups, of which each represents an original system; creating awareness about the historical formation, the general structure, and the distinctive traits of each of these systems seems to be a first, general, and essential part of the scientific comparative law education.[33]

Esmein proposed a division of Western legal systems into four groups: (i) the Latin group, comprising France, Belgium, Italy, Spain, Portugal, Romania, and Latin American countries; (ii) the Germanic group, including Germany, Scandinavian countries, Austria, and Hungary; (iii) the Anglo-Saxon group, comprising England, the United States, and the British colonies and dominions; and (iv) the Slavic group. In addition to these, Esmein suggested the inclusion of a fifth group for Muslim law as yet another original system and of interest to European nations because of their colonies' Muslim populations.[34] Unlike the taxonomies proposed throughout the nineteenth century, Esmein's classification looks similar to those that would become dominant later in the twentieth century. Combine the Latin and the Germanic group, and read "socialist" instead of Slavic, and you get René David's taxonomy. A spin-off of Scandinavian countries from the Germanic group, in turn, produces Zweigert and Kötz's framework.

Yet it would be premature to conclude that the framework later employed by David and by Zweigert and Kötz has been dominant since the publication of Esmein's piece in 1900. On the contrary, Esmein's approach was soon criticized and rapidly forgotten.[35] Perceptions of legal families remained very much in flux among comparativists, and conflicting taxonomies continued to proliferate. Moreover, upon closer inspection, Esmein's classificatory scheme is remarkable not only for the distinctions it anticipated, but also for those it missed. The core distinction between civil-law and common-law systems is entirely absent from his framework. While the Anglo-Saxon group is now separated from others, there is yet no sign of the

32. This approach was indeed dominant in the nineteenth century. *See infra* notes 70-72 and *infra* note 76 and accompanying text for examples of earlier studies adopting precisely this approach.

33. A. Esmein, *Le droit comparé et l'enseignement du droit* 451, *in* PROCEEDS OF PARIS CONGRESS, *supra* note 27.

34. *Id.*

35. ZWEIGERT & KÖTZ, *infra* note 52, at 64, in fact came to the defense of Esmein's classification from later criticism, arguing that "Esmein's grouping was particularly good for his time."

underlying commonality between the Latin and Germanic groups as members of a single tradition.

In 1913, French comparativist Georges Sauser-Hall published his *Fonction et méthode du droit comparé*. His book criticized existing taxonomies and proposed a new, ethnological classification of legal families based on *race*—including such legal families as the Hindu, Celtic, Anglo-Saxon, Hebraic, Egyptian, Germanic, and Graeco-Latin, among many others. In sorting out legal families according to the apparently immutable criterion of race, Sauser-Hall was unsurprisingly quite critical of early comparativists' universalist vision, which in his view ignored entrenched legal differences across countries.[36]

In 1923, it was Henry Levy-Ullman, another French legal scholar, who advocated the formulation of legal family classifications as a central feature of the comparative method in his contribution to the volume celebrating the fiftieth anniversary of the *Société de législation comparée*. In his view,

> les principes fondamentaux de la méthode comparative ordonnent, en effet, aux juristes (. . .) de commencer par procéder a un groupement rationnel des législations, c'est-à-dire de les classer, non pas superficiellement, par l'alphabet ou la géographie, mais par « familles », au moyen d'un véritable apparentement reposant sur des affinités scientifiquement déterminées : et cette opération préalable, à laquelle je vais consacrer quelques moments, dominera, par la suite, mon exposé, jusqu'à ses conclusions finales. [37]

While heaping praise on the scientific character of legal family taxonomies, Levy-Ullman was nevertheless critical of Esmein's proposed classification, which he saw as too dependent on ethnic considerations and "terribly obsolete."[38] In what was an obvious antecedent of René David's work, Levy-Ullman proposed a division into three "great systems" (*grands systèmes*) according to "sources of law": (i) legal systems of continental countries, which are based on written sources of law (*pays de droit écrit*); (ii) legal systems of English-language countries, which follow the common law; and (iii) legal systems of Islamic countries.[39] It is remarkable that the first clear articulation by a prominent comparativist of the great common-civil law

36. GEORGES SAUSER-HALL, FONCTION ET MÉTHODE DU DROIT COMPARÉ 59-63 (1913).

37. Henry Levy-Ullman, *Observation générales sur les communications relatives au droit privé dans les pays étrangers* 85, *in* LES TRANSFORMATIONS DU DROIT DANS LES PRINCIPAUX PAYS DEPUIS CINQUANTE ANS (1869-1919) (Livre du cinquantenaire de la Société de Législation comparée) (1923).

38. *Id.* at 87.

39. *Id.* at 87 ("[t]els sont les trois grands systèmes entre lesquels se repartit aujourd'hui le droit des principaux pays, quelles que soient les nuances qui séparent dans l'intérieur de chaque groupe, les familles distinguées par la classification

dichotomy based on the criterion of "sources of law" apparently did not take place until the 1920s—perhaps not coincidentally after World War I had destroyed the strong faith in world integration and progress that had characterized the previous generation.

Nevertheless, even these seemingly straightforward and all too familiar distinctions were not immediately influential. In 1934, Argentinean comparativist Enrique Martinez Paz advanced a modified version of Glasson and Bevilaqua's taxonomy. The approach embraced in Martinez Paz's treatise shows that, as late as the 1930s, comparativists not only continued to neglect the civil-common law dichotomy but were also willing to group under the same label legal systems as diverse as those of Latin America, Switzerland, and Russia.[40] The Martinez Paz's taxonomy would certainly cause surprise today, and one may be inclined to dismiss it as an aberration or outlier. But in continuing to play down the distinction between civil and common-law systems, Martinez Paz was in distinguished company—namely, that of the early René David, who came to be "one of the most influential theorists of the ideal of 'legal families' in both the continent and the U.S."[41]

As is well known, René David's celebrated book "*Les grands systèmes de droit contemporain*," published in 1962, later came to divide the world map into three large families: (i) Romano-Germanic laws, (ii) Common Law, and (iii) Socialist Law. It is therefore striking that David himself held a very different view of the significance of the common-civil law distinction just one decade earlier, when he published his "*Traité éléméntaire de droit civil comparé*." His 1950 treatise divides the world in five different legal systems: (i) Western Law, (ii) Socialist Law, (iii) Islamic Law, (iv) Hindu Law, and (v) Chinese Law. The distinction between continental and common-law traditions is conspicuously absent as a high-level category.[42]

In his treatise, David emphasizes the "inevitably arbitrary" character of legal taxonomies, and illustrates his claim by citing most of his predecessors' attempts to devise adequate classifications.[43] David, however, deliberately chooses to distance himself from what he described as the "traditional opposition, affirmed by all authors,

d'Esmein, et entre lesquelles les différences—comparées à celles sur lesquelles repose la nouvelle classification—apparaissent comme vraiment secondaires").

40. ENRIQUE MARTINEZ PAZ, INTRODUCCIÓN AL ESTUDIO DEL DERECHO CIVIL COMPARADO (1934).

41. Lama Abu-Odeh, *The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 813 (2004).

42. RENÉ DAVID, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ 225 (1950).

43. *Id.* at 222 (stressing that "[t]oute classification est nécessairement arbitraire").

between the Roman-law system and the common-law system."[44] In fact, his treatise goes to great lengths to downplay the significance of the distinction between Romano-Germanic and common-law systems.

While David acknowledges the existence of important differences between common- and civil-law jurisdictions (and includes the dichotomy between the "French group"[45] and the "Anglo-American" group as main subdivisions of the Western group), he insists that such distinctions are not of the same order as those that exist among the other groups. The observable differences between French and English law, he argues, exist at what is "essentially a technical, not an ideological, level." David contends that both systems, through different technical methods, reach essentially similar legal solutions.[46] Therefore, he concludes that

> [t]he opposition between continental and common law cannot be scientifically placed at the same level as that between French and Chinese law; it permits no more than to establish a division, albeit fundamental, within a legal system whose unity is recognized and affirmed: the Western legal system. It is only by an error of perspective that Anglo-American law, and with even greater reason German law, was until now considered as constituting separate categories enjoying perfect autonomy relative to French law.[47]

In the same year in which René David's volume came out, a trio of Egyptian, Russian, and German scholars—Pierre Arminjon, Boris Nolde, and Martin Wolff, respectively—teamed up to publish a competing comparative law treatise.[48] Arminjon et al.'s treatise valued the formulation of legal family taxonomies to an even greater extent than David himself. In their view, "the task of comparative law as an autonomous science should have as its starting point the classification of the large number of the world's legal systems."[49] They divided the world map explicitly into "parent tree systems" and "derived systems," which together constituted seven different legal families: (i) French, (ii) German, (iii) Scandinavian, (iv) English, (v) Russian, (vi) Islamic, and (vii) Hindu.[50] Interestingly, like David's book published in the same year, Arminjon et al. failed to make any overarching distinction between civil-law and common-law systems.

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44. *Id.* at 225 ("l'on s'étonnera principalement, sans doute, de ne pas retrouver, dans la classification ici proposée, l'opposition traditionnelle, affirmée par tous les auteurs, entre le système du droit romain et le système de la common law").
45. The author's national bias is once again apparent.
46. *Id.* at 225.
47. *Id.* at 225.
48. PIERRE ARMINJON ET AL., TRAITÉ DE DROIT COMPARÉ (1950).
49. *Id.* at 42.
50. *Id.* at 49.

It was not until the 1960s that the legal family classifications that are standard today came into being in the later and more well-known work of David and the comparative law treatise of Zweigert and Kötz. David's new taxonomy—which divided the world into Romano-Germanic, Common Law, Socialist, Muslim-Hindu-Jewish, and Far East legal traditions—replaced a monolithic view of the Western legal tradition with a conception of the continental legal family as distinct from the common-law family.[51] The shift in David's classifications is particularly revealing, for it shows that conceptions of legal families—and, in particular, the importance of the distinction between common and civil law—were gaining importance over time not only generally among scholars but even for the same author.

In 1969, Zweigert and Kötz brought the subdivisions within the civil-law tradition into the mainstream by spinning off the French, German, and Scandinavian civil-law families. The resulting classifications have found frequent use among the economists associated with the law-and-finance literature.[52] As German legal scholars, Zweigert and Kötz were arguably interested, if unconsciously, in conferring the status of an independent group on their home country's legal system, as were so many of their predecessors, from Clóvis Bevilaqua, to René David, Arminjon, Nolde, and Wolff. While the pioneers in the efforts to sort legal systems into different legal families have admitted the pliable and arbitrary nature of such endeavors, Ives-Marie Lathier has rightly noted that these typologies also have an ideological character and nationalist bias.[53]

Let us end our look at the evolution of legal family taxonomies (*see* Table 1 *infra*) with a somewhat closer description of the classic categorizations advanced by René David and Zweigert and Kötz in the 1960s, for they are widely recognized as the most well known and influential in this enterprise. As John Langbein once put it, "once René David has written, once you have Zweigert & Kötz on the shelf, there seems to be less reason to keep doing it."[54] But despite such predictions to the contrary, the categorizations proposed by these authors did not mark the end of legal family taxonomies. Comparative

51. RENÉ DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAIN (2d ed. 1966; first published in 1962).

52. KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS (1969). Unless otherwise noted, all references herein are to the English version, KONRAD ZWEIGERT & HEIN KÖTZ, An Introduction to Comparative Law (2d ed. 1987).

53. YVES-MARIE LAITHIER, DROIT COMPARÉ [COMPARATIVE LAW] 31 (2009) (arguing that David's tripartite classification, crafted during World War II, placed France, as the leader of the Roman-Germanistic family, at the same level of the United States and the Soviet Union; Zweigert and Kötz's typology, on the other hand, effectively gave a special role for German law as the parent jurisdiction of its own legal family).

54. Langbein, *supra* note 2, at 9.

lawyers have since continued to refine existing classifications.[55] Moreover, classic works on legal traditions—such as John Merryman's "The Civil Law Tradition," first published in 1969, and Mirjan Damaška's "The Faces of Justice and State Authority," which did not appear until 1986—further conceptualized such distinctions.[56]

It is also important to note that neither René David nor Zweigert and Kötz have claimed that the legal family classifications they identified had deep historical roots. On the contrary, David's well-known treatise was translated into English as "Major Legal Systems in the World *Today*,"[57] thus expressly conceding that the ensuing categorizations were temporally grounded. Likewise, Zweigert and Kötz specifically addressed their work's historical contingency, warning that any taxonomy "depends on the period of which one is speaking," so that "the division of the world's legal systems into families, especially the attribution of a system to a particular family, is susceptible to alteration as a result of legislation or other events, and can therefore be only temporary."[58] And yet once legal family classifications took hold in the twentieth century, they increasingly came to be seen, even if unconsciously, as deep-rooted historical categories.

In sum, we must acknowledge that the now-entrenched conceptions about legal families are relatively recent. It is true, however, that before the twentieth century, the relevance and significance of legal families were under theorized—and to a large extent underappreciated.

TABLE 1. EVOLUTION OF LEGAL SYSTEM TAXONOMIES

Author / Work	Criteria	Classification of Legal Families
Gumersindo de Azcárate, Ensayo de una Introduccion al Estudio de la Legislacion Comparada (1874) *Spain*	* For purposes of exposition only	1. Neo-Latin Peoples a) France b) Spain c) Portugal d) Italy e) Belgium f) Latin America 2. Germanic Peoples

55. *See, e.g.*, Palmer, *supra* note 3 (arguing that mixed jurisdictions are part of a separate legal family); Åke Malmström, *The System of Legal Systems: Notes on a Problem of Classification in Comparative Law*, 13 SCANDINAVIAN STUD. L. 127, 147 (1969) (proposing a division of four main groups: (i) the Occidental group, comprising the laws of Europe, Latin America, common-law countries and Scandinavia, (ii) the Socialist group, including Soviet and Chinese law, (iii) the category of Asian non-communist legal systems, and (iv) the category of African states).

56. JOHN H. MERRYMAN, THE CIVIL LAW TRADITION (1969); MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986).

57. Emphasis added. *See* DAVID & BRIERLEY, *supra* note 31.

58. ZWEIGERT & KÖTZ, *supra* note 52, at 66.

Author / Work	Criteria	Classification of Legal Families
		a) Germany b) Netherlands c) Switzerland d) England and Ireland e) Scotland f) United States 3. Scandinavian Peoples 4. Slavic Peoples a) Russia b) Other Slavic Peoples 5. Other Peoples of Christian-European Civilizations a) Greece b) Malta c) Jonian Islands 6. Other Peoples from Different Civilizations a) Turkey, Egypt, and Tunisia b) India and China c) Liberia
Ernest Glasson, Le Mariage civil et le divorce (2nd ed., 1880) *France*	Roman law heritage and influence * Classification limited to European countries	1. Legal systems strongly influenced by Roman law a) Italy b) Spain c) Portugal d) Romania e) Greece 2. Legal systems that are immune from Roman-law influence a) England b) Scandinavia c) Russia 3. Legal systems that combine Roman and Germanic influence a) France b) Germany c) Switzerland
Clóvis Bevilaqua, Resumo das Licções de Legislação Comparada sobre o Direito Privado (1893) *Brazil*	Legal influence	Bevilacqua follows Glasson's classifications, but adds a fourth category: 1. Legal systems that are not influenced by Roman and canonic law a) England b) Scandinavia c) United States d) Russia 2. Legal systems of strong Roman-law heritage

Author / Work	Criteria	Classification of Legal Families
		a) Spain b) Portugal c) Italy d) Romania 3. Legal systems combining Roman, Germanic, and national influence a) France b) Germany c) Belgium d) Holland e) Switzerland 4. Legal systems of Latin America
Adhémar Esmein, Le droit comparé et l'enseignement du droit (1900) *France*	History, general structure, and distinctive traits	1. Latin group a) France b) Belgium c) Italy d) Spain e) Portugal f) Romania g) Latin America 2. Germanic group a) Germany b) Scandinavia c) Austria d) Hungary 3. Anglo-Saxon group a) England b) United States c) English colonies 4. Slavic group 5. Islamic group
Candido Luiz Maria de Oliveira, Curso de Legislação Comparada (1903) *Brazil*	Relies heavily on Glasson's classification as modified by Bevilaqua	1. Legal systems strongly influenced by Roman law a) Italy b) Spain c) Portugal d) Romania e) Greece 2. Legal systems that combine Roman and Germanic influence a) France (including French colonies) b) Germany c) Austria d) Hungary e) Belgium f) Holland g) Serbia h) Montenegro

Author / Work	Criteria	Classification of Legal Families
		i) Bulgaria j) Turkey 3. Legal systems that are immune from Roman law influence a) England b) United States c) Sweden d) Norway e) Denmark f) Finland g) Russia 4. Republics of Hispanic America
Georges Sauser-Hall, Fonction et méthode du droit comparé (1913) *Switzerland*	Racial or ethnographic	1. Laws of peoples of Arian or Indo-European Race a) Hindu b) Iranian (Persian, Armenian, etc.) c) Celtic (Celtic, Welsh, Irish, and Gaelic) d) Graeco-Latin (Greek, Roman, Canon, and Neo-Latin) e) Germanic or Teutonic (Scandinavian, Germanic, Dutch, and Swiss) f) Anglo-Saxon (English, Anglo-American, and New-Saxon) g) Slav (Russian, Slovenian, Czech, Polish, Bulgarian, etc.) 2. Laws of peoples of Semitic races a) Assyrian b) Egyptian c) Hebrew d) Arab-Islamic 3. Laws of Mongol races a) Chinese b) Japanese 4. Barbarian peoples
Henry Levy-Ullman, Observation générales sur les communications relatives au droit privé dans les pays étrangers (1923) *France*	Sources of law and legal evolution	1. Continental legal systems ("written law") 2. Legal systems of English language-countries ("common law") 3. Islamic law

Author / Work	Criteria	Classification of Legal Families
Enrique Martinez Paz, Introduccion al Estudio del Derecho Civil Comparado (1934) *Argentina*	Uses and modifies Glasson's classification, as modified by Bevilaqua	1. Barbarian a) England b) Sweden c) Norway 2. Barbarian-Roman a) Germany b) France c) Austria 3. Barbarian-Roman-Canon a) Spain b) Portugal c) Italy 4. Roman-Canon-Democratic a) Latin America b) Switzerland c) Russia
Pierre Arminjon, Boris Nolde, & Martin Wolff, Traité de droit comparé (1950) *Egypt*; *Russia*; *Germany*	Centers of influence	1. French Law 2. German Law 3. Scandinavian Law 4. English Law 5. Russian Law 6. Islamic Law 7. Hindu Law
René David, Traité élémentaire de droit civil comparé (1950) *France*	Ideology	1. Western Law a) French group b) Anglo-American group 2. Socialist Law 3. Islamic Law 4. Hindu Law 5. Chinese Law
René David, Les grands systèmes de droit contemporain (1962) *France*	Legal techniques and concepts; worldview and ideology	1. Romano-Germanic Law 2. Common Law 3. Socialist Law
Konrad Zweigert & Hein Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts (1969) *Germany*	"Styles" (combination of history, mode of thought, distinctive institutions, legal sources, and ideology)	1. Romanistic Legal Family 2. Germanic Legal Family 3. Anglo-American Legal Family 4. Nordic (Scandinavian) Legal Family 5. Far Eastern Legal Family 6. Islamic Law 7. Hindu Law

III. From Comparative Legislation to Comparative Law

Compared to thousands of years of legal history and writing, comparative law is a fairly new discipline.[59] For most scholars, the landmark International Congress on Comparative Law (*Congrès international de droit comparé*), which took place in Paris in 1900, marked the beginning of comparative law as we know it.[60] Up until the 1900 Paris Congress, the emerging comparative efforts of the nineteenth century were generally more pragmatic than theoretical.[61] The very designation of the field in the nineteenth century is suggestive of this more practical approach: its usual title then was "comparative legislation" (*législation comparée*), not comparative law proper.[62] The pioneering *Société française de législation comparée* was established in 1869, having as its object "the study of statutes of different countries and the research of practical means to improve the various branches of legislation."[63] Even in England, the mother country of the common law, the *Société's* counterpart, founded in 1895, was named Society of Comparative Legislation.[64]

The phrase "comparative legislation" hinted at both the practical nature of nineteenth-century comparative legal studies and their cosmopolitan orientation. For while judicial decisions were not formally

59. *See, e.g.*, Walther Hug, *The History of Comparative Law*, 45 Harv. L. Rev. 1027, 1028 (1932). ("[u]ndoubtedly, comparative law as a distinct branch of legal science is of recent origin, and no common opinion yet prevails as to the tasks it should fulfill, the objects of its studies, and the methods it should pursue"); Frederick Pollock, *The History of Comparative Jurisprudence*, 5 J. Soc'y Comp. Legislation 74, 74 (1903) ("the name of comparative jurisprudence is modern; our current use of the term, with the full meaning which it now bears, is barely a generation old"). Both authors of course acknowledge that legal scholars have looked into foreign legal systems before the nineteenth century, but argue that the process was not one of comparative law as it came to be conceived.

60. *See, e.g.*, H.C. Gutteridge, Comparative Law 18 (1946) (noting that the Paris Congress "came to be regarded by many as the occasion in which modern comparative law first came into being"); Zweigert & Kötz, *supra* note 52, at 2 ("[c]omparative law as we know it started in Paris in 1900, the year of the World exhibition").

61. Zweigert & Kötz, *supra* note 52, at 53 ("[t]here is an astonishing similarity in the way different countries in the early nineteenth century embarked on the purposive and systematic comparison of different legal systems, that is, modern comparative law. Its intellectual origins are also similar. The purposes are practical, namely reform and improvement of the law at home, rather than theoretical, philosophical and speculative").

62. H.J. Randall, *Sir John Macdonell and the Study of Comparative Law*, 12 J. Comp. Leg. & Int'l L. 188, 189-90 (1930) (arguing that, in England, the "rather strange name comparative legislation was undoubtedly a diplomatic subterfuge. It would have been a hopeless task to have aroused interest in a society formed to study anything so unpractical and academic as comparative law; but comparative legislation had a useful and practical sound about it").

63. Société de législation comparée, *Statuts*, *in* Bulletin de la Société de législation comparée (1932) ("[U]ne Société est intitulée sous le nom de Société de législation comparée; II. Elle a pour objet l'étude des lois des différents pays et la recherche des moyens pratiques d'améliorer les diverses branches de la législation").

64. M. Schmitthoff, *The Science of Comparative Law*, 7 Cambridge L. J. 94 (1939-1941).

recognized as a source of law in many jurisdictions, all countries had legislation in one form or another. In fact, the dominant focus on legislation arguably shaped, and was shaped by, nineteenth-century comparativists' universalist vision by concentrating on a source of law that was both shared and more easily reproducible.[65] Later comparativists such as René David criticized early works on comparative legislation for holding too narrow a view of sources of law and, therefore, failing to capture the importance of judicial lawmaking in common-law countries.[66] It is noteworthy that his nineteenth-century predecessors from the Anglo-Saxon world, perhaps too immersed in a cosmopolitan culture, had largely failed to voice similar concerns.

Classificatory schemes did not play a major role in early studies on comparative legislation, although the first groupings of jurisdictions into a handful of categories were beginning to appear. These early groupings of different countries, however, were not, nor did they aspire to be, "scientific." The primary driver behind early categorizations seems to have been ease of exposition rather than an overarching theory about the relationship among different legal systems. As explained in greater detail in Part II above, early taxonomies of legal systems were rudimentary, fluid, and conflicting. They were, at any rate, quite different from the mainstream categorizations of the twentieth century.

In the rapidly globalizing world of the nineteenth century,[67] early comparativists seemed less concerned with measuring differences across legal systems than with paving the way for legal convergence. The purpose of most comparative works was to search for common ground amidst apparent diversity.[68] An 1850 commercial law treatise by Leone Levi, one of the first comparative lawyers in the English-speaking world,[69] is illustrative of the prevailing beliefs that legal convergence was both the inevitable and desirable result of economic globalization. In his words,

65. Conversely, as noted by ZWEIGERT & KÖTZ, *supra* note 52, at 60, "[t]here is a clear connection between the shift of focus from purely statutory law and the 'discovery' of the Common Law."

66. DAVID, *supra* note 42, at 10.

67. *See infra* note 106 and accompanying text.

68. This trend reappeared more recently. ZWEIGERT & KÖTZ, *supra* note 52, speak of a *praesumptio similitudinis*, that is, a presumption that different advanced legal systems achieve similar practical outcomes to similar questions. *Id.* at 36.

69. Walther Hug, *The History of Comparative Law*, 45 HARV. L. REV. 1027, 1066 (1932) (remarking, based on Levi's work, that "an Englishman was the first to give expression to the idea that in the field of commercial law comparison should be followed by unification"); ZWEIGERT & KÖTZ, *supra* note 52, at 44 (citing Levi's work as the "first-fruit of English comparative law," which was inspired by a "practical aim, namely to satisfy the need of English tradesmen for information about the commercial law of other peoples"). Another early comparative work from nineteenth-century England is WILLIAM BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS: GENERALLY, AND IN THEIR CONFLICT WITH EACH OTHER, AND WITH THE LAW OF ENGLAND (1838).

> To bring these separate rules into contact with each other, and to study these great monuments of legislative and philosophical research, will furnish materials for arriving at those universal principles which form the common law for all nations. In an epoch when commercial relations embrace the greatest public and private interests, when nationalities are all but blended into each other, when work, improvement, and welfare are all-prevailing ideas; and when the rapidity of communication demands in a corresponding degree security and protection; the revision of the laws, statutes, usages, and customs of all countries becomes imperative. As nations approach one another, each is enabled to profit by the common experience; and it is of the utmost importance to watch carefully all innovations, and to mark the reason and the starting point of all essential and permanent progress.[70]

Leone Levi's work provides a paradigmatic example of the style, ambitions, and pitfalls of comparative work in the nineteenth century.[71] The very cover and subtitle of his volume illustrates its impressive coverage: in addition to Great Britain, it lists fifty-nine other "countries," plus the Institutes of Justinian.[72] The book's primary purpose was practical, and its target audience—British merchants involved in cross-border trade—was well defined. As described by Levi, "the object of this work being the compilation of a Manual for constant use and reference to the Mercantile Classes, nothing has been spared to give it clearness, order, and easiness of information."[73]

Consistent with his strong faith in commercial progress and legal convergence, Levi's treatise culminates in a bold proposal for a "National and International Code of Commerce among All Civilized

70. LEONE LEVI, COMMERCIAL LAW: ITS PRINCIPLES AND ADMINISTRATION vii (1850).

71. *Id.*

72. The subtitle of the book is "The Mercantile Law of Great Britain Compared with the Codes and Laws of Commerce of the Following Mercantile Countries: Anhalt, Austria, Baden, Bavaria, Belgium, Brazil, Bremen, British Colonies, British Guiana, Brunswick, Canada, China, Denmark, East Indies, France, Frankfurt, Greece, Guernsey, Hamburg, Hannover, Haiti, Hesse Electorate, Hindustan, Holland, Hungary, Ionian Islands, Lombardy, Louisiana, Lubeck, Lucca, Luxembourg, Malta, Mecklenburg, Mexico, Modena, Nassau, Norway, Normandy, Papal States, Parma, Portugal, Prussia, Russia, Sardinia, Saxe-Coburgh-Gotha, Saxe-Weimar, Saxony, South America, St. Lucia, Sweden, Switzerland (Cantone), Spain, Tunis, Turkey, Tuscany, Two Sicilies, United States, Wurternburg, and the Institutes of Justinian." The inaccuracies associated with such a sweeping coverage start in the title, since quite a few of the "mercantile countries" listed—such as Louisiana, South America, and the British Colonies—were not even countries.

73. *Id.* (Plan of Work).

Countries."[74] In his letter to Prince Albert of Great Britain, Levi justified his proposal as follows:

> Jurisprudence has made rapid advancement in every country—an advancement directed everywhere in conformity with the established laws of other nations. Commercial legislation, in its onward course, has manifested in special degree a tendency to an equalization of general principles. To foster such a development, and to lay the basis for the universal adoption of those great fundamental laws which regulate commercial intercourse, deserve the most strenuous efforts. To your Royal Highness (. . .) I venture to propose what, it is generally acknowledged, would be an invaluable benefit to this and to all nations—A NATIONAL AND INTERNATIONAL CODE OF COMMERCE AMONG ALL CIVILIZED COUNTRIES.[75]

Such a comprehensive International Commercial Code never came into being as originally envisioned—and the first international conventions on narrower areas of commercial law, such as negotiable instruments and the law of contracts, had to wait until the twentieth century. Meanwhile, most works on comparative legislation continued to provide more or less organized collections of foreign laws. The practical nature of these endeavors was also evident in works that focused on the laws of a small number of jurisdictions. For instance, M.J.C. Colfavru's book on *Le droit commercial comparé de la France et de l'Angleterre* had as its subtitle "a necessary and practical book for the application of the new treaty of commerce of January 23, 1860, following the ordering of the French Commercial Code." Published in response to the recent commercial treaty between Great Britain and France, the volume sought to facilitate business practice and to strengthen the relationship between both nations.[76]

While comparisons of commercial law in the nineteenth century were often directed at merchants (as were, in fact, many of the works on domestic commercial law at the time[77]) and sought to facilitate business practice, other comparative studies were meant to inform national legislative reform—presumably to foster greater legal convergence. As summarized by H.C. Gutteridge, comparative legislation essentially aimed at the "collection and distribution of in-

74. *Id.* at xv.
75. *Id.*
76. M.J.C. COLFAVRU, LE DROIT COMMERCIAL COMPARÉ DE LA FRANCE ET DE L'ANGLETERRE i (1861) (my translation; in original: "Suivant l'ordre du Code de commerce français, ouvrage théorique et pratique nécessaire à l'application du nouveau traité de commerce du 23 Janvier 1860").
77. *See, e.g.*, for an exemplar of a Brazilian commercial law book directed to merchants, DÍDIMO AGAPITO DA VEIGA, O AMIGO E CONSELHEIRO DOS COMMERCIANTES (1873).

formation as to foreign law," and the "utilization of the experience gained in other systems of law for the purpose of law reform."[78] Nineteenth-century faith in legal harmonization was such that one German jurist went as far as to publish a booklet in 1888 entitled "*Die Möglichkeit eines Weltrechts*" ("*The Possibility of a Global Law*"), which came to represent the high-water mark of belief in the possibility of global legal convergence.[79]

Nonetheless, by the turn of the century, both the form and substance of existing comparative studies came under assault during the 1900 Paris Congress, which gathered prominent comparativists (mostly from France but also from other countries) to discuss methods, purposes, and vision for the discipline of comparative law. One perceived problem was that, by relying primarily on superficial and uncritical descriptions of foreign laws, comparative legislation was not up to the task it set for itself—namely, contributing to the improvement of national law. Specifically, its deficiencies were twofold. First, comparative works rarely compared; instead, they merely described foreign legal regimes.[80] And the resulting descriptions, which encompassed an arbitrarily large number of countries, were often sketchy and unsatisfying. This paradigm of "juxtaposition without comparison"—that is, the indiscriminate collection of foreign legal rules—was precisely the problem that the leading comparativists present at the 1900 Congress sought to overcome.[81] Second, and relatedly, these uncritical inventories of foreign rules lacked scientific character.[82] It was this absence of scientific method and aspirations that Raymond Saleilles, a prominent French scholar and chief organizer of the Congress, found particularly problematic:

> Souvent même cette fonction critique est totalement absente de l'exposé parallèle que l'on présente des législations étrangères. On se contente d'une juxtaposition de textes empruntés à des législations de pays différents, sans qu'aucune méthode, ni critique, ni rationnelle, préside à cette sorte de nomenclature. Il va de soi que cette façon de faire du droit

78. GUTTERIDGE, *supra* note 60, at 2.

79. ERNST ZITELMANN, DIE MÖGLICHKEIT EINES WELTRECHTS (1888; 2d ed. 1916).

80. This feature arguably did not change much in the following century, although this dearth of actual comparison came to be regarded as a positive feature. *See* William Twining, *Reviving General Jurisprudence* 19, *in* TRANSNATIONAL LEGAL PROCESSES (Michael Likoksi ed., 2002) (arguing that "few experienced comparativists compare," by which he means that "even within mainstream comparative law sustained explicit molecular comparison is wholly exceptional," although "juxtaposition, parallel studies, outsider perspectives, and ad hoc contrasts all abound").

81. *See* PROCEEDS OF PARIS CONGRESS, *supra* note 27. In the words of Edouard Lambert "il n'y a là qu'une juxtaposition de législations, et non pas une comparaison entre législations." *Id.* at 31.

82. The conception of "law as science" was particularly dominant in the nineteenth century—and remains prevalent, although arguably with lesser force, in many countries outside the United States today.

> comparé ne saurait en aucune manière correspondre à l'idée d'une science indépendante, ayant son objet propre, ses lois et sa méthode. C'est l'absence même de toute discipline scientifique.[83]

By 1900, two distinctive features of comparative legislation as practiced in the nineteenth century—its cosmopolitan vision and its practical orientation—were beginning to break down, although this was not at all apparent from the surrounding discourse. On the contrary, as described by Christophe Jamin, the "old dream" shared by Raymond Saleilles and Édouard Lambert—the French comparativists who served as organizer and rapporteur of the Paris Congress, respectively—encompassed both a universalist and a practical dimension.[84]

Both Saleilles, a prominent legal scholar, and Lambert, then a young law professor, proclaimed the existence of substantial unity amidst apparent diversity across national laws. Lambert, in particular, argued that it is the task of comparative law to search for what he calls "*droit commun législatif*" that reflects the underlying unity of purpose among the laws of different jurisdictions.[85] For both authors, comparative legal studies ought to have direct influence on national laws. Lambert defended the use of *droit commun législatif* as discovered and articulated by legal scholars as an instrument to perfect national laws.[86] Similarly, Saleilles argued that comparative law should become "one of the factors, no longer unconscious, but rather reasoned and truly scientific, for the development of the civil law."[87]

Nonetheless, the new scientific approach advocated by comparativists would progressively undermine both its universalist and its practical vocation. As mentioned, a number of comparativists present at the 1900 Paris Congress advocated the formulation of scientific taxonomies—along the lines of those used in linguistics and biology—as one of the field's principal tasks. One immediate, if unintended, effect of taxonomic efforts is to spotlight differences among various categories of legal systems.

Moreover, the conception of a "*droit commun législatif*" embraced by the young Lambert was far less universalist than the notion of a "*droit commun*" embraced by Saleilles and his predecessors. In a different venue, Lambert proclaimed in the same year that

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83. Raymond Saleilles, *Conception et objet de la science du droit comparé*, *in* PROCEEDS OF PARIS CONGRESS, *supra* note 27, at 167.

84. Christophe Jamin, *Saleilles' and Lambert's Old Dream Revisited*, 50 AM. J. COMP. L. 701 (2002) (interpreting the rise of comparative law in France as a reaction against the prevailing formalism and the exegetical approach of nineteenth-century legal scholars).

85. *Id.* at 708.

86. *Id.*

87. *Id.* at 706.

> [f]rom now on, we should direct our energies towards a rapprochement between our legislation and germane legislations, that is, those legislations that have reached approximately the same level of scientific elaboration as ours, and which govern peoples that have achieved the same stage of social and economic development as we have.[88]

As noted by Christophe Jamin, this restriction to comparisons among "germane legislations" was a novel development, and one not shared by Saleilles.[89]

Another departure from prior practice was Lambert's hostility towards English law and his conclusion that it must be excluded from the group of "germane legislation"—a groundbreaking approach that would soon become popular among comparativists.[90] Perhaps influenced by his negative personal experience with the British, Lambert came to despise English law as "archaic and conservative," which, in his view, precluded "any convergence between this system and those of other European countries in all but a few rare instances."[91] Indeed, Lambert came to emphasize the existence of a "group-based *droit commun* specific to each group."[92] He argued that common-law countries belonged to a separate group and thus in most instances did not deserve the attention of continental jurists.[93] Notions of different legal traditions were beginning to take hold.

Roughly at the same time as French jurist Edouard Lambert was emphasizing the common elements shared by continental legal systems and excluding English law from the set of "comparables worth comparing," English scholars were asserting the rising prominence of English law as a competitor to Roman law, which they saw as dominating most of the world. In 1907, James Bryce declared, referring to Roman law and English law, that "[t]he world is, or will shortly be, practically divided between two sets of legal conceptions or rules, and only two."[94] Still, Bryce continued to believe in the likelihood of convergence, especially in private law. Even as he argued that "[n]either is likely to overpower or absorb the other," he conceded that "it is possible that they may draw nearer" and that "[a]lready the commer-

88. *Id.* at 716.
89. *Id.*
90. *Id.*
91. *Id.* ("Lambert does not much appreciate the English and he dislikes the disorderliness of their law"). Jamin attributes Lambert's hostility to English law, among other things, to an incident at the École khédiviale in Cairo, from which Lambert resigned "after months of quarrels with the English authorities who in Lambert eyes conspire to deprive the French of one of the last remaining fields where they might exert their influence in Egypt." *Id.*
92. *Id.*
93. *Id.* at 717.
94. James Bryce, *The Extension of Roman and English Law throughout the World*, *in* SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 619 (1907).

cial law of all civilized countries is in substance the same everywhere, that is to say, it guarantees rights and provides remedies which afford equivalent securities to men in their dealings with one another and bring them to the same goal by slightly different paths."[95]

But if by 1900 Anglo-Saxon scholars stressed differences but continued to believe in convergence, by 1950 the common-civil law dichotomy was beginning to be viewed as sufficiently entrenched and historically rooted to prevent harmonization. As Roscoe Pound put it in 1950,

> History has played a decisive part in the development of systems of law more than once. A taught tradition is a decisive element in a system. Two distinct long traditions, the one going back to the Roman jurisconsults of the classical era, the other to the teaching of the law of the King's Courts by medieval English lawyers, have kept their identity since the Middle Ages. They have put their mark upon the significant features of the respective systems and have set the two systems off as independent however much either may have borrowed something from the other at one time or another. Whatever the Continental law borrows it Romanizes. (. . .) Whatever the Anglo-American law borrows it Anglicizes. (. . .) From the Middle Ages the Continental lawyer and the English lawyer have had a different bringing up.[96]

By the middle of the twentieth century, the civil-common law dichotomy was exalted to such heights precisely as René David was seeking to abandon it as he emphasized the unity of the Western legal tradition.[97] The dichotomy was reaching its apex in the eyes of comparativists precisely as the first seeds of its destruction were being sowed.

In sum, the rise of legal family categories helped transform the methods and practice of comparative law. The new taxonomies of legal systems were crucial both for the purported scientificization of comparative law and for solidifying a hierarchy of foreign laws.[98] The

95. *Id.* at 619-20.
96. Roscoe Pound, *Philosophy and Comparative Law*, 100 U. PA. L. REV. 1 (1950).
97. DAVID, *supra* note 42, at 227.
98. In addition to drawing attention to seemingly natural and insurmountable differences among groups of legal systems, another consequence of the greater prominence of classificatory schemes was a sharp decrease in the number of countries of interest to comparativists. The comparative studies of the nineteenth century typically encompassed a very large number of jurisdictions. One reason for such extensive coverage is the practical and informative goals of these early works: country-specific information is certainly more useful to merchants doing business in any given jurisdiction than overly rough approximations based on theoretical models. Another, perhaps more important, reason is that, in the absence of both a theory and a method, early comparativists also lacked consistent criteria for choosing target jurisdictions—and apparently concluded that the more, the merrier.

concept of legal families—and the hierarchical structure they inevitably expressed—provided comparativists with clear guidance on which jurisdictions to focus: the parent jurisdictions were clearly more important than their offspring and only they were, for the most part, worthy of attention. This point is made particularly clear in Zweigert and Kötz's treatise, which urges comparativists to "ignore the affiliate [legal system] and concentrate on the parent system"[99] As a result, classificatory schemes not only complemented descriptions of legal rules of different jurisdictions; to a large extent they simply replaced them.

TABLE 2. COMPARATIVE LEGISLATION VS. COMPARATIVE LAW[100]

	Comparative Legislation	***Comparative Law***
Period	Nineteenth century	Twentieth century
Orientation	Practical	Scientific
Target audience	Domestic lawmakers International merchants	Scholars Students
Primary content	Description of (mainly statutory) laws of foreign jurisdictions	Classification of legal families and theorization about similarities and differences
Role of classifications	Incidental; goal is expositional clarity	Central; goal is scientific or didactic
Number of foreign jurisdictions analyzed	Large	Small (focus on a few "parent" or original jurisdictions as representative of a legal family or tradition)
View of legal differences	Contingent	Crucial
View of legal evolution	Universalist; emphasizes convergence	Acknowledges continuing differences across legal families or traditions, even if different institutions might serve similar functions

99. ZWEIGERT & KÖTZ, *supra* note 52, at 64. In this vein, they suggest that scholars interested in the Romanistic tradition focus exclusively on France and Italy, as "[t]he legal systems of Spain and Portugal (. . .) do not often call for or justify very intensive investigation." *Id.* Although clearly enunciated by Zweigert and Kötz, the notion that comparativists should concentrate their efforts by focusing on "parent" jurisdictions is almost as old as legal families themselves.

100. At the risk of oversimplification, the purpose of this chart is to highlight the dominant characteristics of nineteenth-century comparative legislation compared to twentieth-century comparative law, not to suggest that these were the only relevant features in each period.

IV. Jurisdictions' Self-Image and Legal Transplants in the Nineteenth Century

The relatively recent vintage of legal family classifications as we know them today raises several questions. Why did prevailing conceptions about the origins and affiliations of legal systems undergo such a major transformation over time? To what extent did shifting taxonomies track changes in legal developments on the ground? Were early comparativists simply less sophisticated and knowledgeable about foreign legal systems, and did they thus fail to grasp the true nature of their object of study? Or could it be that the variation in taxonomies over time was attributable to corresponding differences in underlying legal phenomena? While this study cannot provide definitive answers to these questions, it offers some tentative thoughts that underscore the importance of pursuing this line of inquiry.

Clearly, one cannot take legal family classifications—present or historical—as precise assessments of an underlying reality. Yet, it would also be wrong to dismiss the early authors' groupings of legal systems as hopelessly flawed and lacking any instructive value about the then-contemporary legal systems that they sought to describe. While the first comparativists of the nineteenth century did not enjoy the benefit of subsequent theoretical advances, they had the comparative advantage of greater proximity to the legal systems and worldviews that their classifications sought to capture compared to twentieth-century observers.

There are reasons to believe that there is a mutually reinforcing relationship between legal family classifications and surrounding legal developments. On the one hand, one can expect classificatory schemes to reflect, even if only partially and imperfectly, the character of legal systems around the world as contemporary observers perceived them. On the other hand, because law is a social and cultural phenomenon, existing understandings about legal systems and traditions may in turn impinge on subsequent legal developments. In this view, the nineteenth-century comparativists' lesser degree of attention to the civil-common law dichotomy was in part a product of the more cosmopolitan orientation of law and culture in that period. In turn, by de-emphasizing the importance of deep-rooted legal traditions, the existing theoretical framework likely facilitated legal borrowings from a broader array of jurisdictions, thus reinforcing the reigning belief in the desirability and feasibility of legal convergence.

A variety of factors may have contributed to a lesser degree of deference to, or consciousness of, legal traditions in the nineteenth century compared to the twentieth century. First, and most obviously, there was significant theoretical confusion in the nineteenth century about the meaning and origins of different legal systems—as exemplified by the existing diversity of classificatory schemes, as well

as the frequent statements by prominent English and U.S. authors that English law stemmed from Roman law.[101] An excellent study by Michele Graziadei examines the "change in the image" in the nineteenth century from the early understanding of English law as originating from Roman law to a later conception of the common law as the source of a distinct legal tradition.[102] In his words, theoretical developments in nineteenth-century England (which were, paradoxically, inspired by contemporary doctrinal developments in Germany) "transformed the perception of the historical background of the law and eventually produced a new awareness of the distinctive character of the common law tradition."[103]

Second, conceptions about legal tradition and the appropriate sources for one country's law were intimately intertwined with the search for identity—including legal identity—by the various nations that had then recently acquired independence. New countries were reluctant copycats, and wholesale legal transplants from one legal system seemed more dangerous to one's identity and autonomy than a combination of numerous foreign sources. Relatedly, anti-colonialist sentiment was very much alive in many newly independent nations, which made them despise the notion of legal continuity from colonial times and thus view the idea of legal tradition rather unfavorably. For instance, in the United States, Chancellor Kent famously resorted to continental sources to legitimize certain common-law concepts in light of the "unpopularity of things English."[104] In his words, "[t]he judges were Republicans and very kindly disposed to everything that was French, and this enabled me, without exciting any alarm or jealousy, to make free use of such authorities and thereby enrich our commercial law."[105] That is, the argument that rendered English law an acceptable source was not that it was part of the U.S. particular legal tradition, but quite the opposite: En-

101. *See, e.g.*, John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 570 (1993) (noting that noted that Chancellor Kent—a prominent U.S. judge, legal scholar and author of the famous "Commentaries on American Law" (1826-1830)—relied on continental legal materials to such an extent that he went as far as to rewrite history through his repeated assertions that English law derived from Roman law); Michele Graziadei, *Changing Images of the Law in XIX Century English Law Thought (The Continental Inputs)* 118, *in* THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920 (Mathias Reimann ed., 1993) (citing the example of Finlason's 1869 edition of John Reeve's book on "The History of English Law," which purported to identify Roman-law roots for every possible rule of English law, including trial by jury).

102. Graziadei, *supra* note 101.

103. *Id.* at 115.

104. Alan Watson, *Chancellor Kent's Use of Foreign Law* 50, *in* THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920, *supra* note 101 (arguing that many of Kent's references to foreign law were unnecessary or inaccurate, and that virtually all such references were not dispositive of the outcome of the case).

105. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 117 (2001; originally published in 1898).

glish law was more legitimate to the extent that its precepts were the same as those of French and Roman law.

Third, the nineteenth century was the heyday of economic liberalism and the free trade of goods, persons, and ideas. Just like the globalization movement of the late-twentieth century, the late nineteenth century's own (arguably just as profound) period of globalization generated significant pressures for cross-border legal convergence and integration.[106] Such an intense degree of international trade and economic integration, in turn, created demand for legal harmonization and lessened the importance of local peculiarities. For instance, an 1862 free trade agreement between England and France pushed France to relax authorization requirements to incorporations along the lines of the English Companies Act in order to avoid putting French firms at a competitive disadvantage.[107] In Brazil, the economic connections to Britain arguably generated more reliance on Anglo-Saxon legal institutions in the nineteenth than in the twentieth century.[108] Yet each of these factors that downplayed the salience of legal traditions in the nineteenth century lost significance in the twentieth. The rise of comparative law as a discipline and the greater sophistication of comparative and historical studies cleaned up some of the existing confusion about the origins of legal systems in the Middle Ages. Roman and common law were then increasingly understood as not only lacking a common root but also as largely impervious to mutual influence, despite what were seen as sparse and isolated instances of legal borrowings. In addition, as memory of colonial times receded, legal traditions came increasingly to be viewed in a more favorable light.

Moreover, changes in world's balance of power facilitated the solidification of legal traditions. Following decolonization, declining powers such as France and Great Britain viewed legal imperialism and the export of legal culture as a substitute for de facto occupation.[109] From the perspective of the periphery, the return to legal

106. *See* HAROLD JAMES, THE END OF GLOBALIZATION 10-12 (2001) (noting that "[a]t the end of the nineteenth century, the world was highly integrated economically, through mobility, of capital, information, goods, and people," and that "[f]or most countries, despite all the intervening improvements in the means of transportation, the levels of trade of the prewar world were not reached again until the 1980s"). James also stresses that "the optimism of the age [late nineteenth century] can be used as a testimony to its internationalization of cosmopolitanism." *Id.* at 13.

107. JEAN STREICHENBERGER, SOCIÉTÉS ANONYMES DE FRANCE ET D'ANGLETERRE 43 (1933).

108. Indeed, knowledge of English was, together with French proficiency, an entry requirement for Brazilian law schools during most of the nineteenth century, though the practice died out in the twentieth century. *See* Mariana Pargendler, *Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil*, 60 AM. J. COMP. L. 805 (2012), for a more detailed description.

109. To be sure, French legal imperialism was alive and well in the nineteenth century through the diffusion of the *Code Napoléon*. Nevertheless, the Code's export was not framed in terms of the diffusion of France's legal *tradition*. On the contrary,

traditions in the twentieth century often had the effect of strengthening a country's sense of independence and identity in the face of American and Soviet economic and political hegemony. Finally, the turn towards autarkic policies and economic nationalism after World War I put an end to the earlier age of globalization and, in decreasing international trade, created an environment more favorable to legal nationalism (and to the ingrained and persistent differences across legal systems that legal families implied) and less conducive to legal convergence.

V. CONCLUSION

Comparativists have insistently debated the extent of the decline of legal family distinctions, but little attention has been paid to the rise of now-conventional understandings about legal families and traditions. By offering a brief intellectual history of the taxonomic efforts in the comparative law literature, this Article suggests that legal family categories followed a parabolic, rather than linear, path. Contrary to conventional understandings, the reification of a strong common-civil law dichotomy may have peaked in the twentieth century—after the end of the first globalization in 1914 but before the second globalization of the latter half of that century. In this light, the recent call by comparative law scholars for the abandonment of legal family classifications is a far less radical move than it may seem.

The view of the nineteenth century as a period dominated by a particularly strong and conscious dichotomy between civil law and common law is wrong. A variety of factors—ranging from theoretical underdevelopment to anti-colonialism and free trade—circumscribed the role of legal tradition in that period. Perhaps more important, many critical choices that would eventually shape legal family affiliations had not yet been made in the nineteenth century. Take, for example, Germany and Brazil which today are solidly in the civil law tradition but which then had not yet adopted one of the very hallmarks of that tradition, i.e., a civil code. Germany's *Bürgerliches Gesetzbuch* came into force in 1900, while Brazil's first *Código Civil* was not enacted until 1916. In both cases, the delay was not accidental, but rather the result of genuine disagreement about the desirability of a code and the suitability of existing models.[110]

Napoleon envisioned the Code as an effective tool to break away from the law and institutions of France's past.

110. The famous opposition to codification on the part of Savigny's Historical School here comes to mind. *See, e.g.*, Mathias Reimann, *The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95 (1989), for a brief overview of Savigny's anti-codification arguments in English and its influence on the opposition to codification efforts in New York. This, in turn, explains and reinforces the conclusions of more recent studies in economic his-

Ultimately, the development of legal family categories cannot, as is usually assumed, be explained by long-standing historical traditions alone; it was also profoundly shaped by trends in politics and economics. As the bulk of the comparative law literature has focused on the extent to which legal families are still relevant, the inquiry into the causes and consequences of strong conceptions of legal traditions provides interesting avenues for future research.

tory, which find that the statistical correlations in legal and economic outcomes along the legal family lines exalted since the 1990s were entirely absent in the beginning of the twentieth century. *See* Raghuram Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. FIN. ECON. 5 (2003); Aldo Musacchio, *Law and Finance c. 1900* (working paper, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648016.