At the Intersection of North American Free Trade and Same-Sex Marriage

Laura Spitz

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1 Associate Professor of Law, University of Colorado. This paper was prepared in partial fulfillment of the requirements of the Doctor of the Science of Law at Cornell University. Financial assistance was provided by the Graduate School at Cornell University, the Gender, Sexuality & Family Project at Cornell Law School, and the British Columbia Law Foundation.
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PORTLAND, ME., April 3 – A small agency responsible for marking and maintaining the expansive border between the United States and Canada has fallen so far behind that it may never catch up …

The agency, the International Boundary Commission, has warned that border markers are deteriorating and parts of the border are becoming overgrown by trees and brush to the point that the border’s location could be lost in some areas.2

A. Introduction

Imagine that it is the year 20433 and the president of the American Union (AU) – a Brazilian national – is traveling from the presidential seat in Vancouver to a meeting of regional leaders in Buenos Aires. The meeting is scheduled for three days. This is one day longer than they usually meet, as the leaders need extra time to discuss an unexpected vacancy on the AU

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3 While acknowledging all the reasons comparison with the European Union (EU) is not a simple nor perfect proposition, it remains important to remember that Europe is fifty years into its experiment. I chose the year 2043 specifically because it would be the fiftieth anniversary of the ratification of the North American Free Trade Agreement or NAFTA. Dec. 17, 1992, H.R. Doc. No. 103-159 (1994) (NAFTA). I briefly describe the EU in *infra* note 170.
Supreme Court. Too farfetched to imagine? Maybe so.\(^4\) What if we were to imagine something geographically more limited? A North American Union? Or something less formal? A sort of \textit{de facto} North American Union? Are we more comfortable with this? Most importantly, are we heading in that direction regardless?

These are interesting but infrequently asked questions in the North American context.\(^5\) I am fascinated with the question of whether or not existing treaties between and among Canada, the United States and Mexico amount to a small “c” constitutionalization of North America,\(^6\) and

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\(^4\) It may even be that South America’s biggest economies (joined together as the MERCOSUR trading block, which includes Argentina, Brazil and Paraguay) are closer to a trade deal with the EU then the Western Hemisphere is to any Free Trade Area of the Americas (FTAA). In April 2004, Todd Benson reported:

“Two years ago, nobody thought that the talks with the European Union were serious – everyone said that the F.T.A.A. would come first,” said Marcos Sawaya Jank, president of the Institute for International Trade Negotiations, or Icone, a research group in São Paulo [Brazil]. “What’s so surprising is that now it’s the other way around.”

Todd Benson, \textit{Europe and South America Near Trade Accord}, N.Y. TIMES, April 20, 2004 at W1.

\(^5\) Relatively few legal scholars have looked at the question or possibility of North American unification or integration in anything other than the trade context. But see Justice Frank H. Easterbrook, \textit{Alternatives to Originalism}, 19 HARV. J. L. & PUB. POL’Y 479, 484 (1996) (suggesting that a constitution is slowly being assembled through a variety of treaties in North America; and predicting that “the North American Free Trade Agreement will lead to some form of political union, over some domain, which will need its own constitution”); Ari Afilalo, \textit{Constitutionalization Through the Back Door: A European Perspective on NAFTA’s Investment Charter}, 36 REV. JUR. U. I. P. R. 117, 120 (2001) and 34 N.Y.U. J. INT’L L. & POL. 1, 7-8 (2001) (arguing that private party access to litigate international trade controversies under Chapter 11 of NAFTA renders it “constitutional” in nature, and that the experience of the EU suggests that North America – beginning with NAFTA – may evolve into a constitutionalized supranational polity); Howard Shapiro, \textit{Interview: James Gardner} (former Chairman of the Joint Legislative Committee on Trade and Economic Development), 4 INT’L LEGAL PERSP., Fall 1992, at 143 (“I wouldn't be surprised if the long-term effect of the NAFTA agreement turns out to be enormous pressure for some kind of supranational structure that resembles the European Community”); and Stephen Zamora, \textit{NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade}, 12 ARIZ. J. INT’L & COMP. L 401 (1995) [hereinafter Zamora, \textit{Side Effects}] (the long-term significance of NAFTA will extend beyond the economic sphere).

\(^6\) Professor Alexandra Maravel has argued that NAFTA has the attributes of a constitution:

Like a national constitution, the NAFTA embodies economic principles with the force of law, allocates power among constituent political bodies, creates structures of governance to wield that power, contains a supple future potential in provisions for its own amendment and accession by other political bodies, and provides a text that will become the backbone of the polity as it grows across national borders and territorial divides. The NAFTA’s side accords are like constitutional codicils, amplifying and refocusing original
if not, whether they lay the groundwork for, or represent the beginning of, a future constitutionalization of a North American polity. As a part of these larger questions, this paper asks whether the United States can expect the kind of economic integration between Canada and the United States envisioned by the North American Free Trade Agreement (NAFTA) without concomitant social, legal and cultural harmonization on an equally meaningful scale.

A focus on questions aimed at exposing and understanding the consequences of economic integration in North America is critical if we are to engage in meaningful, participatory and representative politics at all levels of government: local, state, federal, transnational,

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I define what I mean by “culture” in Part B(1), infra.

I think it is fair to say that the European Union (EU) has arrived at an answer for them: no. For an account of the relationship between economic integration and social policy in the European Union, see Pierson, infra note 11. Although the article is six years old, and European unification has progressed substantially since its writing, Pierson’s ideas about economic integration and social policy remain relevant. Professor Christian Joerges has lectured and written about economic integration and social regulation. See, e.g., Christian Joerges, *What is Left of the European Economic Constitution?*, (Working Paper, Law Department, European University Institute (2004)), available at http://webdb.iue.it/ (on file with author). I briefly describe the history of the European Union in infra note 170.


As just one example of the issues raised by economic integration, Chapter 11 of NAFTA permits Canadian and Mexican investors to have judgments of American courts, including the United States Supreme Court, reviewed by a NAFTA tribunal if the investors believe they were not treated as NAFTA requires or if they believe an American law is not the least trade restrictive possible. If the business prevails in its appeal, the American government is potentially liable for damages awarded to the business.
international and supranational. The negotiation and implementation of trade agreements that purport to circumscribe domestic decision-making has obvious and troubling implications for national systems of representative democracy. It also limits the effectiveness of national and regional attempts at redistributive justice. We have been told that the globalization of a
particular capitalist economic model is natural and inevitable. At the same time, we are told that NAFTA is largely restricted to economic rights, and that each country retains ultimate jurisdiction over its domestic affairs, such as immigration, labor and family law. Such a view suggests that the economy can be neatly carved off and separated from other aspects of life. In this version, economic globalization is something that happens to us; at most, it is something to which we can react. Culture, on the other hand, is something the United States can create, maintain and protect.

12 Spitz, Enron, supra note 9 (challenging the view that economic globalization of a particular economic model is “inevitable”).


14 The fallacy of this assertion can be easily demonstrated by looking to some specific examples. First, Canada, the United States and Mexico are all members of the World Trade Organization (WTO). A core provision of the WTO states: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” World Trade Organization Agreement, art. XBI. In addition, each of the NAFTA signatories is prohibited by NAFTA from having domestic laws that (a) draw distinctions between domestic and foreign investors from the other member states; (b) are not “the least trade restrictive” possible; and/or (c) amount to an expropriation of foreign property. In order to enforce these provisions, standing is granted to individual investors (i.e., non-parties) to sue Canada, the United States, and Mexico directly for breaches of certain NAFTA provisions. This means that an American investor can sue Canada, for example, if a Canadian law discriminates against him or unduly restricts his trading rights. If the challenged law is found to offend NAFTA, then Canada is forced to choose between changing the law and paying damages for lost profits to the investor (or both). Chantell Taylor describes specific examples of NAFTA cases in, NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers’ Rights, 28 DENV. J. INT’L L. & POL’Y 401, 413-415 (2000) (describing specific examples of NAFTA cases). See also Fran Ansley, Inclusive Boundaries and Other (Im)Possible Paths Toward Community Development in a Global World, 150 U. PA. L. REV. 353, 384-385 (2001).

15 There is a cultural exception built into the North American Free Trade Agreement. It originated in the Canada-United States Free Trade Agreement. Canada-United States Free Trade Agreement, Jan. 2, 1988, ch. 19, art. 2005(1), 27 I.L.M. 281 (1988) (CFTA). Annex 2106 of NAFTA incorporates by reference Art. 2005 and applies it to relations between Mexico and Canada as well, but oddly, not to Mexico and the U.S. This would seem to support the view that expanding the CFTA to include Mexico was motivated, at least in part, by a U.S. desire to Americanize Mexican culture and law (see Stephen Zamora, The Americanization of Mexican Law: Non-Trade Issues In The North America Free Trade Agreement,
What happens to this version if we can demonstrate links between economic integration and cultural harmonization,\(^\text{16}\) where the latter is not simply the Americanization of Canadian and Mexican cultures, but something else? And if harmonization of cultures might mean something different than sameness and Americanization, what might it mean? Can we imagine something like, “Canada Wins Culture Ruling in Dispute Over Same-Sex Marriage”\(^\text{17}\)? If so, why? If not, why not?

\(^{16}\) L. \& POL’Y INT’L BUS. 391 (1993) [hereinafter Zamora, *Americanization*]. However, it presumably goes both ways; the United States cannot invoke the cultural exception against Mexico.

Under the “cultural exception,” subject to certain limitations, “cultural industries” are excluded from the CFTA and NAFTA trade liberalization requirements, as between Canada and the U.S., and Canada and Mexico. That is, at least in principal, the production and distribution of books, periodicals, film, video and audio recordings, radio, television, and cable broadcasting may be protected by the governments to whom the article applies. To the extent cultural-import restrictions conflict with the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade (GATT), however, it is unclear which agreement should prevail. See Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does it Exist in GATT and GATS Frameworks?*, 15 CARDOZO ARTS \& ENT. L.J. 281 (1997). For example, NAFTA arguably permits Canada to deny national treatment to a foreign copyright holder contrary to the national treatment provisions under the WTO Trade Related Intellectual Property Rights Agreement. When Canada undertook cultural measures to limit the distribution of U.S. split-edition periodicals in Canada, however, the U.S. took the position that the GATT national treatment provisions prevailed over the cultural exception to NAFTA. The WTO panel and appellate body agreed with the U.S. The decision of the WTO regarding Canadian cultural measures is discussed in Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1, 36-37, 40-51 (2000).

\(^{17}\) On March 22, 2004, Bloomberg.com reported that “Canada Wins WTO Lumber Ruling in Dispute Over U.S. Tariffs,” available at http://quote.bloomberg.com/apps/news?pid=10000103&sid=aPZLgFnXJj5A&refer=us (on file with author). That decision was reported by The Jurist (www.jurist.law.pitt.edu) at 12:50 p.m., the day of the
These questions lead to others. There can be no serious argument that the economy and culture are not connected and, to a large degree, interdependent in the United States.\(^{18}\) Accepting the connections between culture and the economy, can we actually separate participation in one from participation in the other? Can one sphere extend transnationally and the other only nationally?\(^{19}\) What does it mean to resist cultural integration in the face of economic globalization? Can it simply be done by assigning culture to the nation and the economy to the world? In our newly configured world, has the “domestic” or “national” come to occupy a “private” sphere, relegated to the purview of “individual” nations? Has the transnational market displaced the state’s occupation of the “public” sphere? If national governments give up control to corporations in the transnational economic sphere – as they seem intent on doing – can they legitimately assert control in any other? If so, which other? What are the assumptions underlying any assertion that they can? What are the implications for national sovereignty? Is national sovereignty still a coherent concept? Does NAFTA confer economic citizenship on us as North Americans \textit{qua} North Americans?\(^{20}\)

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\(^{18}\) I discuss the connections between culture and the economy in Part B(4), \textit{infra}.


\(^{20}\) A vigorous debate is currently under way as to the nature of “citizenship,” and whether or not the concept can be framed in anything other than national terms. That debate is discussed in Spitz, \textit{Enron, supra} note 9. \textit{See also} Linda Bosniak, \textit{Citizenship Denationalized}, 7 IND. J. GLOBAL LEGAL STUD. 447, 448 (2000) [hereinafter Bosniak, \textit{Citizenship}] (a denationalized citizenship claim is coherent); Saskia Sassen, \textit{The Participation of States and Citizens in Global Governance}, 10 IND. J. GLOBAL LEGAL STUD. 5, 6 (2003) (it might be useful to think about citizenship as “something akin to an ‘incompletely theorized’ form”); Kim Rubenstein and Daniel Adler, \textit{International Citizenship: The Future of Nationality in a Globalized World}, 7 IND. J. GLOBAL LEGAL STUD. 519, 522 (2000) (citizenship represents “cohesion in a world increasingly characterized by fragmentation”); and Adelle Blackett, \textit{Global Governance, Legal Pluralism and The Decentered State: A Labor Law Critique of Codes of Decision.} By mid-afternoon, it was still not on the NYTimes web site. Interestingly, a separate panel, formed under the North American Free Trade Agreement, ruled March 5, 2004, that the U.S. correctly calculated the tariff on Canadian lumber, rejecting Canada’s complaint. This raises interesting supremacy and forum-shopping issues in the international arena.
All of these questions are connected, and worthy of consideration; I suggest that one starting point for what should be a dynamic, evolving and inclusive conversation in North America is the question to which I turn in this paper: can the U.S. move closer and closer to free trade with Canada without itself feeling the influence of increasing cultural cross-pollination? I come at this question from the United States side because, while much has been written about the concerns of Canadians and Mexicans, wondering whether it is possible to protect and maintain national and regional cultural norms in the face of economic integration with the United States, very little has been written about the possibility that economic globalization in North America could mean that Canadian and Mexican cultural norms will make their way, in some version or another, to United States soil.

This article will proceed as follows. In Part B, I position family law generally, and same-sex marriage in particular, as my context for asking whether the United States can expect to

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Corporation Conduct, 8 IND. J. GLOBAL LEGAL STUD. 401, 439 (2001) (“the organizing notion of ‘citizenship’ in its varied manifestations... needs to be fundamentally rethought”).


The United States control[s] ninety-five percent of Canadian movie screens. That does fluctuate. Some say it is ninety-two percent; some say it is ninety-six percent, but let us say it is ninety-five percent. The United States controls eighty percent of Canadian news and television broadcasts. U.S.-published books take up sixty percent of Canadian bookshelf space, and U.S. magazines make up eighty percent of the English-language market.

Id., at 148.

22 For a provocative discussion about the history of the U.S.-Mexico relationship, the alleged failure of Americans to appreciate or value Mexican culture, and the use of NAFTA to Americanize Mexican culture, see Zamora, Americanization, supra note 15.


24 At least in the Mexican context, arguably racist concerns in the United States about the encroachment of Mexican culture have been essentially limited to debates about exclusionary immigration policies.
admit Canadian goods and services without admitting Canadian cultural norms. In Part C, I set out the reasons for asking this question at this particular moment. In doing so, I explore the relationship between economic integration and the extant potential for family law harmonization between Canada and the United States.

I do not know if I would go so far as to say the North American Free Trade Agreement and same-sex marriage go together like a “horse and carriage.” This paper suggests, however, that economic integration and some interjurisdictional family law harmonization will follow one from the other. And although the United States might “try to separate them,” it probably “can’t have one without the other.” At a minimum, the United States will have to address the incoherence of simultaneous commitments to global economic integration on the one hand, and political, cultural, and social isolationism on the other. In these circumstances, I sketch some

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25 In this paper, I focus on the relationship between the United States and Canada. I do this because they are industrialized “equals”, each others’ largest trading partners, and parties to a liberalized trade agreement. In addition, they share language, a colonial history, and geographic proximity, as well as similar education systems and legal traditions. True, power imbalances remain, particularly in military and economic strength, but given its history, level of economic development, and geographical proximity to the United States, Canada’s relationship to the United States is unique. The relationship between the United States and Mexico is different for a variety of reasons, complicated in no small measure by the structural and historical racism of the United States vis-à-vis Mexico. I would put Mexico in the category of developing nations for the purpose of exploring transnational norm harmonization, although I recognize that Mexico’s proximity to the United States makes it a unique case in that general category. For one account of Mexico’s relationship to the United States in the NAFTA context, see Zamora, Americanization, supra note 15.


challenges to both international and comparative legal methods (Part D), and conclude that the dramatic changes brought about by the rapid spread of global capitalism and increasing economic integration may require a paradigmatic shift in our approaches to understanding and managing norm harmonization and cultural evolution in North America.

B. Culture and the Family Law Context

1. The Meaning of Culture

Before turning to why I chose family law as my point of departure for exploring the potential effect of North American free trade on the evolution of culture in the United States, I want to briefly state what I mean by “culture.” Definitions and interpretations of “culture” vary widely, depending in some measure on academic discipline, philosophical point of view, and the purpose of the discussion.

In this paper, I use culture in a very broad, general and inclusive way. I intend to capture a wide variety of interpretations and categories, such as popular culture, high culture and legal culture,29 to name a few. I am concerned less with precisely defining culture and more with the...
contingencies of its transmission. I seek to avoid the modern/post-modern debate, to wit: is culture a set of behaviors and ideas attributable to a given population or is it merely a constructed flow of images? For my purposes, it does not matter so much whether the modernists or the post-modernists (or some combination) are right. I mean culture to simply be “the complex of shared attitudes, beliefs, practices and institutions which shape and inform the life of a regularly interacting human community,” regardless of whether they are learned or constructed, “real” or “discursive.”

An equally important piece of political discourse that I do not directly address, but that nonetheless could be the backbeat for much of my discussion, is the central insight of Marxism that culture can never be understood as a phenomenon separate from economic considerations. For Marx, of course, what we call “culture” is one among several “superstructural” manifestations (including government, law and family) of class-stratified modes of production (or more specifically for my purposes, modes of worldwide market creation and maintenance). In this article, however, I do not undertake either to critique Marx or incorporate his theories as necessarily true. Rather, I allow the possibility that anti-Marxian positions are plausible to this extent: markets and cultures are not necessarily interdependent in the historically determinist way asserted by Marx. Instead, I assert the existence of a de facto interdependence, without expressing any view as to its inevitability.

which follow large social transformations such as those following technological breakthroughs. Finally, as compared to ‘legal ideology’, the term ‘legal culture’ is more concerned with a variety of social influences on attitudes towards law, rather than just the ideas and influence of legal professionals.


Id. at 1.

Goodenough, supra note 21, at 209.

For a wonderful and concise introduction to Karl Marx’s CAPITAL, see BEN FINE AND ALFREDO SAAD-FILHO, MARX’S CAPITAL (3rd, 2004).
2. Why Family Law?

The question of whether the type of integration envisioned by NAFTA can be limited to the American “economy” without implicating culture is usefully analyzed in the context of family law for several reasons. 33 Primary among them are three separate but connected points. First, the family is an important center in and through which culture is created, constructed, mediated, and maintained. Children are most often first introduced to culture through their families. And throughout many peoples’ lives, family continues to be an important site for learning about and expressing cultural values. Indeed, because of the critical importance of family to the learning, producing and reproducing of culture, families have been and continue to be “a primary terrain for the cultural wars in which our society is increasingly mired.”34

Second, family law is one of the critical means by which we regulate the family, and how we regulate the family remains central to the study of cultural reproduction. Whether one ascribes to the view that law is culture or the view that law and culture, while separate, are connected, it is clear that choices about who and what constitutes “family” as a matter of law – and how relationships and relationship breakdown intra- and inter-family are regulated – are political and cultural, not natural nor inevitable. Law is both a product and an instrument of culture. 35 In thinking about the possibility for cultural integration, then, it makes some sense to focus on family law.

33 Other points of departure might include the media or religious institutions. Given the vast literature recently generated on the subject and effects of what we loosely call globalization, including the seemingly relentless exportation of U.S. legal and social norms to other countries, surprisingly little attention has been paid to the relationship between globalization and culture in the United States.
34 MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 57 (2004) [hereinafter Fineman, AUTONOMY MYTH].
35 See, e.g., Lauren Edelman, The Centrality of the Economy to Law and Society Scholarship, 38 LAW & SOC. R. 181 (2004). Edelman makes a persuasive case for understanding both law and the economy as social, cultural and political. By highlighting the social and cultural aspects of law, she argues that law and society scholarship “provides a means of understanding how both law and the economy are
Finally, and perhaps most importantly, I use family law as my point of departure for exploring the relationship between economic integration and cultural harmonization because of the fundamental connections between the “economy” and the “family.” In fact, they are somewhat artificially divided for the purposes of this explanation, and I do not mean to cast them as binary. They are interdependent, and as categories, they overlap. Examples are obvious. Included among them are: the family provides critical caretaking functions that enable some citizens to participate in the market economy; workplaces are structured in ways that affect family relationships and diminish some family members’ individual and collective opportunities; the family represents a potential market for goods and services; systemic discrimination against women and racial minorities in the paid workforce cannot be understood without reference to the structure and function of the family and their roles within it; technological and electronic developments can have a profound effect on the way work is done at home; wealth is inherited and (re)distributed through families; and the real societal costs of economic and other subsidies for corporations cannot be measured without reference to the nature and cost of subsidies in the family context. Feminists have played a central role in advancing our understanding of the family’s role in the economy, and the economy’s role in the family. It is not possible, nor is it embedded within a social environment in which power matters and in which highly institutionalized beliefs, structures, and rituals jointly shape the nature of legality and rationality.” Id. at 193 (emphasis in original).

36 Eric Chiappinelli, among others, believes the connections between the market and the family are so important that understanding family dynamics and family law are critical to teaching and understanding corporate law. Eric A. Chiappinelli, Stories From Camp Automotive: Communicating the Importance of Family Dynamics to Corporation Law Students, 34 GA. L. REV. 699 (2000).

37 See generally Martha Albertson Fineman, Contract and Care, 76 Chi.-Kent L. Rev. 1403 (2001) [hereinafter Fineman, Contract and Care]; and Fineman, AUTONOMY MYTH, supra note 34.

38 There are a wide variety of feminist viewpoints, spanning many decades, and certainly far too many to exhaustively list here. But see, e.g., Anne L. Alstott, Tax Policy and Feminism: Competing Goals and Institutional Choices, 96 COLUM. L. REV. 2001 (1996); Dorothy A. Brown, Race, Class, and Gender Essentialism in Tax Literature: The Joint Return, 54 WASH. & LEE L. REV. 1469 (1997); Patricia A. Cain, Dependency, Taxes, and Alternative Families, 5 J. GENDER, RACE & JUST. 267 (2002); Ruth Colker, Pregnancy, Parenting, and Capitalism, 58 OHIO ST. L. J. 61 (1997); Lisa M. Colone, Taxing
my intention, to repeat or examine that work in any detail here. Rather, I would simply add my voice to those who insist that the family is integrally connected to the economy in a multiplicity of ways.

3. Why Same-Sex Marriage?

Having explained my basis for choosing family law as one way to explore the possibility that “free trade” cannot be limited to the American economy, I should explain my reasons for focusing more particularly on same-sex marriage. I have done this for four separate but related reasons.

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First, marriage is regarded as fundamental to the creation of family in North America. The centrality of marriage is not without its critics, but the fact of its centrality is relatively uncontroversial.

Second, the topic of same-sex marriage in the United States is obviously timely. One cannot open a newspaper without reading about it. Early last year, a variety of city and state politicians, beginning with the mayor of San Francisco, urged city and state employees to give marriage licenses to same-sex couples. Some officiated marriages themselves. The Supreme

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39 See, e.g., Fineman, NEUTERED MOTHER, supra note 38; Fineman, AUTONOMY MYTH, supra note 34; and Anita Bernstein, For and Against Marriage: A Revision, 102 MICH. L. REV. 129 (2003).
40 This is not to say that approaches to marriage are uniform through time. For a description of the relatively recent shift in societal understanding of marriage in the United States, see Martha Albertson Fineman, Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 265-266 (Martha Albertson Fineman and Nancy Sweet Thomadsen eds., 1991).
41 A search on the New York Times' website on March 27, 2004 for the phrase “same-sex marriage” in any article in the previous 90 days came up with an astonishing 869 articles. In the New York Times and the Washington Post, I have personally read what seems like hundreds of articles, including Kate Zernike, Gay? No Marriage License Here. Straight? Ditto., N.Y. TIMES, March 27, 2004 at A8; Matthew Preusch, Oregonians Look to One Suit to Settle Gay Marriage Issue N.Y. TIMES, March 25, 2004 at A16; Carl Hulse, Gay Official Denounces Amendment, N.Y. TIMES, March 24, 2004 at A18; Carl Hulse, Backers Revise Amendment on Marriage, N.Y. TIMES, March 23, 2004 at A21; Thomas Crampton, Ministers Who Officiated At Same-Sex Marriages Go To Court, N.Y. TIMES, March 23, 2004 at A5; Thomas Crampton, At a Gay Synagogue, a Rabbi Isn’t Fazed by Legalities, N.Y. TIMES, March 21, 2004 at 129; Colin Campbell, Canada: Quebec Court Upholds Gay Marriage, N.Y. TIMES, March 20, 2004 at A5; Patricia Leigh Brown, For Children of Gays, Marriage Brings Joy, N.Y. TIMES, March 19, 2004 at A14; Dean E. Murphy, San Francisco Married 4,037 Same-Sex Pairs From 46 States, N.Y. TIMES, March 18, 2004 at A26; William B. Rubenstein, Hiding Behind The Constitution, N.Y. TIMES, March 20, 2004 at A13; Adam Liptak, Bans on Interracial Unions Offer Perspective on Gay Ones, N.Y. TIMES, March 17, 2004 at A22; Thomas Crampton, Two Ministers Are Charged In Gay Nuptials, N.Y. TIMES, March 16, 2004 at B1; Thomas Crampton, Spitzer and New Paltz Mayor Meet About Gay Marriages, N.Y. TIMES, March 12, 2004 at B4; Clyde Haberman, NYC: Outrage Is Getting So Ho-Hum, N.Y. TIMES, March 12, 2004 at B1; Lisa Foderaro and Suzanne Moore, Mayors Asked to Face the Music, As in a Same-Sex Wedding March, N.Y. TIMES, March 9, 2004 at B1; Andrew Jacobs, Gay Legislator at the Center of a Storm in Georgia, N.Y. TIMES, March 9, 2004 at A20; Robert D. McFadden, Bloomberg is Said to Want State To Legalize Same-Sex Marriages, N.Y. TIMES, March 6, 2004 at A1; Andrew Jacobs, Black Legislators Stall Marriage Amendment in Georgia, N.Y. TIMES, March 1, 2004 at A11; and Dean E. Murphy, San Francisco Mayor Exults in Move on Gay Marriage, N.Y. TIMES, February 19, 2004 at A14.
42 See, e.g., Carolyn Marshall, Dozens of Gay Couples Marry in San Francisco Ceremonies, N.Y. TIMES, February 13, 2004 at A24 (reporting that Mayor Gavin Newsom urged the county clerk's office to begin issuing marriage certificates to same-sex couples).
Judicial Court of Massachusetts decided in November 2003 that it was unconstitutional to exclude same-sex couples from civil marriage. On May 17, 2004, that judgment took effect in Massachusetts. The Supreme Court of California decided in August 2004 that the mayor of San Francisco acted outside his jurisdiction in issuing marriage licenses to same-sex couples, and voided those marriages.

Together, the decisions of the Massachusetts court, the mayor of San Francisco and the California court arguably made same-sex marriage an issue in the 2004 presidential election. The United States Congress was asked to consider an unprecedented amendment to the Constitution of the United States that would define marriage as between a man and a woman, and while both the Senate and the House earlier rejected the idea of a Constitutional amendment, George W. Bush apparently supports it. Eleven states passed constitutional

43 See, e.g., Thomas Crampton, Same-Sex Weddings Bring Division to an Upstate Village, N.Y. TIMES, March 1, 2004 (reporting that the mayor of New Paltz, New York, performed 25 marriages on February 27, 2004).
45 See, e.g., Vanessa Williams, “Ohio Gay Marriage Initiative Roils Skeptics,” The Washington Post, May 10, 2004. I am not suggesting, however, that the Democrats lost the election because of these decisions.
46 The Senate voted on July 14, 2004 to block the constitutional amendment. Only 48 senators supported the amendment, 12 short of the 60 needed to proceed with the debate and 19 short of the two-thirds majority it would take to amend the constitution. Helen Dewar and Alan Cooperman, Senate Scuttles Amendment Banning Same-Sex Marriage, WASH. POST, July 14, 2004 at A12.
amendments banning same-sex marriage on November 2, 2004. 49 A federal ban may be re-introduced in the 109th Congress. 50 No matter where one falls on the continuum represented by this debate, its timeliness cannot be argued. 51

Third, same-sex marriage is inextricably tied to global capitalism in the ways explored later in this paper. 52 As such, it is not so much a Canadian or an American issue 53 as a transnational equality issue 54 that provides an almost perfect example of the tensions presented by the United States’ apparent commitment to cultural isolationism on the one hand, and economic integration on the other. Persistent failure to acknowledge and explore these tensions obfuscates both the nature of the larger task presented by economic integration (i.e. how to fit Canada and the United States together in a new and larger whole), and the normative effects of a simultaneous commitment to inevitably inconsistent postures.

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49 The eleven states were: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oregon, Oklahoma and Utah. For a selection of articles reporting about the circumstances and aftermath of these amendments, see http://www.lambda.org and http://www.PlanetOut.com. Since the date of the election, Alabama, Indiana, and Virginia have moved to amend their respective constitutions to ban same-sex marriage. Christopher Curtis, Gay marriage bans advance in 3 states, PlanetOut, Feb. 9, 2005 (on file with author).


51 The American Bar Association has taken a position against the proposed amendment, arguing inter alia that no matter where one stands on the issue of same-sex marriage, “the Constitution should not be amended absent urgent and compelling circumstances: it certainly should not be amended to call halt to democratic debate within the states or to promote a particular ideology.” Letter from Dennis Archer, President of the American Bar Association, to each Senator of the United States of America, (July 9, 2004) (on file with author).

52 See Part C of this paper, infra.

53 James Gordley makes a similar distinction between national and transnational problems in his article, Comparative Legal Research: Its Function in the Development of Harmonized Law, 43 AM. J. COMP. L. 555, 561 (1995). Gordley argues that when jurists tackle problems that arise in different countries, they should take a transnational and transtemporal approach to law. Indeed, he concludes that “there is no such thing as a French law or German law or American law that is an independent object of study apart from the law of other countries.” Id. at 566.

54 Same-sex marriage raises unresolved constitutional issues in the United States. It is commonly regarded as a gay and lesbian “rights” or equality or privacy issue as much as a family law issue. As an equality issue, it raises questions of “universal” protections and “minimum” standards. This makes it potentially different than other types of cultural expression and other types of family law issues.
Finally, I offer same-sex marriage as the context for my questions about economic integration and cultural harmonization between Canada and the United States because of Canada’s unique geographical and political relationship to the U.S.: it is its largest trading partner; it shares its longest border; it has a similar legal system; it shares some aspects of its colonial history; and it is its industrial equal. Yet, notwithstanding these similarities and close
geographic proximity, it takes a markedly different approach to the issue of same-sex marriage and same-sex relationships.

Social science, political economy and other disciplines have long focused on the potential and realized effects of liberalized trade on developing nations. One oft-expressed concern is that harmonization in that context really means some combination of homogenization and American imperialism, whereby the legal, social, political, and cultural norms of the United States are

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The federal government submitted a constitutional reference to the Supreme Court of Canada (what in the U.S. would not be allowed – a request for an advisory opinion), seeking the Court’s guidance with respect to proposed Parliamentary legislation in order to ensure that it comports with Charter guarantees. See Kim Lunman and Drew Fagan, *Marriage Divides the House*, GLOBE & MAIL, Sept. 17, 2003 at A1; and Mary Jane Mossman, *Conversations About Families in Canadian Courts and Legislatures: Are There Lessons For the United States?*, 32 HOFSTRA L. REV. 171, 172 (2004). The Court handed down its decision on December 9, 2004: Reference re Same-Sex Marriage [2004] S.C.C. 79 (Can.). The questions put to the Court were: 1) Is the draft federal marriage bill (expanding the definition of marriage to include any two persons) within the exclusive legislative authority of the Parliament of Canada?; 2) Is the section of the draft bill that extends capacity to marry to persons of the same sex consistent with the Canadian Charter?; 3) Does the freedom of religion guaranteed by the Charter protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?; and 4) Is it unconstitutional to limit common-law marriage to opposite-sex couples? *Id.* Most importantly, the court’s answer to question 2 was yes. *Id.*


56 Same-sex couples have enjoyed the benefits and responsibilities of common law marriage in Canada for several years. These benefits and responsibilities were, with very few exceptions, the same or similar to those enjoyed by married couples.

57 See generally MICHAEL HARTD & ANTONIO NEGRI, EMPIRE (2000).
visited upon developing nations through the machinery of advanced capitalism and liberalized trade. But what does cultural harmonization look like as between two relatively equally “developed” or industrialized nations like Canada and the United States?

When the possibility of a U.S.-Canada Free Trade Agreement was first raised, a flurry of articles was written about the potential effects of trade liberalization from Canadian perspectives. The issues raised by those authors continued to occupy the attention of activists, politicians, educators, journalists, researchers, and other Canadians through the ratification of that agreement, then the introduction and ratification of NAFTA. They continue today. Concerns include a fear that Canadian culture will be erased or diminished by the pressure of American capitalism. Although these concerns are legitimate, and many have been borne out, I wonder if Canadians underestimate themselves. If economic integration and cultural harmonization are linked, who is to say Canadian culture will not move south? Or that some new transnational “Canamerican” cultural norms will not materialize? I focus on same-sex marriage, then, because notwithstanding its unique relationship with Canada, and the fact that same-sex marriage is legal in Canada, the federal government and almost all state governments in the United States resist having to extend the definition of marriage to same-sex couples.

Let me state at this point that I do not take a position in this paper on the North American Free Trade Agreement nor same-sex marriage. Accepting their existence, my focus is their intersection.

59 See, e.g., Thompson, supra note 20, Goodenough, supra note 21; and Paul, supra note 15, at 43-51.
60 Of course, “Canadian culture” is not some monolithic universally recognizable thing, but is actually made up of many intersecting cultural norms. Indeed, Canada prides itself on being multi-cultural. What makes them “Canadian” is a combination of history, geography, law, and politics.
61 I do not mean to suggest that there is only one Canadian position on same-sex marriage, only to point to the fact that it is lawful in most jurisdictions, and the recent Supreme Court of Canada decision, supra note 53, suggests that it is only a matter of a short time before it is lawful in all Canadian jurisdictions.
C. Economic Integration and Family Law Harmonization: What’s New About Now?

There are a number of recent developments which seem to suggest that the United States cannot expect a free trade in goods and services with Canada without some concomitant “trade” in culture. Historically, American concerns about norm harmonization and the effects of foreign culture have been played out in the immigration context. It has long been thought that racist immigration policies are an acceptable and necessary part of protecting American cultural norms. I do not intend to revisit these debates in this paper. Rather, I am looking at increasing economic integration and other recent developments associated with economic globalization in order to ask whether they change or inform the old debates. The question is: what’s new about now?

In the subsections that follow, I outline some recent developments that challenge how we traditionally think about international norm harmonization and transplantation. While some of these developments are probably sufficient to challenge the relevance of traditional arguments in

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62 Of course, historically, culture was not only implicated in protecting national boundaries, but in their formation. At one time, for example, individual First Nations (or Native American Tribes) spanned areas now divided by national borders. In those cases, new cultures were imposed on them, depending on where they were located when the maps were drawn. The consequences were devastating, and have been eloquently documented by many writers. For a look at some of the problems and issues presented by this history, see Richard Osburn, Problems and Solutions Regarding Indigenous Peoples Split by International Borders, 24 AM. IND. L. REV. 471 (2000); and Courtnery E. Ozer, Make It Right: The Case For Granting Tohono O’Odham Nation Members U.S. Citizenship, 16 GEO. IMM. L. J. 705 (2002). See also Leah Castella, The United States Border: A Barrier To Cultural Survival, 5 TEX. F. on C.L. & C.R. 191 (2000), and Melissa L. Tatum, A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts, 90 KY. L. J. 123, 181 (2002).


this context, they are made exponentially more powerful by their connections and simultaneous operation.

1. Rapid Trade Liberalization

First, in the last ten years, the North American Free Trade Agreement has systematically dismantled trade barriers between Canada and the United States. It has been assisted in this mission by Canadian and American membership in the World Trade Organization (WTO), together with other examples of increased institutionalization of interstate relations.°

Traditional trade barriers included taxes or tariffs on goods and services, as well as historical discrimination against foreign investment. Tariffs are no longer or infrequently permitted, and, with very few exceptions, Canada, Mexico and the United States can no longer discriminate between domestic and foreign direct investment from and among each of the member signatories.°° The result of these measures has been that goods,°°° services,°°°° information,°°°°°

° One example is the Council of Great Lake Governors.
°° Interestingly, the remedies available to businesses depend upon their nationality. Under Chapter 11 of NAFTA, investors from a member state can sue only other member states. That is, an American business can only complain of treatment by Canada and Mexico under NAFTA, and not of treatment by the United States. So, for example, in Loewen, a case described in Chantell Taylor, supra note 13, a NAFTA tribunal denied a company’s claim against the United States in part because the company, which was originally Canadian, had been reorganized as an American company between the date of the claim and the date of the hearing. Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3 (NAFTA Ch.11 Arb. Trib. June 26, 2003) available at http://www.naftaclaims.com. See also Adam Liptak, NAFTA Tribunals Stir U.S. Worries, N.Y. TIMES, April 18, 2004 at A20. For a description of how NAFTA’s Chapter 11 works, see Guillermo Aguilar Alvarez and William W. Park, The New Face of Investment Arbitration: NAFTA Chapter 11, 28 YALE J. INT’L L. 365 (2003).
°° Hiram Chodosh provides the following statistics with respect to goods:

The value of world merchandise exports grew by 12.5%, reaching USD $6.2 trillion in 2000, which tripled the amount in 1999. Further, growth in trade volumes more than doubled for the major regions of the World Trade Organization (WTO). Asia and the transition economies recorded the highest export growth among the major regions and the largest increases in imports. In Western Europe, trade grew by 10%, double the amount of the preceding year, and in North America, the growth of imports exceeded that of exports for the fourth consecutive year.

technology, people, and capital now move increasingly freely between the NAFTA states.

Put another way, while the borders between Canada, the United States, and Mexico remain for some purposes, they have shifted or disappeared for others.

This has put enormous stress on our historical understandings of the nation-state, sovereignty, citizenship and democracy. Some have argued that the state has become decentered, that we live in a “postnational” world, that sovereignty is an increasingly contested subject, that sovereignty is permeable, that citizenship is only a partially theorized

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69 I discuss the flow of information in Part C(2), infra.

70 I discuss the increased mobility of people in Parts C(6)-(7), infra.


72 Consider, as one example of a challenge to these historical understandings, that NAFTA tribunals, as opposed to national courts, may be the court of last resort in certain circumstances. See NAFTA, supra note 3, at chs. 11, 19. NAFTA tribunals cannot overturn national court decisions, of course. Rather, they can order governments to essentially indemnify investors for damages where court processes or court decisions conflict with NAFTA obligations. See Spitz & Scales, supra note 9, at 548-49.


74 Id.

75 See generally SOVEREIGNTY IN TRANSITION, supra note 19. In particular, see the following articles in that volume: Neil Walker, Late Sovereignty in the European Union, id. at 3; Martin Loughlin, Ten Tenets of Sovereignty, id. at 55; Ernst-Ulrich Petersmann, From State Sovereignty to the ‘Sovereignty of Citizens’ in the International Relations Law of the EU, id. at 145; Richard Bellamy, Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights Within the EU, id. at 167; Jef Huysmans, Discussing Sovereignty and Transnational Politics, id. at 209; Jeffrey Goldsworthy, The Debate About Sovereignty in the United States: A Historical and Comparative Perspective, id. at 423; and Jo Shaw, Sovereignty at the Boundaries of the Polity, id. at 461. See also Anne-Marie Slaughter, Sovereignty and Power in a Networked World Order, 40 STAN. J. INT’L L. 283 (2004) [hereinafter, Slaughter, Sovereignty]; Delbrück, supra note 6; and Spitz, Enron, supra note 9.
form, and that the push for global capitalism under the banner of democracy is disingenuous at best. Whether borders can be erased for some purposes and retained for others is a question that leads logically to another: can one reasonably argue that it is possible to move capital, goods and services to the United States without moving culture?

Add to this the fact that in order to facilitate trade liberalization and the economic globalization of capitalism, the harmonization of legal institutions and legal rules has become a priority for the World Bank, the International Monetary Fund, the WTO, and various other trade regimes. The effects of this have been most pronounced in developing nations, but vestiges of it can be found in the North American Free Trade Agreement as well. NAFTA members, for example, must enact laws in all areas of life that are the “least trade restrictive possible.” The intended effect of this is to make law and its application consistent among the member states. Furthermore, permitted cultural exceptions to the elimination of trade barriers have been undermined by the World Trade Organization.

The import of this broad legal harmonization in the face of trade liberalization is that trade cannot be neatly separated from culture generally, and from family law in particular.

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77 Sassen, *supra* note 20, at 6.


79 For a discussion about the informal harmonization of laws among the NAFTA member-states, see Patrick Glenn, *Conflicting Laws in a Common Market? The NAFTA Experiment*, 87 CHI-KENT L.REV. 1789 (2001) [hereinafter, Glenn, *NAFTA Experiment*].


82 *See discussion infra* Part C.4 (connections between commerce and culture).

83 *See discussion infra* Part B.2 (connections between family and the economy).
The fact that the business world has become transnational is not something that has been kept from ordinary citizens. Are we content to let business people live in a differently constructed world than the rest of us? Is it even possible? In any case, it is nonsensical to suggest that once the door to legal harmonization is opened, it can be held firmly at an irrational angle. At a minimum, it is easier to hold shut than it is to hold part way open between business and family law or business and culture in the context of rapid trade liberalization.

2. Technological Changes

A second reason to question whether a line can be drawn between economic integration and family law harmonization is technology. Recent technological changes have rapidly provided for enhanced communication possibilities without regard to national borders. It is no longer possible to keep particular cultural, political, and legal norms out of the United States by simply preventing the people associated with them from immigrating to the United States. The

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84 A strain of transnational “capitalism” not dealt with in this article, but maybe worth considering in this context, is transnational crime. Anne-Marie Slaughter tells us that “[t]errorists, arms dealers, money launderers, drug dealers, traffickers in women and children, and the modern pirates of intellectual property all operate through global networks.” ANNE-MARIE SLAUGHTER, NEW WORLD ORDER, 1 (2004) [hereinafter, Slaughter, NEW WORLD ORDER]. As just one example, the New York Times recently reported that over “the last decade gangs have spread like a scourge across Central America, Mexico and the United States, setting off a catastrophic crime wave that has turned dirt-poor neighborhoods into combat zones.” Ginger Thomson, Shuttling Between Nations, Latino Gangs Confound the Law, N.Y. TIMES, Sept. 26, 2004. I know very little about these things, but I suspect that it both affects and is affected by the changes described in this Part C.

85 I wonder if there is an argument to be made that restricting marriage to opposite-sex couples in the United States somehow adversely affects Canadian investors’ rights under NAFTA, i.e., is not the “least-trade restrictive” possible. For example, marriage and immigration laws in the United States may prevent a Canadian investor from moving employees to the United States, where those gay or lesbian employees are married in Canada, and those employees could not bring their spouses to the United States in the same way that their heterosexual counterparts could. If gay and lesbian employees of an American employer were able to live together with their partners in the United States, but gay and lesbian employees of Canadian investors in the United States could not bring their partners with them under American immigration rules defining spouses as opposite-sex married couples – i.e., were prevented from living in the United States with their partner – and this effected the Canadian investor’s business (where, for example, a key employee could not be moved to the United States because she was married to someone who was not able to accompany her to the United States), then presumably a complaint could be made under NAFTA.
Internet, email, broadband cable, facsimile machines, and cell phones with unlimited calling plans, for example, mean that Canadian and American citizens are sharing information in ways and at speeds previously unthinkable. Judges, law-makers, journalists and ordinary citizens can share and gather information almost as fast as it becomes available. Life in other jurisdictions is occurring for many of us in something close to “real time.”

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86 Justice Ginsburg observes that the Internet is one tool readily at hand for international and comparative law inquiries. Ruth Bader Ginsburg, Looking Beyond Our Borders: The Value of a Comparative Perspective In Constitutional Adjudication, 40 IDAHO L. REV. 1, 3 (2003).

87 Justice Ginsburg, for example, cites her colleague, Justice Stephen Breyer, for the observation that audio and visual technology permits U.S., Canadian, European, Asian or African professors to “team teach” classes held simultaneously in classrooms in different nations. Id. at 3, referring to Stephen Breyer, Mensaje del Juez Stephen Breyer en la Rededicacion del Edificio de la Escuela de Derecho de la Universidad de Puerto Rico, 70 REV. JUR. U.P.R. 1015, 1017 (2001).


89 Canadian and American court decisions, for example, are usually available on-line the day they are released. Similarly, law review articles and newspaper columns are now available on-line (sometimes for a fee). I am aware that some countries—including China, Saudi Arabia and Singapore—“successfully deploy firewalls and other blocking technology to keep out undesirable thoughts.” See Justin Hughes, Of World Music and Sovereign States, Professors and the Formation of Legal Norms, 35 LOY. U. CHI. L.J. 155, 184-185 (2003).

90 Dictionary.com defines “real time” as “the actual time in which a physical process under computer study or control occurs;” response time (typically milli- or micro-seconds), at http://dictionary.reference.com/search?q=real+time. In jargon, it has come to mean something closely approximating “actual time.” The Merriam-Webster Online Dictionary, for example, defines “real time” as “the actual time during which something takes place,” at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=real%20time.
The implications for culture brought about by ever-increasing contacts and mutual influences would seem profound. One of the underlying premises of both cultural exceptions to free trade rules\(^91\) and traditional immigration restrictions is that a state can and should protect its national culture from foreign influences. However, even assuming that the United States could distinguish between foreign and domestic culture,\(^92\) how can it seal itself off from foreign cultural influences with the advent of the Internet, cell phones, facsimile machines, and email?\(^93\)

For example, even if the U.S. could lawfully stop the dissemination of Canadian films in the United States under NAFTA cultural exception rules, it is simply not possible to stop Canadian filmmakers and journalists from coming into contact with American filmmakers and journalists or from sharing their work on the Internet or at international gatherings. David Westbrook has described this phenomenon as the creation of a new, global “communicative space.”\(^94\) As Westbrook points out, it not only spans the globe, “it establishes a new cultural context.”\(^95\)

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\(^91\) See supra note 15.

\(^92\) Professor Joel Paul challenges the assertion that we can distinguish foreign and domestic culture: Throughout history, new cultural forms have followed migration, trade, and investment; the process of global acculturation is normal and vital for human society. Culture is not bounded by national territory; it is the product of sub-national and transnational influences. Nations cross-trade culture. Among our art, literature, music, cuisine, dress, and social attitudes, we must acknowledge that much of what we regard as English, Japanese or American came from other sources. William Shakespeare wrote in an amalgam of ancient languages that we call “English” plays based upon stories that originated throughout Europe and presented in a style derived from the ancient Greeks. The Japanese constructed their written language and art from borrowed Chinese written characters and painting style. American cuisine evolved from an eclectic mix of German, Dutch, English, Spanish, Mexican, Chinese, Italian, and indigenous tribal ingredients. The writing of Gabriel Garcia Marquez, the painting of Hockney, the films of Truffaut and the social theory of Foucault shaped contemporary American art and literature. Latin American and African music continue to shape contemporary American and European music. These cross-cultural influences continue into the future. See Paul, supra note 15, at 41-42.

\(^93\) Id.

\(^94\) This is a term used by David A. Westbrook in his new book, CITY OF GOLD 1 (2004).

\(^95\) Id.
This is certainly true for communication about law. The United States, as a sovereign nation, has – with very few exceptions – historically been able to control intranational legal developments. But with recent changes in communications technology, it cannot stop judges, politicians and other decision-makers from meeting and talking with their Canadian counterparts. Nor can it stop the dissemination of information about legal developments elsewhere. It is no longer possible to change a law in British Columbia, for example, without the change and the reasons for it becoming immediately available to citizens worldwide. Not only was it impossible to keep the expansion of Canadian marriage law to same-sex couples from the American public, it was impossible to delay delivery of the information. Most importantly, it was difficult to mediate or shape delivery of the information. Citizens no longer need to rely on newspapers or multinational television stations for information about and from other countries. Instead, they can sign on to the Internet and immediately get that information from a wide range of perspectives.

What might this mean for us? “[I]n light of the increasing interaction among diverse societies,” Professor Martha Nussbaum has written, “cross-cultural debate about questions of justice is both possible and actual.” Nussbaum believes that technological changes which support a global communicative space make the debates increasingly significant and urgent.

[I]t is urgent that this [cross-cultural] discussion should develop further. Many of the most urgent problems of justice and distribution that face human beings who live within nation-states are problems that are now, in their very nature, international problems, requiring worldwide communication and common effort for their effective solution.

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Cross-cultural and transnational communication among Canadians and Americans is a fact that cannot be ignored in debates about same-sex marriage, family law, and international norm harmonization.

3. Transnational Alliances

Third, and relatedly, introducing the idea of a transnational capitalism into the North American vocabulary – where borders can be relevant for some purposes, but maybe not others – at the same time that communication among North Americans has become possible in increasingly effective ways, has meant that traditionally disadvantaged and relatively powerless groups in the United States and Canada have been able to form transnational alliances in order to
pursue social justice strategies.98 In doing so, they have been able to pool, and thereby increase, their numbers, bargaining strength and resources (financial and intellectual).99

The effects of this have been tremendous.100 For example, gay and lesbian organizations in Canada and the United States have been able to share legal information, develop legal arguments, share research and develop strategies. This means that they have been able to do more with less money, not having to reinvent the much-maligned wheel in each instance. As a

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98 Justice Ginsburg has observed, hopefully: “We live in an age in which our most cherished values—liberty, equality, and justice for all—are encountering extraordinary challenges. But it is also an age in which we can join hands with others who share those values and face similar challenges.” Ginsburg, supra note 86, at 10 (emphasis mine); see also Zillah Eisenstein:

Feminism(s) as transnational—imagined as the rejection of false race/gender borders and falsely constructed ‘other’—is a major challenge to masculinist nationalism, the distortions of statist communism and ‘free’-market globalism. It is a feminism that recognizes individual diversity, and freedom and equality, defined through and beyond north/west and south/east dialogues.


The excluded, whether people or countries, or even continents like Africa, are integrated in the global economy by the specific ways in which they are excluded from it. This explains why among the millions of people that live on the streets, in urban ghettos, reservations, the killing fields of Urabá or Burundi, the Andean Mountains or the Amazonic frontier, in refugee camps, occupied territories, sweatshops that use millions of bonded child laborers, there is much more in common than we are ready to admit.


99 Of course, the same applies to powerful conservative groups. They, too, are able to form transnational alliances and assist one another in new and increasingly effective ways. See Henry H. Perritt, Jr., The Internet is Changing the Public International Legal System, 88 Ky. L.J. 885 (1999-2000). Because of the potential for the less powerful to utilize transnational alliances, some powerful groups may also be interested in making transnational alliances more difficult altogether by constructing the discourse about norm development in terms antagonistic to the alliance formation process. See Hughes, supra note 89, at 169-170.

100 But see de Sousa Santos, supra note 98, at 1056: “[S]o far, theories of separation have prevailed over theories of union among the great variety of existing movements, campaigns, and initiatives.”
consequence of this information sharing and resource building, jurisdictions in different
countries have been targeted for law-reform and test cases. ¹⁰¹

This is most easily illustrated by a hypothetical. City ordinances, legal institutions and
political views may be sufficiently similar in Minneapolis, Minnesota and Toronto, Ontario, that
a Minneapolis organization trying to challenge a city ordinance may form an alliance with a
Toronto organization with similar goals. They may decide after reviewing their collective
research and strategy papers that Ontario judges will be more sympathetic to their shared legal
positions. The Minneapolis group may then decide to assist the Toronto group in making its
claim in Ontario in an effort to secure a favorable judgment in Canada that may in turn provide a
basis for a subsequent Minneapolis application. National interest groups have long done this
type of jurisdiction targeting within the United States, but economic integration and information
technology now make this increasingly possible internationally. ¹⁰²

The potential for disadvantaged groups in Canada and the United States to benefit from
this strategy would seem considerable. ¹⁰³ In addition to the benefits of information and resource

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¹⁰¹ One example can be found in the case of R. v. Butler [1992] 1 S.C.R. 452 (Can.), a Canadian
pornography case. In that case, the Supreme Court of Canada held for the first time that the test for
obscenity, which permits the government to criminalize, regulate or restrict pornography, was not
morality but harm to women. That is, pornography was cast as an equality issue; pornography was
viewed as diminishing women’s interest in equality, life, liberty and security of the person. Intervenors in
the case included several American organizations, but perhaps most significant was the participation of
American feminists in the drafting of briefs filed by Canadian feminists. The brief which is commonly
accepted as having had the most influence on the court was filed by the Canadian Women’s Legal
Education and Action Fund (LEAF). That brief benefited from the shared experiences of American
feminists, including Catharine MacKinnon, who saw an opportunity in Canada to advance women’s
equality in ways that had failed in the United States. They believed that the decision of the Supreme
Court of Canada represented a potential step towards eventually changing the legal definition of obscenity
in the United States and elsewhere.

¹⁰² The fact that some United States Supreme Court justices have recently referred to foreign judgments
favorably seems to suggest that American courts might be increasingly open to arguments based on

¹⁰³ The balance to be achieved, of course, is “to identify common ground in an indigenous struggle, a
feminist struggle, an ecological struggle, etc., without canceling out in any of them the autonomy and
difference that sustains them.” de Sousa Santos, supra note 95, at 1058.
sharing, transnational coalition-building presents a real, and arguably hopeful, challenge to the
divide-and-conquer strategies deployed by advanced capitalism and other forms of power.
Moreover, it permits groups interested in challenging and shaping family law norms to learn
from one another, and to share information and resources across national boundaries in order
to widen their strategies to include the possibility of a sort of international “forum shopping.”

4. Commercialization of Culture

Fourth, culture – at least in the United States – has arguably been subsumed within the
commercial. Culture is packaged and sold as a commodity. In many respects, it has become
inherently economic. Jeremy Rifkin has observed that “the absorption of the cultural sphere into
the commercial sphere signals a fundamental change in human relationships.” If it is true that
culture has become inherently economic – what philosophers Theodor Adorno and Max
Horkheimer have called the “culture industry” – then it would seem obvious that we cannot
engage in free trade only with respect to commerce or capital and not include some aspect of
culture. Even if we cannot accept the view that culture has been wholly subsumed within the

104 For a discussion about how the Hawaiian circuit court decision in Baehr v. Miike, No. 91-1394, 1996
WL 694235 at *1-22 (Haw. Circ. Ct., Dec. 3, 1996) may have been instructive for Canadians seeking to
expand the legal rights and obligations of same-sex couples in Canada (pre-dating Canadian court
decisions striking down marriage laws restricting the institution to opposite-sex couples), see Martha
Bailey, Hawaii’s Same-Sex Marriage Initiatives: Implications for Canada, 15 CAN. J. FAM. L. 153
105 JEREMY RIFKIN, THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM, WHERE ALL OF
LIFE IS A PAID-FOR EXPERIENCE 11-12 (2000).
106 Id., cited in Don Mayer, Community, Business Ethics, and Global Capitalism, 38 AM. BUS. L. J. 215
(2001). Interesting connection(s) between culture and the economy have been played out in the context
of the National Trust for Historic Preservation’s designation of Vermont as “endangered” by Wal-Mart
expansion. See Pam Belluck, Preservationists Call Vermont Endangered by Wal-Mart, N.Y. TIMES, May
107 THEODOR ADORNO & MAX HORKHEIMER, DIALECTIC OF ENLIGHTENMENT 120-168 (1972). See also
Dyer-Witheford, supra note 78, at 50.
commercial, there can be no doubt that there are cultural goods and cultural services, and that culture is shaped by commodities.

Gay and lesbian media is one obvious example of the reflexive relationship between culture and commodities. Another is tourism. In British Columbia, for example, the tourism industry is essential to the provincial economy. For the purposes of that industry, sexual orientation has become a commodity, and gay and lesbian people have become a market. Consider, for example, that marriage license registries in British Columbia and Ontario were kept open twenty-four hours a day over the 2003 Gay Pride weekend in order to attract gay and lesbian American tourists, who could not get married at home. Tour groups in Vancouver and Toronto offered “wedding packages” for same-sex couples who wanted to board a bus or airplane in the United States and get married in Canada over Gay Pride weekend. These

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108 See Robinson, supra note 21 (arguing that American culture may be commodified, but Canadian culture is not).
109 Professor Joel Paul notes that cultural anthropologists view culture as material production. Paul, supra note 15, at 41.
110 See www.hellobc.com (the official web site of Tourism British Columbia).
111 For a discussion about the intersection of identity and capitalism, see e. christi cunningham, Identity Markets, 45 HOW. L.J. 491 (2002). For a discussion about another “gay market”—the retirement market—see Lee Hockstader, Gray and Gay? These Communities Want You, WASH. POST, May 31, 2004, at A01. In that article, it was reported that:

Largely unnoticed amid the uproar and invective over same-sex marriage, gay developers, activists and entrepreneurs are building an archipelago of gay retirement communities across the Sun Belt.

The projects, mostly unopposed and in at least one instance a beneficiary of federal tax breaks, are striking in their variety and ambition, reflecting what their backers describe as a huge untapped market of aging gay men and lesbians in all income brackets.

Id. (emphasis mine).

112 See Foreign Desk, Toronto Dash to Gay Unions, N.Y. TIMES, June 24, 2003 at A6. A complete list of places that would issue marriage licenses in British Columbia over pride weekend could be found at www.vic.gov.bc.ca/marriage/index.html.
113 For an interesting account of the Canadian gay and lesbian wedding “business”, see Sarah Robertson, Journeys: Mining the Gold in Gay Nuptials, N.Y. TIMES, Dec. 19, 2003 at F1, an article in the travel section of the Times. She reports that Gloucester Square Inns in Toronto was offering three-day gay wedding packages from $725 to $3,260 (all priced in U.S. dollars). And the Westin Resort and Spa in Whistler had been marketing a Honeymoon in the Mountains package to gay and lesbian couples. The Coast Plaza at Stanley Park in Vancouver is “promoting its indoor garden lobby and rooftop for same-sex ceremonies.” And eight same-sex wedding specialists, “handling everything from finding venues to
couples were targeted as the gay and lesbian “marriage market.” A 2003 New York Times article discussing this new market bore the title, “Mining the Gold in Gay Nuptials,” and led with this paragraph:

THERE may be plenty of people excited about the prospect of legalized gay marriage in Massachusetts, but Canadian tourism officials are probably not among them. That is because the provinces of Ontario and British Columbia, where same-sex marriage has been legal since the summer, have been doing brisk business, attracting gays and lesbians from the United States who want to tie the knot.

A 2004 Washington Post article about same-sex marriage in Massachusetts, titled “At Expo, Few Disagreements on Gay Marriage,” carried the subtitle, “Wedding Planners Foresee Expanded Market in Massachusetts.” The article reports that there is “little controversy [about same-sex marriage] among those in the wedding industry for whom more marriages mean essentially one thing: more customers.”

In the Mexican context, similar sentiments were reported in a recent article about the emergence of Puerto Vallarta as a “premier destination on the gay travel map, joining a growing

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114 Bob Tosner, cited in Robertson, id.
115 Id.
117 Id. (emphasis mine). Finer reports that Richard Martel, president of the Association for Wedding Professionals International, recently surveyed 20,000 industry members on the subject of same-sex marriage, and the support was unequivocal – virtually unanimous. Out of 50 members of the Boston Wedding Group, a local industry organization, only one did not want to be involved in same-sex weddings. Only 15% of the 4,000 vendors at the Cambridge Hotel Gay and Lesbian Wedding Expo on Sunday May 2, 2004 were gay or lesbian-owned. Id. Clearly, weddings are big business.
roster of places that are drawing gay and lesbian travelers.”118 In response to a question about
the social climate in Puerto Vallarta, one businessperson answered: “It’s economics…. There is
tolerance and acceptance because we [gay men and lesbians] bring a lot of money into the
community.”119

Gay and lesbian consumers represent an estimated $450 billion in purchasing power
annually in the United States, and Forbes magazine has estimated that the size of the potential
market for same-sex marriages in the United States to be $16.8 billion a year.120 It is difficult to
imagine that American businesses are prepared to forego that market,121 while their Canadian
counterparts do not, when the commodification and commercialization of culture is consistent
with capitalist ideology. The United States is a market economy. Markets are cultural, both in
the sense that cultural norms govern market behavior122 and in the sense that culture defines and
constructs markets. In these circumstances, it seems unlikely, if not impossible, that the United
States can hold the line at same-sex marriage when the United States itself drives the global
commodification of culture.123

118 David Kirby, Rainbow Beach Towels on Mexican Sand, N.Y. TIMES, May 16, 2004 at 57.
119 Id. (emphasis mine). Indeed, the Greater Philadelphia Tourism Marketing Corp. has apparently
“found” gay visitors “to be avid travelers and to spend more money than straight tourists.” Robert
Strauss reports that the Greater Philadelphia Tourism Marketing Corp. (GPTMC) is the first government-
supported agency to attempt to attract gay and lesbian tourists through television advertising in the United
States. Research commissioned by the GPTMC found that gay and lesbian travelers spend about $54
billion a year, and “that they spend $500 per two-day domestic trip, traveling on average three or four
times a year”. Strauss, id. In that same article, Strauss reports that Tourism Montreal has been targeting
gay and lesbian travelers for over a decade. Id.
120 Finer, supra note 116, at 34.
121 Relatedly, at the request of the Hon. Steve Chabot, Chair, Subcommittee on the Constitution,
Committee on the Judiciary, the Congressional Budget Office earlier this year prepared an analysis of the
potential budgetary effects of recognizing same-sex marriage. That report is available on-line at
www.cbo.gov/showdoc.cfm?index=5559&sequence=0 (last visited by me on Oct. 21, 2004).
122 Edelman, supra note 35, at 192.
123 Other obvious examples of connections between the economy and culture include family laws, and
related estate and tax rules, which regulate how wealth is inherited, accumulated and distributed.
Financial planning for wealthy families is a huge industry in the United States. Wealthy gay and lesbian
5. The Global Capital Project and Privatization

The erosion of trade barriers between Canada and the United States represents only one prong of a larger project: to make capitalism global. Historically, Canada has been identified as a social democracy – a “welfare state” – rather than a pure market economy. The United States has been identified more clearly with the latter. Because the United States is the more powerful economy, economic integration in North America has meant, at least in part, the Americanization of the Canadian economy and the subsequent dismantling of many welfare programs in Canada. Ironically, though, same-sex marriage is consistent with one of the hallmarks of American capitalism: the privatization of caretaking. Same-sex marriage simply expands the category of the state-sanctioned private caretaking sphere, turning what are arguably collective or public responsibilities, such as health care and child care, into individual ones.

families are as interested in financial and estate planning as any other wealthy families. As a transnational group, they represent a great deal of wealth and therefore arguably an increasing deal of clout. Ably assisted by the technological advances described above and the enhanced mobility in the non-immigrant context described below, wealthy gay and lesbian Canadians who are able to marry and benefit from the same privileges enjoyed by wealthy heterosexual Canadians, are sharing this information with their wealthy American counterparts, backed in no small measure by the powerful financial planning industry.


125 Susan Boyd and Claire Young give us some examples of how the Canadian government saves money by extending marriage “benefits” to same-sex couples. Boyd and Young, supra note 126, at 774-775. In British Columbia, immediately following the ground-breaking decision, Knodel v. British Columbia Medical Services Ass’n, [1991] 6 W.W.R. 728, 58 B.C.L.R. (2d) 356 (C.A.), in which the British Columbia Court of Appeal found that restricting the definition of spouse to someone of the opposite sex for the purposes of providing medical services violated the equality provisions of the Canadian Charter of Rights and Freedoms, the provincial government introduced legislation to change the definition of spouse to include same-sex partners for the purpose of welfare benefits. The effect of this was to reduce the amount of benefits payable to gay and lesbian recipients in long-term relationships.
I suspect that the legalization of same-sex marriage in Canada had as much to do with the rapid privatization of previously public services (i.e. the Americanization of the Canadian economy) as it did with social and cultural views. It is certainly consistent with another recent development in Canadian law: the extension of maternity leave to one year. As in the case of same-sex marriage, the one-year maternity leave has been celebrated by many feminist groups and other progressive organizations. But the extension of maternity leave to one year, at the same time that other government programs for women and children have been cut, has raised some red flags. In the context of social welfare and other program cuts, one year off paid work for individual mothers (granted on a case-by-case basis, depending upon her employment situation) so that she can care for young children without other forms of public support, starts to look more like a responsibility and less like a benefit. At a minimum, the fact that private caretaking responsibilities have been extended while public services have been taken away complicates the celebration.

It seems to me that if the legalization of same-sex marriage in Canada is politically and philosophically consistent with the American economic model, and North American economic integration is part of a larger project to make the American economic model global, then Americans have reason to believe same-sex marriage – i.e., the further expansion of the private care-taking sphere – will become important to large economic actors in the United States. In other words, the federal government (which is facing the largest deficit in history), multinational insurance companies, and other corporations awarded government contracts for what were

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126 See Grinspun & Kreklewich, supra note 9; and Cohen, supra note 9.
127 See Calder, supra note 9, at 8: “Restructuring can be seen as the act of implementing the values of globalization in the nation’s economic, social and political systems.” See also, SHELAGH DAY & GWEN BRODSKY, WOMEN AND THE EQUALITY DEFICIT: THE IMPACT OF RESTRUCTURING CANADA’S SOCIAL PROGRAMS (Ottawa: Status of Women Canada, 1998); PATRICIA M. EVANS & GERDA R. WEKERLE, EDS., WOMEN AND THE CANADIAN WELFARE STATE (1997); and BRENDA COSSMAN & JUDY FUDGE, EDS., PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM (2002).
previously understood as public services, will all be interested in expanding the private caretaking sphere in order to save money. One way to do this in a relatively short period of time is to broaden the definition of family. And experience tells us, at least in the United States, that when the insurance industry and large government contractors become interested in change, they bring enormous pressure to bear on politicians and other decision-makers.

6. Human Mobility in the Non-Immigration Context

A sixth recent development that challenges historical understandings of norm harmonization is increased human mobility. The North American Free Trade Agreement provides for the movement of people among member states in a non-immigration context, so that strict immigration rules, designed in part to protect “American” culture, no longer keep people out of the United States. Under NAFTA, certain professionals, such as doctors, lawyers, and law professors, are able to work in other NAFTA countries. These professionals do not need to satisfy the onerous criteria for permanent workers, and so it is easier than ever for them to travel between Canada and the United States for work. Their status is temporary; permits are given for one-year periods. They can only attain a TN (work permit) if their intention is to return to their home country rather than immigrate. Nevertheless, the presence of Canadians in the United States and Americans in Canada for extended periods of time, albeit temporarily, means that cultural ideas are shared in context. An American lawyer in Vancouver will be daily exposed to Canadian media; more importantly, however, she will see Canadians, some of whom are gay and lesbian and some of whom are married, living their lives. She will see that the world went on in

any case; heterosexual people continue to marry at about the same rate and with the same success as before, and the republic has not crumbled. In other words, she will have personal experience with Canadian relationships and Canadian culture.

Similarly, Canadians who travel to the United States to work under NAFTA presumably bring some part of their culture with them. Because Canadians and Americans can visit one another without visas for as much as six months at a time, they may even bring their same-sex partners for some or all of their stay. When these Canadians return to Canada, they leave behind them friends and memories that continue in their absence. In this way, Americans are and will continue to be exposed to Canadian relationships and culture even if they never travel to Canada themselves.

7. Global Education

Also related to technological changes and enhanced human mobility has been the increased presence of foreign students at American universities. Indeed, many graduate law programs in the United States are now aimed at international students. Many Canadians, particularly Canadian law teachers, have been educated at American universities. As only one example, a recent visit to the law school faculty page of the University of Toronto website revealed that of

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129 This is certainly true for most LL.M. programs in the United States. As just one example, the 2004-2005 LL.M. class at Cornell Law School is made up of 62 students from 28 countries, none of whom were educated at U.S. law schools prior to attending Cornell (although a few are American citizens). Email from Dean Charles Cramton to Laura Spitz, dated September 7, 2004 (on file with author). Similarly, a visit to the Harvard Law School website revealed that: “The LL.M. (Master of Laws) program … typically includes 150 students from more than 60 countries.” See http://www.law.harvard.edu/academics/graduate/ (last visited Oct. 6, 2004).
the sixty-one full-time law faculty listed, thirty-nine had at least one American university degree.\(^{130}\)

Again, as with the movement of professionals between Canada and the United States, this contributes to what former Canadian Supreme Court Justice Claire L’Heureux-Dubé calls “cross-pollination” of culture.\(^{131}\) In the education context, it means that young Americans, at a very formative time in their lives, are increasingly exposed to foreign cultures. Trite though it may sound, these young Americans are the future politicians, judges and business people of the United States. Consequently, their exposure to Canadian and other cultures may have more of an impact on the future development of American law than the exposure of other American populations to the same cultures.

8. Investors: The Interplay of NAFTA and Immigration Rules

Recently, arguably racist immigration policies, aimed at excluding certain people from the United States in order to protect “American” culture, have been challenged and complicated by the simultaneous operation of NAFTA and immigration investor rules. It has always been true that each of the member states has had special immigration rules for investors. Canada, for example, permits those who invest a certain amount of money in Canada to apply for landed immigrant status.\(^{132}\) But under NAFTA, Canada, Mexico, and the United States cannot

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\(^{131}\) L’Heureux-Dubé, supra note 88, at 17, 22. But see Robert M. Cates, International Relations 101, N.Y. TIMES, March 31, 2004, at A2 (post 9/11 policies making it more difficult to get a visa to come to the United States has meant that a growing number of young people are deciding to stay home or go to other countries for their education); and Steven C. Clemons, Land of the Free?, N.Y. TIMES, March 31, 2004, at A2 (post 9/11 changes to visa application process make it increasingly difficult for people to travel to the United States from developing nations).

\(^{132}\) There are three classes of permissible Business Immigrants in Canada: entrepreneurs, investors and self-employed business people. Immigration and Refugee Protection Regulations of Canada, SOR/2002-227, part 6, div. 1; Immigration and Refugee Protection Act of Canada, S.C. 2001, c. 27, s. 12. Investors
discriminate against American, Mexican and Canadian investors on the basis of nationality.\footnote{133 For a discussion about foreign direct investment in Canada and the United States under NAFTA, see Steven Globerman & Daniel Shapiro, \textit{Assessing Recent Patterns of Foreign Direct Investment in Canada and the United States}, in Harris, \textit{NORTH AMERICAN LINKAGES}, \textit{supra} note 128, at 281.} By disallowing member-states to discriminate against foreign investment from other member-states, NAFTA would seem to require Canada, the United States, and Mexico to give investors from member-states the opportunity to satisfy immigration criteria. That is, by virtue of the investment provisions of NAFTA, wealthy Canadians, Americans, and Mexicans may in fact move freely within North America, regardless of race.\footnote{134 This is complicated by the fact that currency values and relative wealth mean that Canadians and Americans are more likely than Mexicans to satisfy the investor criteria. For a more in depth discussion of the interaction between NAFTA anti-discrimination provisions and investor immigration rules, see Spitz, \textit{Enron}, \textit{supra} note 9.} In this way, NAFTA essentially provides for an end-run around historically racist immigration policies for a limited class of wealthy people. Like temporary TN workers, these investors bring with them and share their cultural norms and information.

\footnote{must have a minimum net worth of \$800,000 (Canadian). Immigration and Refugee Protection Regulations, s. 88.}

As with NAFTA, U.S. tax treaties regularly contain non-discrimination provisions. For example, article XXV, para. 1 of the U.S.-Canada tax treaty provides:

Citizens of a Contracting State, who are residents of the other Contracting State, shall not be subjected in that other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of that other State in the same circumstances are or may be subjected.

When that treaty was ratified in 1980, definitions of marriage in Canada and the United States were similarly restricted to one man and one woman. But recent changes to that definition in Canada – together with enhanced mobility possibilities under NAFTA – mean that some Canadian same-sex married couples will undoubtedly be living in the United States as resident aliens subject to U.S. income tax. Applying the non-discrimination clause to those couples, it might read something like:

[Married] citizens of [Canada], who are resident of the [United States], shall not be subjected in [the United States] to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of [the United States] in the same circumstances [or, who are also married] are or may be subjected.

As will be immediately obvious, much will turn on the meaning given to the phrase: “in the same circumstances.” If, however, it means “legally married,” then one can see how Canadian same-sex married couples residing in the United States might argue that the Internal Revenue

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137 Infanti explores what “in the same circumstances” might mean more fully in his article. Id. at 566-567.
Service (IRS) must treat them as it does opposite-sex married U.S. citizens. It will not be an easy sell in today’s political climate, of course, but should those couples be successful, it is difficult to imagine that American same-sex couples – particularly those lawfully married according to state or foreign law – would be content to have Canadian same-sex couples treated more favorably by the IRS than they are.

The legislation that complicates this situation is the federal Defense of Marriage Act.138 The IRS has recently stated that same-sex couples who are married under state law are ineligible to file a joint federal income tax return.139 In coming to this decision, presumably the IRS relied on DOMA, which provides that when interpreting any federal law, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”140 Whether or not DOMA is constitutional and/or the IRS is correct in taking this position is a matter of some debate. More interesting to me, however, is how this might be complicated by international treaties, and in particular, tax treaties. In a recent Tax Notes report, Anthony Infanti looked at the question of whether the IRS can rely on DOMA to discriminate against foreign same-sex married couples notwithstanding the presence of non-discrimination clauses in applicable tax treaties.141 He concludes that it ought not be able to do so.142 Recent experiences with transnational alliance-building and litigation strategies suggest that it is only a matter of time

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139 Infanti, supra note 136, at 563.
140 DOMA, supra note 138, at section 3(a). Cited in Infanti, supra note 136, at 566. There are almost endless possible implications of the state statutory and constitutional DOMA’s, all beyond the scope of this article.
141 Infanti, supra note 136, at 566.
142 Id. at 572.
before a Canadian same-sex married couple challenges both the constitutionality of DOMA and
any IRS ruling against them under the U.S.-Canada tax treaty.

10. Transnational Regional Similarities in an Era of Enhanced Communication

It has always been true that in countries as vast and geographically diverse as Canada and
the United States, transnational regional similarities may be more pronounced than national ones.
That is, Maine may have more in common – historically, economically, politically,
geographically, culturally – with New Brunswick than with New Mexico just as British
Columbia may have more in common with Washington than Quebec. However, regional
interchange, at least in the context of law, has historically “seemed to fall to the forces, however
artificial in the largest sense, that direct our legal attention along national rather than regional
lines.”143

Nevertheless, increased human mobility and enhanced communications, together with
international economic integration, means that these regions are now better able to recognize and
communicate about their similarities. Shared waterways, industries or agriculture, only make
this communication and integration easier. In addition, some of these regions may share some of
the same concerns vis-à-vis their respective national governments, and form coalitions for the
purpose of expressing those concerns. In an increasingly fragmented world, they may find that a
shared history and a shared economy are a sufficient basis for cultivating stronger transnational
relationships; indeed, they may feel something akin to a regional, transnational identity. The
interchange incident to these regional relationships can’t but spill over into cultural matters such
as family formation and regulation.

143 Gerard V. La Forest, The Use of American Precedents in Canadian Courts, 46 ME. L. REV. 211, 212
(1994). At the time of writing this article in the Maine Law Review, the Hon. Gerard LaForest was a
justice of the Supreme Court of Canada.
11. Transnational Families, Transnational Identities (or “Multiple Nationality Disorder”)

Enhanced communication and mobility has meant that transnational marriages and other transnational family-like relationships\(^{144}\) have become increasingly common. The Hague Convention on Private International Law “has led the contemporary effort to harmonize the rules of family law”\(^{145}\) among nations, particularly with respect to marriage, divorce, cohabitation, child abduction and child protection.\(^{146}\) But it cannot possibly keep up with the rapid changes described herein. Transnational family relationships pose a direct challenge to any claim that national culture and international economic integration can be separated. At the same time, these relationships provide a poignant example of how national borders can be more or less important, depending on the context.

The increase in the number of transnational families resulting from trade liberalization, relatively easy travel and enhanced communication, has given rise to a sharp increase in the number of people who feel or express multinational identities. Particularly in Europe, children are increasingly multinational citizens and/or multinationally identified. What this means for identity in general, and national identity in particular, are open questions.

At a conference in New Haven last year,\(^{147}\) I met a woman born and raised in Poland,\(^{148}\) studying in the United States, engaged to be married to a man from Spain, with plans to work

\(^{144}\) The concept of “transnational families” is being increasingly employed in legal scholarship. See, e.g., Ann Laquer Estin, Families and Children in International Law: An Introduction, 12 TRANSNAT’L L. & CONTEMP. PROBS. 271 (2002). Also, see generally, FAMILIES ACROSS FRONTIERS (Nigel Lowe & Gillian Douglas, eds., 1996).

\(^{145}\) Estin, supra note 144, at 273.

\(^{146}\) Id. at 273-280.


and make a life in Belgium. Early in our very first conversation, she expressed anxiety about whether her future children would feel a national identity – an identity she equated with a sense of “home” – and if not, whether they would suffer for that disconnect. This is a very real question for Europeans today. I am a Canadian (of Ukrainian and English descent), living in the United States with my American partner (of English, German and Cherokee descent). My son is a Canadian (of Ukrainian, English, East African, West Indian and East Indian descent). My son and I moved to the United States just before he entered first grade, and he seems to regard himself as American, Canadian, Ukrainian, English, East Indian, West Indian, East African, English, German and Cherokee. Is this what it might mean to be “Canamerican” or North American in the 21st century?

What are the implications of transnational or multinational identity for the evolution of national and/or transnational culture? What are the implications for citizenship? In her recent article, “Multiple Nationality and the Postnational Transformation of Citizenship,” Linda Bosniak tackled the relationship between identity and citizenship in the face of economic globalization and multiple nationalities.

In the course of characterizing these various developments, many scholars have shown a particular concern with the ways in which transnationality-in-fact leads to transnationality in subjective experience. One prominent analyst [Alejandro Portes] has written that transnationalism entails “the gradual growth of communities that sit astride political borders and that, in a very real sense, are ‘neither here nor there’.” It is the experience of being “neither here nor there”–or, stated more affirmatively, being located in a “third space” beyond the parameters of any individual nation-state–that shapes the sense of postnational identity to which many commentators refer. Scholars have developed concepts that seek to capture this experience—including hybrid identity, transnational identity, deterritorialized identity, and liminality—to express this phenomenon. The psychic phenomenology of “diaspora” is closely linked in the literature with this sense of subjective multiple location and/or rootlessness as well.

I am drawn to the descriptive notion of “neither here nor there.” It is with some sense of irony that I make the following observations: the phrase “multiple nationality” sounds like a

149 See Bosniak, Multiple Nationality, supra note 98 (identifying and exploring some of the issues raised by multinational citizenship and transnational identity).
150 Id. at 989 (footnotes omitted).
psychiatric disorder; “multiple nationality disorder” sounds like a psychiatric diagnosis! I am only half-joking when I wonder if this might be what my New Haven conference colleague meant when she worried about the effect of multiple nationalities on her future children.

Anne Marie Slaughter has described the effects of economic integration on national sovereignty as having transformed political boundaries “into a network of overlapping regulatory jurisdictions.”151 In some sense, this is also true for individuals. In an increasingly integrated world, we are all a network of overlapping regulatory memberships or identities. What all this might mean for culture has not yet been determined. At a minimum, however, in very integrated regions such as Europe and, to a lesser extent, North America, claims to national culture, and any assertion that “it” (whatever “it” may be) can be protected, are complicated by multinational and transnational identities.

D. Comparative Law, International Law, Transnational Phenomena and a Porous Border: Evolving Areas of Inquiry and Methodological Challenges

So far I have argued that recent legal, political, social, economic and technological changes – changes which are both facilitative of, and consequential to, the global capital project – have made it increasingly unlikely that the United States can enjoy the economic “benefits”152 of NAFTA without some cultural integration with Canada. For all the reasons described in Part C, I have come to the conclusion that the United States cannot expect economic integration without some version of same-sex marriage.153

151 Slaughter, A New Look, supra note 76, at 138.
152 Many would not characterize the consequences of NAFTA to the U.S. as beneficial.
153 Having said that, I am not suggesting complete integration or harmonization. The United States itself, for example, is economically and politically integrated, but retains important local cultural differences within its borders. There is every reason to believe this will happen transnationally and internationally as well. But some cultural differences are more difficult to retain in the face of economic integration than
But same-sex marriage is only one example – albeit a marvelous one – of the inherent tension between an economic policy which favors international and transnational integration, and a foreign policy which grounds itself in political and cultural isolationism. The schizophrenia of the American position has put a tremendous strain on jurists and scholars seeking to develop explanatory and prescriptive theories about the effects of trade liberalization, and prevented the United States from having an honest discussion about the implications of NAFTA and other free trade agreements.

Given this tension and the changes described in Part C, how do we understand, navigate and negotiate legal responses to cultural evolution, economic transformation and norm harmonization? In thinking about whether a Canadian cultural norm or law might become a norm or law in the United States, one might instinctively look to either international legal method or comparative legal method. I am interested in whether international legal method, comparative legal method, or some combination of them, is up to the task of understanding,

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154 Comparative law is by no means a monolithic discipline. Within the discipline, there are a wide range of views on meaning and method. In a 1997 article, David Kennedy roughly divided comparativists into three broad geographic categories and two broad methodological styles:

Geographically, we find work predominantly concerned with the Western tradition and differences within it (say between civil and common or capitalist and socialist law), work focused on non-Western cultures (typically studied in their specificity rather than in explicit relation to the civil/common or capitalist/socialist traditions of Western law) and work which styles itself universal or global in its reach. At the same time, for all the discipline’s internal divisions among historicists, idealists, functionalists, and so forth, at the broadest level of intellectual style we can differentiate two types, which I think of as “technocrats” and “culture vultures.”

participating in, and managing the legal and cultural developments attendant to international
economic integration and global capitalism. I believe the answer is “not entirely.”

1. Comparative Law

Five years ago, Annelise Riles published a thought-provoking article about comparative law “in the era of information.” In that article, Riles concluded (among other things) that globalization is characterized by a great excess of information. What is ultimately needed from comparative law, from Riles’ perspective, is “an antidote to an excessively self-aware, self-reflexive, self-informed world.”

What is needed are [sic] … not empirical findings…, nor is it a critique of context and categories for their inadequacies as representation devices. Instead, what is needed… [is] a passion for comparison itself.

[A] possibility for legal reform [is more likely] to go unconsidered, for example, because of a lack of interest, empathy, or faith in the possibility of engagement with difference than because of a lack of information about things foreign.

The contribution of comparative law emanates not from its pseudoscientific, information-gathering pretenses. Rather… [w]hat comparativists share, as much as a body of knowledge, a set of methods or techniques, or even common research questions, is a passion for looking beyond, an empathy for differences but also for similarities, a faith in the self-transformative task of learning, and an interest in the form of knowledge itself.

There are at least four themes in Riles’ paper to which I am drawn.

First, I agree that in many respects we may suffer from an information overload. An abundance of information about culture, law, economics, sociology, et cetera, is literally at our fingertips. What seems to be missing, however, is a focus on ways to organize and use that information to take account of the challenges posed by global capitalism and the attendant changes described in Part C above.

Second, I am persuaded that a passionate commitment to interest and empathy, a faith in the possibility of engagement with difference and similarity, and a renewed spirit of

155 Riles, id. at 221.
156 Id. at 281-82.
157 Id. at 229.
experimentation are critical to participating in valuable comparativist work (not to mention, participating in North American democracy more generally). Indeed, they are critical to participating in all manner of legal and other methods.

Third, I am convinced that the combination of economic globalization, the increasingly transnational nature of capitalism, and the demands these phenomena create “in all aspects of legal scholarship and practice, calls for a reconsideration of the rules.”¹⁵⁸ (Riles observes that this would seem to be “precisely” the task of comparative law, and this is one of the points where she and I may part company. I will come back to this.)

Finally, it may be the case that comparativists’ shared passion for the discipline unites them/us, or at least has that potential. A renewed interest in comparative law has ignited “within the discipline a raging debate over purposes and methods.”¹⁵⁹ Foci for that debate include the question of scale of comparisons to be made, the status of non-European legal systems in comparative law, and the place of instrumentality in comparative law.¹⁶⁰ But, as I think Riles correctly points out, comparativists should be able to see the discipline itself as a source of common ground. It is not to say these debates and differences aren’t important. It is to say, however, that regardless of where we stand on any of the issues raised by intra-discipline debates, and regardless of how we define comparative law and our role in it, all comparativists have a role to play in the future of the discipline, and in its future in helping us to understand and manage the effects of international economic integration and global capitalism.

¹⁵⁸ Id. at 223 (emphasis mine). In a similar vein, Professor Reimann argues that “[c]omparative law should occupy a central place [in legal academia and practice] in an environment in which transboundary issues have become routine.” Mathias Reimann, Beyond National Systems: A Comparative Law for the International Age, 75 TUL. L. REV. 1103, 1104 (2001).
¹⁵⁹ Riles, supra note 154, at 225.
¹⁶⁰ Id.
Having said that, is comparative law the best method for a “reconsideration of the rules”? It depends, in some part, on what we mean by “rules”. Riles states that the impetus for a “reconsideration of the rules” is the “fascination with things global, and the demands that this creates in all aspects of legal scholarship and practice.”\(^{161}\) By rules, she can’t possibly mean all rules, period. Similarly, I don’t think she means only the rules by which we apply comparative legal method, because she goes on to say that a reconsideration of the rules “would seem to be precisely the task of comparative law.” She must mean the rules implicated by the changes brought about by what is commonly and loosely referred to as “globalization”.\(^{162}\) Is this reconsideration best accomplished by comparativists? As I said above, I believe the answer is: not entirely.

Here are the three ways in which I believe comparative legal method is increasingly useful.\(^ {163}\) First, because comparative method requires a contextualized\(^ {164}\) analysis of sameness as much as of difference, then it may be able to provide a framework for analyzing and comparing cultural norms in Canada and the United States, *provided the larger context of transnational capitalism and economic integration are accounted for*. In the absence of that larger context, comparison is almost certainly inadequate to the task of understanding and managing the effects of global capitalism on both Canada and the United States, as well as their transnational relationship(s).

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\(^{161}\) *Id.* at 223.

\(^{162}\) I have argued elsewhere for being specific about meaning when using the word “globalization”. *See* Spitz, *Enron, supra* note 9.

\(^{163}\) For another view of how comparative law might contribute to the debate about the changing nature of nation states, democracy and the law, see Igor Stramignoni, “Mediating Comparisons, Or The Question of Comparative Law,” in 4 San Diego Int’l. L. J. 57 (2003).

\(^{164}\) For a discussion about how comparative method fails if analysis is not contextual, see Martha L. Fineman, *Contexts and Comparisons*, 55 U. CHI. L. REV. 1431 (1988) (reviewing Mary Ann Glendon *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987)).
Second, depending on where you find yourself in the debates about nationhood, the future relevance of nationality, and the future of the nation-state as the appropriate political or economic unit for analysis, comparative law could be invoked to reassert a role for the state in an increasingly integrated world.\textsuperscript{165} Any claims to national culture as knowable and protectable might be supported by emphasis on the fact and value of difference as between “national cultures.”

A third and arguably much more significant role for comparativists is comparison of trading blocks, international regions, transnational alliances, supranational regimes,\textsuperscript{166} and the like. I started this paper with questions about the potential constitutionalization of a North American polity. Is NAFTA a kind of constitution?\textsuperscript{167} Does some constitutionalization inevitably flow from economic integration?\textsuperscript{168} In order to answer these questions and understand

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\item Saskia Sassen argues for reasserting a role for the nation-state in \textit{The Participation of States and Citizens in Global Governance}, supra note 20 (the pursuit of global democratic governance cannot be confined to global institutions; national state institutions and nation-based citizens need to be part of this project).
\item See, e.g., Susan H. Shin, \textit{Comparison of the Dispute Settlement Procedures of the World Trade Organization for Trade Disputes and the Inter-American System for Human Rights Violations}, 16 N.Y. INT’L L. REV. 43 (2003). Mathias Reimann has urged comparativists to integrate study of international and supranational regimes into mainstream comparative law, and move away from the comparison of national legal systems. \textit{See} Reimann, supra note 158, at 1104. Indeed, he argues, transnational systems have yet to be explored. Our discipline has produced almost no comparative knowledge about, or understanding of, their genesis, institutions, actors, sources, and processes. Nor has comparative law explored the relationship among supranational systems or between them and national laws. Here, we are at the very beginning and need all the knowledge we can get. \textit{Id.} at 1113. He argues that while some of this can be done with traditional tools, other parts present serious challenges to traditional comparative method. \textit{Id.} at 1105.
\item As stated above, Professor Maravel has argued that NAFTA has the attributes of a constitution. \textit{See} supra note 6. For a discussion about the limits and benefits of North American monetary integration, see Sven W. Arndt, \textit{The Pros and Cons of North American Monetary Integration}, in Harris, \textit{NORTH AMERICAN LINKAGES}, supra note 130, at 391. For a discussion about the potential for constitutionalizing a transnational federalism, see Delbrück, supra note 6.
\item This is a question to which Europe has provisionally answered: yes. For discussions about connections between the common market and the constitutionalization of Europe, see Jürgen Habermas, \textit{Why Europe Needs A Constitution}, 11 NEW LEFT REVIEW 5 (2001); \textit{JOSEPH H. H. WEILER, THE CONSTITUTION OF EUROPE: ‘DO THE NEW CLOTHES HAVE AN EMPEROR?’ AND OTHER ESSAYS ON EUROPEAN...}
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the potential for family law harmonization in North America as an economically integrated
region, I believe that comparison with other inter-state trading blocks is not only useful, but
critical. MERCOSUR, for example, is a South American alliance joined together in the trade
liberalization effort. Like NAFTA, it is relatively young and it is structured as
intergovernmental rather than supranational. For these reasons alone, MERCOSUR may be
worth comparing with NAFTA.

The European Community is much further along the path of economic integration than
the NAFTA member-states, and today represents only one arm of a much larger European
Union project. Whether or not the NAFTA member-states follow in the footsteps of the

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169 MERCOSUR is described supra note 4. Other South and Central American (sub) regional integration
movements include CARICOM, the Andean Community, and the Central America Common Market. See
Sheldon MacDonald, *The Caribbean Court of Justice: Enhancing the Law of International
Organizations*, 27 FORDHAM INT’L L. J. 930, 944 (2004). For a general overview of common markets,
trade arrangements, preferential programs and broader regionalism initiatives in South America, see
generally Frank Garcia, ‘*Americas Agreements*’ – An Interim Stage in Building the Free Trade Area of
the Americas, 35 COLUM. J. TRANSNAT’L L. 63 (1997), and J. Steven Jarreau, *Negotiating Trade
Liberalization in the Western Hemisphere: The Free Trade Area of the Americas*, 13 TEMP. INT’L &

170 The arrangement commonly referred to as the European Union traces its history back to the three
European communities established by the Treaties of Paris and Rome in the 1950’s: the European
Economic Community or EEC (Treaty of Rome, signed March 25, 1957, effective January 1, 1958), the
European Atomic Energy Community or EURATOM (Treaty of Rome, signed March 25, 1957, effective
January 1, 1958), and the European Coal and Steel Community or ECSC (Treaty of Paris, signed April
18, 1951, effective July 23, 1952 for a limited period of fifty years). The EEC, with its broad range of
competences, soon became the most important of the three treaties, and was amended and modified
several times. Three of the most important treaty revisions were affected by the Treaty on European
Union or the Treaty of Maastricht (signed February 7, 1992, effective November 1, 1993), whereby (1)
the EEC institutions were strengthened and given broader responsibilities; (2) the EEC was renamed the
European Community (EC), acknowledging that despite the importance of its economic objectives, the
Community had become something more than simply a common market and economic integration
project; and (3) the European Union was established. The Treaty of Maastricht sets up the EU as a sort of
“roof”, supported by three “pillars”: (1) the EC (formerly the EEC, EURATOM, and ECSC); (2) the
Common Foreign and Security Policy (CFSP); and (3) the Police and Judicial Cooperation in Judicial
Matters (PJCC). Only the first pillar is supranational. It is characterized by qualified majority voting in
the Council of Ministers, jurisdiction in the European Court of Justice, and the principles of supremacy,
subsidiarity, and direct effect. The other two pillars encompass areas of national competence and
European Community, it is useful for North Americans to understand how social and political union in Europe emerged as part of economic integration. At a minimum, it helps us to understand the cultural implications of economic integration in the European context. The European Community experience provides insight into the connections between economic integration, political integration, cultural integration, and social integration. Understanding intergovernmental cooperation, meaning that there is no intended transfer of national sovereignty. All decisions in the Council of Ministers are taken unanimously or by qualified majority, and the European Court of Justice has no jurisdiction. The new draft treaty establishing a Constitution for Europe is meant to simplify the many treaties comprising the EU but has yet to be approved by all the member states. For a summary of how the EU works, including descriptions of institutional actors such as the Council of Ministers, the European Parliament, the European Court of Justice, and the European Commission, as well as the principles of supremacy, subsidiarity, and direct effect, see “Europe in 12 lessons” available at http://europa.eu.int/abc/12lessons/index_en.htm. and “History of the European Union,” available at http://europa.eu.int/anc/history/index_en.htm. See also http://european-convention.eu.int, and Burchill, supra note 16.

171 European Union member states are having to deal, for example, with the fact that Dutch family law provides for several relationship categories – all available to both opposite-sex and same-sex couples – which do not translate nicely into what other countries call marriage, or even civil union. Nevertheless, other member states must come to recognize and deal with these relationships in one form or another, as immigration among the member states is essentially open. Consistent with the ideas expressed in this paper, I wonder if this means the Dutch family law regime will influence the development of family law regimes elsewhere in Europe? For an interesting overview of European position(s) on the same-sex marriage debate, see LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE (Katharina Boele-Woelki and Angelika Fuchs, eds., 2003); Kees Waaldijk, Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe, 17 CAN. J. FAM. L. 62 (2000); Geraldine Van Buuren, Crossing the Frontier – The International Protection of Family Life in the 21st Century, in FAMILIES ACROSS FRONTIERS 811 (Nigel Lowe and Gillian Douglas, eds., 1996) (discussing families, homosexual rights, and the European Court of Justice); and LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute and Mads Andenæs eds., 2001), and in particular the following articles in that volume: Kees Waaldijk, Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on National Trends, Elspeth Guild, Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC, Ingrid Lund-Andersen, The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitude?, Kees Waaldijk, Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands, Olivier De Schutter and Anne Weycenbergh, ‘Statutory Cohabitation’ Under Belgian Law: A Step Towards Same-Sex Marriage?, Daniel Borrillo, The ‘Pacte Civil de Solidarité’ in France: Midway Between Marriage and Cohabitation, Gioia Scappucci, Italy Walking a Tightrope Between Stockholm and the Vatican: Will Legal Recognition of Same-Sex Partnerships Ever Occur, Lisa Farkas, Nice on Paper: The Aborted Liberalisation of Gay Rights in Hungary, Roland Schimmel and Stefanie Heun, The Legal Situation of Same-Sex Partnerships in Germany: An Overview, and Leo Flynn, From Individual Protection to Recognition of Relationships? Same-Sex Couples and the Irish Experience of Sexual Orientation Reform. For a discussion about the harmonization of family law more generally in Europe, see PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE (Katharina Boele-Woelki ed.,
those connections helps to inform our theories and strategies for participating in, and shaping, economic integration in North America. Finally, exploring the limits and benefits of comparison between the EU and North America would, in and of itself, enhance our understanding of what economic integration means, or might mean, for North America.

However, having identified some ways in which comparative law assists us in understanding the fact and effects of economic globalization, the method has its limitations. I believe that the transformations brought about by global trade liberalization and consequent economic integration challenge how we think about citizenship, nationality, the traditional role of the nation-state, and the relevance of geographical categories. Insofar as comparative method identifies the nation-state (or subnational groups by reference to the nation-state) or other geographically defined areas as the relevant units for comparison, it is similarly challenged.

At first glance, this criticism might simply look like traditional arguments about scales of, or relevant categories for, comparison. Questions about scale have typically corresponded to political geography. So, for example, traditional comparativist debates about same-sex marriage might posit the appropriate comparison as Canada and the United States. Others might argue

2003). As of the time of this writing, the most recent additions to the list of European countries considering or adopting same-sex marriage and/or civil partnerships were the United Kingdom and Spain. For information about the English bill, see http://www.publications.parliament.uk/pa/ld200304/ldbills/053/2004053.pdf. Most recently outside the EU, New Zealand and Israel have taken steps to recognize same-sex marriage. See generally, Slaughter, NEW WORLD ORDER, supra note 84.

172 See also Sassen, supra note 20.

174 Reimann argues that the focus on comparison of national legal systems is one of the reasons why comparative law “does not play nearly as prominent role in legal academia and practice as befits our age of globalization”: [T]here is fundamental deficit that has by and large gone unnoticed but that may be more responsible than any other problem for the marginal status of our field: comparative law is badly out of date because it is premised on the legal reality of an age long left behind [ie, the comparison of national legal systems]. … As recently as 1996, the authors of what is probably the leading textbook on comparative law summarized the state of our discipline quite simply: “Comparative lawyers compare the legal systems of different nations.” This orthodoxy has not changed. Reimann, supra note 158, at 1104 and 1108 (citations omitted).
that it should be Canadian provinces and American states, Canadian cities and American cities, Canadian conservatives and American conservatives, or Chinese Canadians and Chinese Americans. But the nature of the debate has shifted with economic integration, rendering traditional battle lines potentially obsolete, geographical categories often inappropriate as units of comparative analysis, and comparison itself increasingly inadequate as a method for analysis. I am not persuaded that comparison is the right model for thinking about simultaneously evolving national, transnational and supranational cultures, when comparative law “by definition deals with and analyzes the other.” Economic integration increasingly means that it is not so much a case of us and them or “here and there” anymore. Instead, it is a whole bunch of layered and intersecting “us’s” and “thems” together, which form an entirely new “us.”

The case of same-sex marriage is illustrative of this phenomenon. Same-sex marriage in particular, and family law more generally, is an issue of law, politics, and culture that is inextricably tied to global capitalism and the tensions presented by political isolationism and economic integration. Today, law, politics and culture are simultaneously subnational, national,
regional, transnational, trans-systemic, and supranational in ways previously unimaginable. While Canada and the United States remain sovereign nations, their relationship has taken on an organic and dynamic life of its own, and the developments discussed in Part C above all limit and shape that relationship in different ways. My view is that any study of that relationship is just that – the study of a relationship and its own unique features and parts. It is not so much an exercise in comparison of component parts – just as a study of water is not made up entirely of comparing hydrogen with oxygen – and therefore, should not be submitted exclusively to comparative legal method, which emphasizes or foregrounds comparisons of us and them, us and other, here and there. The relationship between the United States and Canada is synergistic and multi-faceted; the whole is more than the sum (or comparison) of its parts. In the circumstances attendant to global capitalism and economic integration, I am convinced that a reconsideration of the rules – far from being the obvious task of comparative legal method – requires a reconsideration of method itself.

177 Relatedly, the concept of transculturation was developed in 1940 by Fernando Ortiz, in Cuba. FERNANCO ORTIZ, CONTRAPUNTO CUBANO DEL TABACO Y EL AZUCAR (1973), cited in de Sousa Santos, supra note 98, at 1061.

178 Relatedly, Professor Reimann and others have written about the transnationalization of legal practice as something that operates to some extent outside national systems. Reimann observes that: Today, there are innumerable firms, clients, transactions, and disputes that are international in the sense that their geographic location hardly matters anymore. As result, there is a world of commercial law practice, i.e., of counseling, negotiating, drafting, and arbitration, that is operating on its own terms and becoming increasingly independent from national systems.

179 Reimann is concerned that comparative law fosters “simplistic thinking.” Indeed, in his words, “[p]resenting the world solely as a set of coexisting national systems (or families) creates a psychology of us versus them: our law here, their law there. In today’s world, things are not so easy anymore.” Id., at 1113. Kennedy, too, points to the inadequacies of a framework which emphasis us and them, here and there. Kennedy, New Approaches, supra note 154, at 551.
2. International Law

What of the potential for international law or international legal method? In a wonderful article published in 1997, David Kennedy explores differences between comparativists and internationalists, and identifies places where each could learn from the other. In distinguishing internationalists from comparativists, Kennedy observes that:

"[f]or an internationalist… [t]he comparativist’s focus on an “us” and a “them” is replaced by a more universal claim and project: to empower an international public order above the nation, an international private order below or outside the state, or a complex regime of transnational order…"

This description, and particularly the aspiration to a complex regime of transnational order, makes international legal method sound like a promising paradigm for a “reconsideration of the rules.” Kennedy goes on to add, however:

For the internationalist governance project, the foregrounded relations are between global and local, norm and fact, law and society, the legal and the political, the universal and the particular, rather than here and there or us and them. The most ambitious intellectual and practical accomplishment of the field of international law is to align these images so that the universal and the legal have a geography as the global, consigning the political, the social, the factual, and the particular firmly to the local or national. Indeed, Kennedy observes that for internationalists, “cultural differences are best when they remain differences between or within nations and when states can be brought into the relationship with one another in a regime of global governance which floats above culture.”

As with comparativists’ divisions between us and them or here and there, internationalists’ divisions between national – to which is assigned the political, the social, the particular, and the cultural – and international – to which is assigned global governance – cannot adequately account for the intersecting and layered nature of cultural evolution in the face of globalization.

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180 See generally, Kennedy, id.
181 Id. at 548.
182 Id. at 550-551 (emphasis added).
183 Id. at 554 (emphasis added).
184 “For the internationalist, law and culture inhabit different frames… [C]ulture is a natural, local, antiquated, and largely national thing.” Id. at 552.
of transnational economic integration. International law defines itself by its relationship to nation-states and by contrast to domestic or national law; it is the law “of which and to which” sovereign states are subjects. National borders are knowable and necessary for its continued existence. But economic integration on the scale of NAFTA pushes at our historical understanding of nation-states and their relationships to one another. At a minimum, the recent political and economic developments described in Part C above complicated the internationalist’s project.

Of course this does not mean there is no role for international law in a reconsideration of the rules implicated by economic globalization. As with comparative law, international law presents an opportunity to reassert the role and relevance of the nation-state. While political geography and national borders have been challenged, the nation-state and international law remain relevant. Indeed, the reasons for engagement with the possibilities for internationalist governance may be more pressing than ever before and, in the end, it may be that transnational problems require some international action. But as with comparative law, international law is not sufficient, not adequate, not enough. “National/international”, “us/them”, “us/other”, and “here/there” dichotomies cannot alone adequately provide a descriptive or analytic framework for understanding the transformative effects of economic integration on Canada and the United States.

185 Relatedly, the methodological problem of applying the traditionally state-centered concept of federalism to the transnational realm is discussed in Delbrück, supra note 6, at 47-48.
186 Kennedy, New Approaches, supra note 154, at 563.
3. Transnationalizing Existing Methods

In Parts D(1) and D(2), my goal is to identify challenges to comparative and international legal methods, and ask whether these paradigms\textsuperscript{187} are adequate to the task of understanding, re-articulating and managing international and transnational economic integration between Canada and the United States. My answer remains: not entirely.

In my view, in order to understand and manage the evolution of law and culture in North America, the work of comparativists and internationalists might be usefully supplemented by transnationalists, engaged in what might be described as transnational _______ method. The blank could be almost any existing method – feminist legal, critical race, law and society, law and economics, and so on. As an analytical framework and proposed method, transnationalism concerns itself with the growth, evolution and transformation of law, culture, society and the economy “across national borders.” It is at once a method and the subject of analysis.\textsuperscript{188} In order to describe it in the broadest terms, Catharine MacKinnon’s eloquent and engaging description of feminism can be conveniently borrowed and re-scripted:

[A transnational method] entails a multifaceted approached to society and law as a whole, a methodology of engagement with a diverse reality that includes empirical and analytic dimensions, explanatory as well as descriptive aspirations, practical as well as theoretical ambitions. It lays the whole world open in new ways, offering fresh vistas and angles of vision. Pursuing its lead is a complex adventure – vast, deep, rich, and open – of reexamining existing legal and social reality in light of [rapid trade liberalization, enhanced communication possibilities, capital and market globalization, transnational

\textsuperscript{187} By referring to comparative and international law as paradigms, i.e., in the plural, I do not mean to suggest that comparative and international law are entirely discreet disciplines. In his recent Michigan Law Review article, Teemu Ruskola proposes “interlegality” as a model for studying comparative and international law. Teemu Ruskola, \textit{Legal Orientalism}, 101 MICH. L. REV. 179 (2002). I like this term. It is one he borrows from Boaventura de Sousa Santos, \textit{supra} note 98. In essence, they tell us, interlegality is a fragmented and multi-dimensional overlay of “multiple legal universes,” none of which are discreet and dissociable from one another.

\textsuperscript{188} To borrow from David Kennedy’s description of contemporary international law, it is as much a project of reform as a field of study. David Kennedy, \textit{A New World Order: Yesterday, Today, and Tomorrow}, 4 TRASNAT’L L. & CONTEMP. PROBS. 329, 335 (1994) [hereinafter, Kennedy, \textit{New World Order}].
harmonizations of legal, cultural and other norms, and the other changes described in Part C above]. 189

What these transnational methods might finally comprise is an open question. It may be that in transnationalizing existing methods, a new method or methods emerge. At a minimum, however, they have the advantage of accounting for: the evolving roles of transnational corporations and the nation-state; the layered and fluid nature of transnational cultural evolution; the role of NAFTA, the WTO, and other trade regimes in economic and social, political and cultural integration; and the fact that transformations in the global economy have outpaced national regulatory responses. 190

In light of the rich tradition of comparativist and internationalist engagement with “globalization,” it might seem presumptuous to suggest that a paradigm shift is required, or that there has been insufficient focus on the methodological challenges posed by economic integration. That said, I remain convinced that we need to explore the potential of just such a shift. Of course, there are some scholars who might not see the transnationalist as distinct from the internationalist or the comparativist. That is, some scholars would include “international” and “supranational” within their definition of “transnational,” and they may have less difficulty than I do with the idea that international law or comparative law could simply be retooled to fully accommodate the plurality of transnational phenomena and new legal relationships described in Part C above. Philip Jessup, for example, defined transnational law in 1958 as “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard

190 See Spitz, Enron, supra note 9.
categories.”191 Forty-three years later, Mathias Reimann uses transnational law to mean “beyond national law in the broad sense. … [including] public and private international law [], as well as supranational structures and regimes[].”192 But in this paper, I am using transnational to mean “across national borders” or “without regard to national borders,” as something distinct from international (between nations) or supranational (above nations).193 I do not do this to be unnecessarily contentious or ambitious, nor to discount the important work of comparative and international scholars using “transnational” in its broadest sense.194 I do this because I believe it is important to make these distinctions for at least two reasons.

First, on a practical level, if we include “international” and “supranational” within a broader category of “transnational,” the category becomes too big, too cumbersome, and too simple for the complex, subtle and often contradictory forces operating within it. It may be that using the term “transnational law” to encompass a broad set of relationships and rules, within

192 Reimann, supra note 158, at 1104. Although I depart from Reimann’s definition, I believe his article highlights the importance of being clear about meaning in this context.
193 This is not to say the lines are so clear that there aren’t overlaps – there are. See supra note 10.
194 There are others who appear to conceive of “transnational” as something different from either “international” or “supranational”. Jost Delbrück, for example, recently published an article in the peer-reviewed Indiana Journal of Global Legal Studies, in which he clearly conceives of “transnational” as something which adds to any discussion about “international”. Delbrück, supra note 6. See also, Gordley, supra note 51; Eisenstein, supra note 95; Keck and Sikkink, supra note 98; and Hope Lewis, Global Intersections: Critical Race Feminist Human Rights and Inter/national Black Women, 50 Me L. Rev. 309 (1998). Interestingly, the Indiana Journal of Global Legal Studies attempts to draw a distinction between international, comparative and global – on the Submissions page of its website, the Journal describes itself this way:

IJGLS is not a journal of international or comparative law generally, but rather has a much narrower focus on globalization and the law. The distinction is often elusive and inevitably subjective. We seek articles that specifically engage in a substantial discussion of globalization and the legal issues that are an outgrowth of globalization.

See http://ijgls.indiana.edu/submissions/ (last visited by me on Oct. 14, 2004). I would argue that a careful reading of TRANSNATIONAL ORDER reveals that if Jessup were writing today, he too would seek to limit the meaning of transnationality, or at least to reserve to legal discourse a specific word for “across borders” or “without regard to borders”, as something potentially distinct from between or above nation-states. JESSUP, supra note 191.
which one might find international law or supranational law, made some sense fifty years ago. That is, the need for a word or idea (“transnational”), as something distinct from “international” or “supranational,” may be something that has evolved over time, and corresponds with the changes described in Part C. What goes in the “transnational” box has simply grown to the point where it needs to split off from its friends “international” and “supranational” in order to remain coherent, analytically meaningful, and theoretically useful.

Second, including “international” and “supranational” within “transnational” affirmatively obscures the unique nature of 21st century relationships and phenomena: the overlapping nature of activities, cultures, politics, relationships and economies across national borders. At a time of rapidly increasing transnational economic integration, we need a term to account for relationships among capital, goods, services, people, corporations and governments that do not operate in ways that can be accurately described as inter-nation or supra-nation – that do not, in Jessup’s words, fit into historically standard categories.\(^\text{195}\) I am drawn to the language of “trans-nation” (or “trans-system”) because it captures the ideas of interdependence and the evolving borderlessness of certain phenomena, while simultaneously recognizing the nation as relevant, acknowledging its changing role, and turning what might otherwise be regarded as regulatory and methodological “gaps” between national law and international law, into what might more hopefully be characterized as simply uncharted territory.

There are others who may say that what I call transnational method is simply just another name for what has already been identified by Riles as “discourse scholarship” – falling under the banner of “new approaches” to comparative law\(^\text{196}\) – or by Kennedy as methods deployed by

\(^{195}\) See supra note 191.

\(^{196}\) As stated above, Riles would divide comparativists into three categories, one of which she calls “new approaches”. Riles, supra note 154, at 230.
“new disciplinary enthusiasts” working in the field of international law. But as I have argued in this Part D, I think the distinctions between transnational and international are sufficiently real and sufficiently important that neither title “fits.”

Similarly, some may say that my call for a transnationalization of method is simply a call for a renaissance of already existing but no longer “fashionable” methods. The modern feminist movement, for example, has claimed to be global for almost as long as its existence. Certainly many, many feminists have devoted considerable time, resources and energy into thinking about and improving the lives of women in countries other than their own. Similarly, the broader international human rights movement has long claimed to transcend national boundaries. Nevertheless, to a large extent, the important global work of feminists and other human rights advocates has been focused on intranational legal problems in foreign countries (for example, a criminal prosecution in a foreign national court), the effects of one nation’s choices and actions on citizens in another country (for example, international human rights violations), intranational religious, racial, or sex persecution (for example, civil war atrocities and genocide), and shared experiences with oppression from country to country (for

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197 Kennedy, *New World Order*, supra note 188, at 333.
198 Some American postmodern writers, for example, have made claims to global feminism or a global women’s movement unfashionable in the academy. Similarly, some would argue that cultural relativism has made claims to universal human rights similarly unfashionable in the academy. For a thought-provoking discussion of how and why this has hurt the equality rights of women and others disadvantaged by male power and global capitalism, see Catharine MacKinnon, *Points Against Postmodernism*, supra note 194. See also Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 6, 626-627 (2001) (we must be careful of the scope we give “relative” in cultural relativism).
200 Professor Catharine MacKinnon, for example, represented the plaintiff-appellants, Kadic, *Internationalna Iniciativa Zena Bosne I Hercegovine*, and *Zena Bosne I Hercegovine*, in a case brought in
example, sexual violence against women). In other words, comparative method (used, for example, when investigating and understanding similar and dissimilar experiences with racism) and international law (invoked, for example, when holding nations accountable for human rights violations through institutions such as the United Nations) have provided the frameworks for advocacy and action. While these have been and continue to be necessary and admirable projects, they have not generally been aimed at the evolving transnational phenomena discussed in this article.202

In summary, for a norm, movement, relationship, or method to be transnational, it need not be global. It need not cross all borders, everywhere in the world. It may only be, as in the case of Canada and the United States, a relationship across one national border. A transnational method, then, need not account for, nor aspire to explain, global phenomena, problems, or experiences, nor even international relationships. It simply must foreground evolving relationships, norms, and movements across national borders,203 as well as the evolving role of state regulation in a world where capital and consumer markets are increasingly transnational.204

New York District Court against the then self-proclaimed president of the unrecognized Bosnian-Serb entity under, inter alia, the Alien Tort Claims Act for violations of international law, including allegations that he personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy religious and ethnic groups of Bosnian Muslims and Bosnian Croats. See Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995).

One of the most well known recent examples of feminists working together on global issues was the Fourth World Conference on Women, held in Beijing, China, in September 1995 (commonly known as the “Beijing Conference”).

This is not to say that scholars and jurists and advocates do not already engage in transnational methods or study transnational subjects: obviously they do. My argument is that transnational method has the potential to address the inadequacies of comparative and international law in any “reconsideration of the rules” made necessary by the changes described in Part C, and that this possibility is worth exploring.

In a 1998 article in the Maine Law Review, Hope Lewis articulated a critical race feminist human rights framework that spoke to the increasingly transnational concerns of women of color, insisting – quite rightly, of course – that they are increasingly “cross-border concerns”. Lewis, supra note 199, at 312.

Or in the words of Hope Lewis, where capital is “homeless”. Id.
4. Animating the Debate

I want to conclude this Part D with some very general comments and questions that might contribute to the debate about challenges to method and any “reconsideration of the rules” occasioned by the developments outlined in Part C. I leave for another day the articulation of a methodological framework for understanding transnational law, transnational culture, and transnational economic integration.

First, I want to make clear that I believe comparative legal method is essential to both improving the operation and understanding of domestic law, and the ongoing attempts to understand and manage the developments attendant to global capitalism, economic integration, and cultural evolution. Similarly, international law will obviously be essential for as long as the world is organized into nation-states. My point is simply that these two approaches may not be enough.

Second, in the last three decades, critical legal scholars, advocates and jurists – including critical race and feminist theorists – have criticized early comparativist and internationalist work for minimizing and obscuring important differences between people. That is, they regard some comparative and international work as essentialist. More recently, post-modern, or anti-essentialist, comparativists – and to a lesser degree, internationalists – have been criticized for obscuring important similarities or shared experiences among people. Without exploring these criticisms in any detail here, I wonder if transnational methodology might be able to mediate this dichotomization of difference and sameness, diversity and unity. I do not mean to suggest that transnational method is a compromise. Instead, by de-emphasizing the “us/them,”

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205 I wanted to use the word “backgrounding” here because I thought it looked better, but my trusty editor discovered that backgrounding is not the opposite of foregrounding. By having reference to the dictionary, he learned that while foregrounding means “to bring to the foreground,” backgrounding
“here/there,” “different/similar,” “domestic/foreign,” and “universal/particular” dichotomies, it may be capable of differently accounting for the intersections of overlapping regulatory regimes and cultural integrations. In other words, transnational methodology may give us a different lens through which to understand difference and sameness, national and international, conservative and protectionist, geography and politics, and culture and the economy.

Third, by invoking the language of transnationalism, I do not mean to suggest that the nation-state is no longer relevant. What I mean by labeling a phenomenon “transnational,” is simply that it occurs across national borders. With respect to the nation-state, I only mean to draw on one commentator’s observation that, “national affiliations no longer clearly trump other associational attachments,” and “the nation-state can no longer afford to extract an exclusive relationship from its membership.” The trick is to determine where and how national borders are relevant, and for what purpose. To lawyers this task will sound reassuringly familiar: it requires line-drawing.

Fourth, to my mind, a method which arises and derives its purpose from indisputable transnational connections among law, the economy, culture and politics, and their simultaneous and overlapping relationships with the forces of global capitalism, should draw, albeit not exclusively, “on the new field of economic sociology, which emphasizes the social embeddedness and politics of markets.” Towards that end, Lauren Edelman’s useful guidance actually means “to provide with a background.” I want to thank him for that discovery, as it is true that in a law review article, meaning is probably more important than aesthetics.


207 For a wonderful account of how national borders and nationalist frameworks have constrained and distorted our understandings and explanations of historical processes in the Australian context, see Marilyn Lake, “White Man’s Country: The Trans-National History of a National Project,” 122 Australian Historical Studies 346 (2003).

208 Edelman, supra note 35, at 183.
on how Law and Economics and Law and Society scholars might talk with one another about the economy,\textsuperscript{209} could be generalized and expanded to a multiplicity of disciplines and schools.

Fifth, the seeming acceptance of the idea that economics should drive – or worse,\

\textit{inevitably drives} – the development of legal, social and political policies must be challenged and rethinked in the United States. When and why did the “market” become the American measure for societal well-being?\textsuperscript{210} How does transnational and international economic integration complicate that view? What are the underlying assumptions implicit in that view? The United States is one of the most powerful forces driving trade liberalization and economic integration in the world. Because of its power, the United States plays a crucial role in defining the content of “economic,” and sustaining the notion that economics can be neatly separated from the social, the political, and the cultural. Feminist legal method, critical race theory, social democratic politics, pragmatism, Marxism, post-modernism, and critical legal studies, have all played a key role in exposing the fallacy of these assumptions in the United States and elsewhere. But as the economy becomes transnational, these and other methods, theories, and strategies must become both transnational and savvy in global trade politics. What appears to have happened in the United States is that economic policies successfully challenged and defeated in the past as having the effect of impoverishing people and therefore the country, are making their way back to American soil under the guise of the \textit{inevitable} effects of \textit{inevitable} trade liberalization. What makes this possible, at least in part, are the gaps between international and domestic law, and the

\begin{flushleft}
\textsuperscript{209} \textit{Id.}, \textit{generally}, and at 189:
So how could [Law & Society] contribute to the discussion of law, markets, and rationality? Generally, it could offer a more socially grounded account of how these institutions are interrelated. This account would involve a lot of messy details and complex interactions, and fewer simplifying assumptions, so it would be far less elegant than the [Law & Economics] account. Nevertheless, a more socially grounded account promises a richer understanding of the interplay between law and the economy, and an account that is more likely to recognize and perhaps ameliorate social injustices that follow from efficiency-based reasoning.
\end{flushleft}

\begin{flushleft}
\textsuperscript{210} \textit{See} Spitz, \textit{Enron, supra} note 9; Fineman, \textit{Contract and Care, supra} note 37.
\end{flushleft}
popular American view that social, political, cultural, and legal considerations must take a back seat to these “inevitable” economic forces. Transnational methods have the potential to fill in those gaps and expose economic integration as itself social, contingent, political, legal, and cultural.211

Sixth, there is a vast and rich body of European literature on the relationship between economic integration, social integration, cultural integration and political union. Surprisingly few American scholars,212 politicians, and lawyers are familiar with that literature; even fewer ordinary citizens know it exists. No debate about method in the context of North American economic integration is complete without reference to that literature.

Finally, if I am correct that economic integration on the scale of NAFTA will inevitably require that we tackle the question and possibility of social, political, legal, and cultural integration in North America, then we would do well to come up with a capital “P” plan.213 At a minimum, North Americans should be debating what economic integration might mean for us as Canadians, Mexicans, and Americans, and for all of us as North Americans qua North Americans.214

211 For a discussion of how “rational” economic behavior is socially, politically and legally constructed, see Edelman, supra note 35.
212 This is not to say no American scholars engage with this literature, because many do. This is only to say that the numbers are relatively few given the potential significance of links between trade liberalization, economic integration, and cultural harmonization in North America.
213 I have argued elsewhere that one possibility would be a North American Charter of Fundamental Rights. See generally Spitz, Enron, supra note 9.
214 Will the member-states of NAFTA, in much the same way as the former British colonies did over two hundred years ago in the United States, eventually come together “to form a more perfect union?” At the Cornell University Commencement address on May 29, 2004, the Hon. William Jefferson Clinton called upon graduating students to build a safer and healthier “global community” by asking them to “defend, define and expand the more perfect [i.e., global] union.” Available at www.cornell.edu (last visited on June 5, 2004).
E. Conclusion: Something Old, Something New, Something Borrowed, Something (Red, White, and) Blue

To a large extent, the development of law and the evolution of culture are being driven by the forces of economic globalization and the agendas of interim “governments,” such as the WTO and NAFTA regimes. The power and size of multinational corporations has made them economically stronger than many countries. Recent economic integration has meant that we are in the process of developing entire bodies of integration law. Examples include the European Union, MERCOSUR, CAFTA and NAFTA. The Internet, cell phones, email, and fax machines have forever revolutionized communication between people from all over the world. Canadians and Americans have been thrown together in previously untold ways, so that

215 I purposely invoke the concept of “government” in referring to regional and global trade regimes. For an interesting discussion about the shift from “government” to “governance” brought about by economic globalization and privatization, see Martin Shapiro, Administrative Law Unbounded: Reflections on Government and Governance, 8 IND. J. GLOBAL LEGAL STUD. 369 (2001).

216 Wal-Mart’s economic power, for example, “would rank it 30th among the world’s 191 countries, ahead of Poland and Greece, and there are eleven other corporations in the world even larger than Wal-Mart.” Claire Moore Dickerson, supra note 195, at 620. If Wal-Mart were a nation, it would apparently be China’s eighth-largest trading partner. Steven Greenhouse, Wal-Mart, a Nation Unto Itself, N.Y. TIMES, April 17, 2004, at B7. In 1999, Wal-Mart employed 1,140,000 people, making it the largest employer in the world. Sarah Anderson and John Cavanagh, The TopTop 200: The Rise Of Global Corporate Power 6 (2000). Of the world’s 100 largest economic entities, 51 are corporations and 49 are countries. Frank René López, Corporate Social Responsibility in a Global Economy After September 11: Profits, Freedom, and Human Rights, 55 MERCER L. REV. 739, 752 (2004). Professor López recently compiled a list of the Top 100 Economies in the world, comparing corporate sales with the Gross Domestic Product of nations, and he would rank Exxon Mobil as the 20th wealthiest economy in the world, followed closely by Wal-Mart at 22nd and General Motors at 24th. Id. at 749-751. When Enron collapsed, it was the 49th richest economy in the world. Id.

217 Nadia de Araujo, Dispute Resolution in MERCOSUL [sic]: The Protocol of Law Leñas and the Case of the Brazilian Supreme Court, 32 U. MIAMI INTER-AM. L. REV. 25, 26 (2001). In North America, the legal profession is attempting to manage integration by expanding services across national borders and teaching itself about integration and cross-border practice. See, for example, the U.S. & Canadian Cross-Border Conference, cosponsored by the Oregon State Bar and the Law Society of British Columbia, in cooperation with the Idaho State Bar, May 14-15, 2004; and the program for the Canadian Bar Association’s annual Canadian Legal Conference, August 15-17, 2004, in which 15 of 29 panels touched on some aspect of international, transnational, or cross-border law. See also Glenn, NAFTA Experiment, supra note 76, and Glenn, On Removing Borders, supra note 173.

their relationship increasingly challenges the independence of their identities. Connections between the economy and culture have been demonstrated beyond doubt. Indeed, some argue that culture has been wholly subsumed within the economy, at least in the United States.\textsuperscript{219} For all of these reasons, and many more, it is inconceivable that the United States can maintain its present stance of political and cultural isolationism, at least in relation to Canada. At the same time that it tackles same-sex marriage and economic integration with Canada, it will have to deal more generally and more broadly with the tensions presented by the simultaneous commitment to isolationism and integration.

One method for exploring and resolving these tensions is comparative law. Another is international law. These are methods with which we are already familiar. In that sense, they are “something old.” At the same time, the developments described in Part C call for a “reconsideration of the rules.” Neither comparative nor international law is sufficient, either alone or together, to wholly account for or manage these changes. A reconsideration of the rules calls for a reconsideration of method, or “something new.”\textsuperscript{220} I have tentatively called this a transnationalist method. Engaging in transnational analyses of same-sex marriage, it is possible to see that it may not be so much “borrowed” from Canada, as it is a part of a much larger project of transnational cultural evolution.

Many Canadians have historically accepted that Canada’s proximity to the United States, combined with the latter’s economic power, has meant that Americanization of Canadian culture is inevitable.\textsuperscript{221} Consider, for example, Margaret Atwood’s oft-cited quote:

\begin{footnotes}
\item[219] Rifkin, \textit{supra} note 102.
\item[220] In some ways, I hesitate to use the word “new” in talking about transnationalist methodology. It is not so much a new method, as a set of new foci for existing methods.
\item[221] \textit{But see}, \textit{e.g.}, Frank E. Manning \textit{Reversible Resistance: Canadian Popular Culture and the American Other, in The Beaver Bites Back? American Popular Culture in Canada} 4 (David H. Flaherty and Frank E. Manning eds 1993); and Goodenough, \textit{supra} note 20, at 222-223.
\end{footnotes}
Canada, as a separate but dominated country has done about as well under the U.S. as women worldwide have done under men; about the only position they’ve ever adopted toward us, country to country, has been the missionary position, and we were not on top. I guess that’s why the national wisdom vis-à-vis Them has so often taken the form of lying still, keeping your mouth shut, and pretending you like it.\textsuperscript{222}

I am not so naïve as to suggest that Ms. Atwood is completely wrong. I believe, however, that the global developments described in this paper give rise to the potential for some Canadianization\textsuperscript{223} of American culture, or what is more likely, the creation of some Canamerican or North American culture that transcends national borders.

In the end, I have not argued for the value of some family law harmonization between Canada and the United States, but rather for its inevitability. In many cases, harmonization is not desirable, or even possible, but we cannot talk meaningfully about desirabilities, possibilities or inevitabilities if we do not move the connections between economic integration and cultural, political, legal and social integration to the foreground of globalization debates. The United States, having made a commitment to the globalization of capitalism and trade liberalization, cannot neatly separate the economy from politics, law or culture.\textsuperscript{224} Same-sex marriage may not be as American as apple pie, but its colors are increasingly “(red, white, and) blue.”

F. Postscript: Same-sex Marriage in Massachusetts

At 12:01 a.m. on May 17, 2004, Massachusetts began handing out marriage licenses to same-sex couples.\textsuperscript{225} More than a dozen states recognize some form of civil unions or domestic

\textsuperscript{222} Margaret Atwood, cited in Manning, \textit{supra} note 218, at 4.
\textsuperscript{223} Interestingly, “Americanization” is a word that my software accepts, while “Canadianization” is caught by my spell-check as nonexistent!
\textsuperscript{224} An interesting question that flows from this is whether, if the United States ultimately rejects Canadian family law models, this empowers Canada to “withdraw” from economic integration.
\textsuperscript{225} Pam Belluck, \textit{Massachusetts Arrives at Moment for Same-Sex Marriage}, N.Y. TIMES, May 17, 2004, at A16. Belluck reports that, “Cambridge – city of just over 100,000 people, home of Harvard, the Massachusetts Institute of Technology and a well-known taste for erudite rebelliousness – decided to start things rolling at 12:01 a.m.”
partnerships.226 The Massachusetts Supreme Judicial Court will hear arguments this year challenging a law being used to prevent out-of-state same-sex couples from marrying in Massachusetts.227 Arguably, as a practical matter and notwithstanding the recent state constitutional amendments, this may be the beginning of the end of the same-sex marriage debate in the United States.228 Obviously this does not mean same-sex marriage will be available in every state, but I suspect that in at least one state, same-sex marriage is here to stay.229 Although objectors remain committed to a constitutional amendment in Massachusetts defining marriage as between a man and a woman, that amendment cannot go to voters before November 2006.230 It seems unlikely that two and a half years into the same-sex marriage

226 Associated Press, Britain to Allow Same-Sex Civil Unions, N.Y. TIMES, Feb. 21, 2005 (on file with author), citing the National Conference of State Legislatures.


228 See Max Boot, The Right Can’t Win This Fight: With gay marriage on a roll, it’s time to move on to another battle, L.A.TIMES, May 20, 2004, at B15. But see Adrianne Brune, Md. conservatives, gays debate marriage, at http://www.washingtonblade.com, June 4, 2004: “A group of devout Christians, some holding Bibles and quoting Scripture, challenged same-sex marriage proponents at a forum held in rural Maryland last week, illustrating the scope and breadth of the debate spreading nationwide.” See also The Same-Sex Marriage Symposium Issue, 18 BYU J. PUB. L. 479 (2004). See also Helen Dewar and Alan Cooperman, Gay Marriage Ban Headed For Senate Defeat; GOP May Salvage Rural Voters’ Goodwill Out of Failure to Amend Constitution, WASH. POST, July 14, 2004, at A02:“When the Senate voted to block the amendment, Majority Leader Bill Frist (R-Tenn.) was reported to have said, “[t]his issue is not going to go away.”

229 See, e.g., Snetsinger and Siegel et al. v. Montana University et al., 2004 WL 3015672 (Mont.), 2004 MT 390, a recent decision in which the Montana Supreme Court recognized same-sex Common-Law marriages in that state. See also, Sabrina Tavernise, New York Judge Opens a Window to Gay Marriage, N.Y. TIMES, Feb. 5, 2005, at A6 (“A New York State judge in Manhattan ruled [on Feb. 4, 2005] that a state law that effectively denied gay couples the right to marry violated the state Constitution, a decision that raised the possibility that the city would begin issuing marriage licenses to same-sex couples as soon as next month.”) Cases challenging restrictive definitions of marriage have recently been filed in several other states, including California, Connecticut, New Jersey, Oregon and Washington. In addition, California’s comprehensive domestic partnership legislation went into effect on January 1, 2004 (A.B. 205). And a same-sex marriage bill is back before the California assembly. See Lisa Leff, “Gay Marriage Bill Back Before Calif. Assembly,” Associated Press, December 6, 2004. Information about this legislation can be found on California Assemblyman Mark Leno’s web page: http://democrats.assembly.ca.gov/members/a13/default.htm (last visited on Jan. 5, 2004).

230 Boot, supra note 228. See also Ken MacGuire, Judge denies 11th hour bid to stop gay marriage, Associated Press, May 13, 2004.
experiment, Massachusetts will take the step of re-redefining marriage.\textsuperscript{231} In the meantime, other state courts will likely redefine marriage to include same-sex couples under their respective state constitutions,\textsuperscript{232} and recent state constitutional amendments defining marriage as between a man and a woman will be challenged, probably successfully in some cases.\textsuperscript{233}

Nevertheless, whether same-sex marriage becomes the law in more states than just Massachusetts, and/or the list of state constitutional amendments banning same-sex marriage grows, the issues raised in this paper are much larger than same-sex marriage. While it remains to be seen whether we are in the throws of a constitutionalization of North America, or the creation of a new transnational polity, what is clear is that we are in the midst of a social and legal transformation that challenges the relevance of national borders to cultural evolution and exposes the absurdity of any claim that the United States can seal itself off from foreign and

\textsuperscript{231} But see Susan Jones, Mass. Court Will Hear Arguments on Its Homosexual Marriage Decision, CNSNews.com, Feb. 11, 2005 (on file with author)(reporting that the Massachusetts Supreme Judicial Court has agreed to hear oral arguments on a request to stay its earlier ruling until Massachusetts has a chance to amend its constitution to ban same-sex marriage). Having said that, I do not believe the court will reverse itself or enter a stay as requested.

\textsuperscript{232} In his commentary, supra note 228, Boot argues that, [s]ince the ultimate concern of conservatives is to preserve the institution of marriage, they would probably be better off caving on gay marriage rather than acceding to the most popular alternative: civil union. Gay marriages won’t affect straights. But if civil union laws were to catch on, as Jonathan Rauch argues in his provocative new book, “Gay Marriage,” many heterosexuals would probably eschew marriage altogether.

My argument is that whether or not civil unions become available to heterosexual couples in the United States will inevitably be influenced by the fact that a statutory version already exists in Canada.\textsuperscript{233} In Ohio, for example, there is a good argument that the amendment violates the Ohio State Constitution because it purports to do more than one thing in a single amendment. See OHIO CONST. art. II §§ 1, 15(A), (D) (the people’s power to adopt constitutional amendments on a referendum vote is subject to the same limitations imposed on the general assembly, and the general assembly may not enact any law containing “more than one subject”). In particular, it not only bans same-sex marriage and civil unions, but also denies any legal status to all unmarried couples and prohibits two unmarried people from jointly adopting a child. See Eric Johnston, Voters in 11 states ban same-sex marriage, PLANETOUT NETWORK, Nov. 3, 2004, available at http://www.PlanetOut.com (last visited Jan. 6, 2005).
transnational cultural influences.\textsuperscript{234} In one context or another, and \textit{sooner rather than later}, the United States is going to have to confront the incoherence of its apparent commitment to economic integration on the one hand, and cultural isolationism on the other.

\footnote{Former Supreme Court of Canada Justice, Claire L’Heureux-Dubé, has argued that the Rehnquist Court fails to take into account the possibility that Americans could be influenced by others \textit{to the Court’s detriment}. \textit{See} L’Heureux-Dubé, \textit{supra} note 88.}