Lex Americana?
A Response to Levi-Faur

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We welcome David Levi-Faur's critique of our article,[1] both because it serves to stimulate debate on this important topic and because it provides us with the opportunity to elaborate on our arguments and touch on their wider potential applicability. Levi-Faur does not take issue with our central empirical finding—that American legal style is spreading to other jurisdictions—nor with our normative assessment of the mixed blessings of this trend. We agree with Levi-Faur that many questions concerning legal change have been largely overlooked by political scientists, and we agree that he raises a number of points that highlight the need for refinements of our argument. Yet, for all that we agree on, we disagree strongly with Levi-Faur's analysis and his main lines of criticism. His core criticisms concern our conceptualization of the dependent variable in our study, our purported disregard of alternative explanations, and our inadequate attention to the importers of American law and processes of "localization." In this article, we respond to each of these criticisms in turn. We then discuss the generalizability of our argument beyond Europe and Japan. We conclude with suggestions for further research.

What Is Spreading?

Levi-Faur's first central critique concerns concept formation. Levi-Faur argues that our dependent variable—the spread of American legal style—conflates three separate phenomena. He argues that actually we are observing three diffusion processes—of transparency, of access to justice, and of adversarial legalism—and that each of these processes is "governed by its own logic" and results "in its own outcomes." This is problematic, according to Levi-Faur, because the explanation for and the patterns of diffusion for each of these phenomena differ. For

1. Kelemen and Sibbitt 2004.

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instance, countries may readily emulate U.S. transparency rules viewing them as normatively desirable, although they might resist importing access to justice norms or "adversarial legalism." Therefore, he argues, we wrongly reject emulation hypotheses where they might have explained important elements of policy diffusion. Essentially, Levi-Faur accuses us of excessive "lumping" and wants future research to "split" our dependent variable into distinct components and study the spread of each in isolation.

Levi-Faur's call for conceptual splitting is the wrong way forward for two reasons. First, similar to concepts such as democracy (which includes numerous attributes, including free and fair elections, the rule of law, and protection of basic civil liberties), legal style is an inherently "thick" concept. Thick concepts are multidimensional and cannot be reduced to a single indicator.[2] In our article, we took what had been an even thicker conceptualization of American legal style deriving from Kagan's work[3] and parsed it down to arrive at a more parsimonious operational definition: a legal style distinguished by its emphasis on enforcing legal norms through (1) transparency and (2) broad empowerment of private actors to assert their legal rights.[4] While we reduced the baggage to allow the concept to travel further,[5] treating transparency, access to justice and adversarialism as separate phenomena to be studied in isolation, as Levi-Faur advocates, would take this process of disaggregation too far, to the point where one would lose sight of the original subject of our study. Certainly, one might undertake a fruitful study of the diffusion of freedom of information acts around the world, but this would not amount to a study of changes in legal style. Ultimately, our study was not concerned with the spread of any particular legal norm, but rather with a shift in a polity's overall approach to the use of law to regulate society.

Second, Levi-Faur's call to treat transparency, access to justice and adversarialism as separate phenomena to be studied in isolation misses one of the core insights of our argument: the focus on transparency and access to justice characteristic of American legal style results in a more adversarial and legalistic approach toward regulating society. The causal model implicit in Levi-Faur's critique runs roughly as follows: transparency and access to justice spread globally as countries seek to emulate these desirable aspects of American legal style, but these countries avoid importing adversarialism, which they find undesirable. This causal model ignores the interdependence between the various attributes of American legal style. Efforts to enhance transparency and access to justice encourage adversarialism. The more that transparency provisions expose malfeasance and the more that access to justice initiatives give private actors the opportunity to challenge one another or the government in court, the more, all things being equal, they will litigate and the more their actions will be shaped by the increased threat of litigation.

2. Coppedge 1999.
3. Kagan 2001.
4. Hereafter, we refer to such empowerment as "access to justice."
5. Sartori 1970.

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Although recent legal changes in both the European Union (EU) and Japan have in fact focused on enhancing both transparency and access to justice, we acknowledge that a specific set of legal reforms could focus more on enhancing transparency and less on access to justice, or vice versa. However, in an economically liberalized and politically fragmented polity, maintaining strong transparency norms with little access to justice or extensive access to justice without transparency is not likely to be a stable equilibrium. As Levi-Faur himself concedes, transparency and access to justice are interdependent. Formal access to justice by private actors is of little use if there is insufficient transparency for litigants to become aware of how they are being harmed and to provide them with the information necessary to prove a claim. Without sufficiently robust transparency, the very existence of substantive access to justice is questionable. Similarly, promoting access to justice enhances transparency. Enabling a private actor to hold another accountable through the judicial system gives them access to greater information (for example, through discovery). The fact that much litigation focuses on violations of transparency norms (for example, lawsuits concerning disputed freedom of information act requests, lawsuits by investors claiming inadequate disclosure, or product liability lawsuits for failure to disclose the risks of a product) shows how access to justice enhances transparency.

Finally, after calling on us to disaggregate our dependent variable, Levi-Faur later widens his lens and suggests that the spread of American legal style we describe may simply be an aspect of broader processes of juridification, legalization, and judicialization. There is considerable overlap of concepts, categories, and competing explanations in studies of the growing role of courts around the world, and we agree with Levi-Faur that clarifying distinctions between the various "judicialization" phenomena is valuable. The spread of American legal style in regulatory policy can be distinguished from other processes of judicialization. Most of the existing literature on the global spread of judicial power focuses on the spread of constitutional review powers,[6] and states can and do develop powerful patterns of constitutional review without adopting American legal style in the regulatory arena.[7] Although we doubt that all phenomena that involve the increased role of law, courts, and litigation have a common cause, it is striking that much of the work on the spread of constitutional review emphasizes the importance of one of our central variables, domestic political fragmentation, in underpinning the growing power of courts in this field.[8] Finally, it is important to note that not all judicialization phenomena should be viewed as shifts toward an American model. For instance, the form of constitutional review adopted across Europe and in many of the new democracies across the world is based not on U.S. style judicial review,

6. See Tate and Vallinder 1995; Shapiro and Stone 1994; Stone Sweet 2000; Ferejohn 2002a; Ginsburg 2003; Hirschl 2004; and Friedman Goldstein 2004.

7. Rose-Ackerman 1995.

8. See Shapiro 1981; Ferejohn 2002a; Guarnieri and Pederzoli 2002; and Ginsburg 2003. More generally see Tsebelis 2002, chap. 10.

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but on the Kelsenian model that originated in interwar Austria and that vests constitutional review powers in a specialized constitutional court.[9] Although Levi-Faur is right to highlight the importance of broad processes of judicialization, our ambitions were more modest: we sought to explain the puzzle of why American legal style—an approach to regulation more often derided than it is praised—is taking root in Japan and the EU.

Why Is It Spreading?

Diffusion?

Levi-Faur states repeatedly that ours is a study of diffusion. This is not strictly correct. Policy diffusion can be broadly defined as a process in which action of state B is conditioned by prior action of state A, with the direction of causality such that A's prior adoption of policy X makes B's subsequent adoption of X more likely.[10] According to this broad definition, the causal mechanisms behind diffusion may be individual/rational or sociological/constructivist and may include coercion, competition, learning, or emulation. However, diffusion cannot be based on a causal model in which independent responses to similar domestic conditions generate similar policies.[11] Our explanation for the spread of American legal style is based on precisely such a causal model. We argue that shifts in legal style resulted from independent responses to similar changes in the domestic political economy brought about by economic liberalization and political fragmentation. While policymakers confronted with a liberalized economy and political fragmentation certainly reference the salient American model when considering their options for crafting new policies suitable for such domestic conditions, their primary reasons for developing a regulatory style that emphasizes transparency and the broad empowerment of private litigants are domestic. Thus, one of the central conclusions of our study is that although American legal style is spreading to other jurisdictions, this is not primarily the result of a diffusion process.

While we maintain that diffusion is not the primary cause of the shifts in legal style that we observed, we acknowledge the importance of diffusion in three respects. First, various forms of diffusion do play important roles in the spread of particular legal norms. Indeed, the comparative law literature is so replete with examples of "legal transplants"[12] over the past thousand years that it would be implausible to suggest otherwise. In the post–World War II era, the U.S. legal system

9. See Stone Sweet 2000, 34–38; Ferejohn 2002b; and Ferejohn and Pasquino 2004.
10. See Simmons and Elkins 2004; and Simmons, Dobbin, and Garrett 2004. Our study could only be considered a study of policy diffusion if one took an extremely broad definition of diffusion such as, "Any pattern of successive adoptions of a policy innovation can be called diffusion." Eyestone 1977, 441.
11. See Simmons and Elkins 2004, 181; and Simmons, Dobbin, and Garrett 2004.
12. See Watson 1978 and 1993; and Ewald 1995.

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has become the most influential national legal system in the world and many aspects of American law have been spread to other countries through diffusion processes.[13] Through diffusion processes variously termed reception of law,[14] legal transplants,[15] legal irritants,[16] or legal translations,[17] U.S. laws and legal practices have influenced constitutional rules concerning the role of the judiciary (such as judicial review), substantive developments in a wide range of areas of law (such as constitutional law, tax law, corporate law, securities law, criminal law, and patent law), and models of legal education and legal practice.[18] Nevertheless, in explaining the broad shifts in regulation toward an American legal style that are the focus of our analysis, the impact of any such diffusion processes is overshadowed by the pressures for the adoption of such norms generated by the fundamental shifts in domestic economic and political structures.

Second, diffusion comes into our explanation through the agency of American law firms. We treat these firms as an intervening variable—their entry is a by-product of economic liberalization and they serve to accelerate the spread of American legal style, though they are not the underlying cause of this phenomenon. We agree with Levi-Faur that large American law firms are by no means the only agents of diffusion—multinational corporations, the media, nongovernmental organizations (NGOs), universities, transnational networks of regulators and judges,[19] and foreign governments may also promote diffusion. As with law firms, these agents may be empowered or disempowered or otherwise profoundly affected by economic liberalization and political fragmentation. The reason that we give American law firms a privileged position in our explanatory framework is that they play a particularly important role in spearheading the spread of legal practices. A similar emphasis on the role that law firms can play in spreading legal practices is found in studies of international commercial arbitration,[20] the globalization of contract law[21] and World Trade Organization (WTO) litigation.[22] American law firms serve as both a transmission belt and a catalyst to accelerate changes in legal practice. Certainly, in issue areas outside the realm of corporate legal practice, other American based providers of legal services—such as internationally oriented activist lawyers—can play an analogous role.[23]

Finally, our study leaves unanswered broader questions of why economic liberalization and political fragmentation were both growing in the EU, Japan, and

13. See Mattei 1994; Wiegand 1991; De Lisle 1999; and Lester 1988.
14. Wiegand 1991.
15. See Watson 1978 and 1993; and Ajani 1995.
16. Teubner 2001.
17. Langer 2004.
18. See Langer 2004 for a recent summary of this literature.
19. Slaughter 2004.
20. Dezalay and Garth 1996.
21. Shapiro 1998.
22. Shaffer 2003, 89, 117–20.
23. See Sarat and Scheingold 2001; and Keck and Sikkink 1998.

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beyond in the 1990s. These deeper changes may indeed be linked through diffusion processes. Simmons and Elkins have demonstrated the relevance of diffusion mechanisms in the spread of economic liberalization. The spread of democracy also has been linked to diffusion processes.[24] Indeed, it would be hard to deny that the four broad diffusion mechanisms outlined by Simmons and Elkins—coercion, competition, learning, and emulation—have not played some role in the economic liberalization and political fragmentation of different states. For the purposes of this article, we can remain agnostic on these wider questions. Even if diffusion played a role in the spread of economic liberalization and political fragmentation, it does not follow that all subsequent consequences of liberalization and fragmentation were caused by this diffusion.

Domestic Political Economy

Levi-Faur accuses us of paying insufficient attention to local conditions and how the importers of legal norms may alter their meanings. This critique seriously misconstrues our argument. As an argument driven primarily by shifts in the domestic political economy, ours is concerned above all with local conditions. Japan and the member states of the EU have experienced fundamental shifts in their approaches to regulation moving them in the direction of American legal style. In our article, we argued that the confluence of economic liberalization and political fragmentation in Japan and the EU was the underlying cause of these shifts. Economic liberalization and political fragmentation[25] undermined existing modes of regulation and created functional pressures and political incentives for policymakers to rely increasingly on transparency and private enforcement. We showed how the timing and impact of these changes encouraged broad shifts to American legal style, and we carefully traced the causal processes involved in our case studies of securities regulation and products liability.

The development of Japanese securities regulation illustrates our emphasis on local conditions. After World War II, the U.S. occupation government imposed a U.S.-style securities regulatory regime on Japan in an act of coercive diffusion. However, much of this regime withered on the vine after the United States turned control to the Japanese, because the domestic political and economic context provided no support for an American approach to securities regulation. In the 1990s, economic liberalization and political fragmentation in Japan created conditions that undermined the distinctive approach the Japanese had developed in securities regulation and made a U.S.-style approach—emphasizing transparency and greater access to justice—more attractive to policymakers. More generally, regardless of

24. Simmons and Elkins 2004. See also Huntington 1991; and Gleditsch and Ward 2003.

25. In Japan, fragmentation came in the form of an increase in the number of partisan veto players, whereas in the EU fragmentation came in the form of an increase in institutional veto players. On these two categories of veto players see Tsebelis 2002, 19.

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why or when they are originally adopted, American style legal norms and practices are only likely to take root and flourish in other jurisdictions if economic liberalization and political fragmentation have created functional pressures and political incentives that encourage these norms and practices.

Extending the Argument

Our empirical research focused on developments in the EU and Japan, but we anticipate that to the extent political fragmentation and economic liberalization continue to unfold elsewhere, these changes will create similar functional pressures and political incentives for reregulation American style. To understand why, it is instructive to return briefly to the roots of adversarial legalism in the United States. In his authoritative analysis of the roots of American legal style, Kagan himself places great emphasis on precisely the two causal factors at the core of our argument: political fragmentation and economic liberalization.[26] In a liberal economy with a multiplicity of players and few encompassing trade associations, informal, cooperative, and flexible approaches to regulation are ineffective. Political fragmentation further undermines such approaches and creates incentives for governments to mandate broad transparency and to empower private actors to enforce regulatory policies.[27] Thus, when new policy demands are filtered through a system that combines a liberalized economy and political fragmentation, an American style approach to regulation is likely to result.

In China, for example, where economic liberalization and, albeit at a slower pace, political fragmentation seem to be unfolding, a new legal regime is emerging.[28] Reforms have been enacted stressing transparency and improving access to justice, and litigation rates have risen rapidly.[29] Together with entry into the WTO, the rise of a middle class, dissatisfaction with corrupt officials, and increase in economic power of coastal cities such as Shanghai and Shenzhen, economic liberalization and political fragmentation would seem likely to continue. As it does, it is quite likely that the Chinese legal system will continue to undertake efforts to enhance transparency and access to justice and that as a result the Chinese approach to law will look increasingly American.

Although we argue that economic liberalization and political fragmentation in other polities create the conditions for American legal style to flourish, and that American law firms can play an important role in speeding the adoption of American legal practices in such jurisdictions, we by no means suggest that this will lead to complete convergence. The spread of American legal style involves a

26. Kagan 2001, 40–54, refers to these as "Fragmented Governmental Authority" and "Fragmented Economic Power." Levi-Faur seems to ignore these central aspects of Kagan's argument in citing him to buttress his critique of our argument. Also see Shapiro 1993 for an argument similar to Kagan's.

27. Kelemen and Sibbitt 2004, 109–11.

28. See Lubman 1999; and Peerenboom 2001.

29. Peerenboom 2001, 191.

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movement toward a particular style of regulation, not a complete convergence with that style.[30] First, one could hardly expect perfect convergence when American legal style itself is a moving target and varies across policy areas. Transparency norms and access to justice are constantly being recalibrated, as evidenced in alternating waves of tort reform and access to justice initiatives. Even within the United States, the extent to which this legal style prevails varies across states and policy areas. With such internal variation, one could hardly expect uniform convergence internationally. Second, a variety of entrenched national legal institutions and norms in foreign jurisdictions will continue to limit the spread of some American practices.[31] Thus, to say that American legal style is taking root in the EU, Japan, or elsewhere is not to suggest these jurisdictions will soon, or ever, experience the most notorious excesses of the U.S. legal system.

Conclusion

Early on in his article, Levi-Faur writes that he doubts if ours is the "optimal" way forward in the study of law and legal change. We make no claim to optimality. However, having carefully considered the other prevalent explanations in the literature, we find that ours provides a more convincing account of the spread of American legal style in Europe and Japan. Indeed, to paraphrase Winston Churchill, our explanation may be the worst one, except all the others that have been tried. Moving forward, we hope that other researchers will continue to explore the causes of legal change in various policy areas, assessing the explanatory power of hypotheses based on emulation, regulatory competition, coercion, and fundamental shifts in domestic political institutions and economic structures. Levi-Faur suggests that "change should be studied within the frameworks of diffusion and policy transfer on the one hand and the juridification of political and social life on the other." We think that precommitting to studying a phenomenon within one theoretical framework is the wrong way to advance knowledge in the social sciences. Rather, we began this research with a puzzle—to explain why American legal style that is so often maligned by foreign observers and indeed by a number of critics in the United States—is spreading to other jurisdictions across the Organization for Economic Cooperation and Development (OECD). We then examined this puzzle through a variety of theoretical lenses. Like Levi-Faur, we initially suspected that policy diffusion might be the primary cause of the spread of American legal style. However, the empirical record simply does not support this elegant and intellectually fashionable hypothesis.

30. Epp 2003.
31. Kagan 1997.

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