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## Sages, Savages, and Other Speech Act Communities: Culture in Comparative Law

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**SAGES, SAVAGES, AND OTHER SPEECH ACT COMMUNITIES:  
CULTURE IN COMPARATIVE LAW**

MONICA EPPINGER\*

ABSTRACT

This Article re-examines the possible utility of the concept of culture in comparative law. It reviews some limits and misuses of the concept of culture and introduces a components approach to using it in comparative analysis. First presented at a Symposium inspired by Laurence Tribe's *The Invisible Constitution*, the Article takes up a key question emerging from Tribe's work: How does a constitution constitute? Two conceptual tools from anthropology and sister disciplines, performative speech acts and performance theory, lend insight into how discourse produces literal meaning and, in parallel, produces and reproduces speech act communities. Having introduced a components approach to undertaking comparative work, the Article then suggests putting the pieces back together; to demonstrate how a holistic treatment of culture might be deployed in larger projects, the Article reviews one against racism and another against ideology-based assertions of group superiority. With a more analytical look at the work of "constituting" and with new tools for studying it, the Article concludes that the concept of culture can facilitate comparative analysis not only between different national jurisdictions, but also between different speech act communities (like law and religion) within a given jurisdiction.

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TABLE OF CONTENTS

INTRODUCTION .....	409
I. TAKING THE INVISIBLE SERIOUSLY .....	410
<i>A. The Invisible Constitution</i> .....	410
<i>B. Invisible Constitution and Culture</i> .....	411
<i>C. Question Asked Versus Question Answered</i> .....	414
II. THE WORK OF CONSTITUTING.....	415
<i>A. Getting Started</i> .....	415
<i>B. Performative Speech</i> .....	416
<i>C. Performance</i> .....	418
III. CAUTIONING AGAINST CULTURE: FOUR COMMON PITFALLS .....	420
<i>A. Stasis</i> .....	420
<i>B. Reification</i> .....	420
<i>C. Excuse</i> .....	421
<i>D. Orientalizing</i> .....	422
IV. THE CONCEPT OF CULTURE, DEPLOYED .....	423
<i>A. Culture Against Race</i> .....	423
<i>B. Culture Against Ideology</i> .....	425
<i>C. Bringing Comparison Home: Culture in Comparative Law</i> .....	426
CONCLUSION.....	427

## INTRODUCTION

The concept of culture holds a paradoxical place in the field of comparative law. On one hand, culture can be helpful in understanding and comparing law across different jurisdictions and normative orders. Some would even call culture indispensable to, or inseparable from, the project of comparative law. On the other hand, the concept of culture is often vaguely understood and the term “culture” wrongly or haphazardly used. Because some misunderstand culture, they miss opportunities to deploy the concept effectively. Worse, misused, the concept of culture can become a tool for miscasting others and doing violence to their identities. This Article briefly explores both sides of the paradox, considering utility and limits of the concept of culture in comparative law.

The goal is to add some specificity to our understanding of the concept of culture in order to harness the best and avoid the worst it may offer. I look to anthropology, the discipline in the U.S. academy that pioneered the study of culture, for tools useful to those seeking to understand law and its workings in comparative perspective. My argument here is not primarily an ontological one over the existence or non-existence of “culture.” Rather, it comes from a practical acceptance that the concept of culture has pragmatic effect and must be reckoned with.

The 2012 Center for International and Comparative Law Symposium at which this paper was presented took inspiration from constitutional scholar Laurence Tribe’s recent work, *The Invisible Constitution*.<sup>1</sup> This Article takes Tribe’s discussion as a point of departure for considering culture. I analyze Tribe’s argument, characterize the mechanisms he identifies, and use some tools from anthropology to address anew Tribe’s central research question. This is done as an experiment, something of a “proof of concept,” for adapting the anthropological tool kit to comparative law. Reference to Tribe’s work is meant to be illustrative. The body of the argument itself has two main points: caution and explanation.

Part I reviews Tribe’s propositions for how the invisible Constitution has been generated. It then explores the concept of culture in relation to the invisible Constitution, explaining why one might characterize the genre of the mechanism he identifies as “culture” (despite his protestations). Part II explores how the study of culture can help in a project like Tribe’s. It proposes a “components method” and reviews two lines of work, performative speech acts and performance theory, which anthropology and sister disciplines have developed that give insight into how a constitution might do the work of constituting, e.g., how speech acts create social reality. This leads to consideration of frames of performance, within which discourse produces

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1. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008).

literal meaning and, in parallel, produces and reproduces speech act communities. Part III describes some limits and misuses of the concept of culture in comparative analysis. Armed with a dual understanding of the work of “constituting” and cautioned against pitfalls, Part IV reintroduces culture with a look at two major projects in which it has been deployed, resituating speech act analysis within a broader context and drawing on the work of two anthropologists, Franz Boas and Laura Nader, to illustrate some further benefit of considering culture.

The Article concludes with a consideration of the possible utility of the concept of culture for comparative law, showing how tools from anthropology allow us to describe and explain the constitution of different kinds of communities defined by speech acts, including law and religion. This facilitates comparative analysis not only between different national jurisdictions, as is the dominant tradition in comparative law, but also between different speech act communities (like law and religion) within a given national jurisdiction. More fundamentally, it may help us understand how authority or power works in different speech acts communities and to compare how the forces that constitute are produced and reproduced. The piece should point the reader towards equipment for analyzing with greater nuance how the Constitution and other authorized speech acts constitute, when the focus is not what a constitution says, but on how it does what it does. It is this focus that arises in dialogue with Tribe.<sup>2</sup>

## I. TAKING THE INVISIBLE SERIOUSLY

### A. *The Invisible Constitution*

*The Invisible Constitution*, constitutional law scholar Laurence Tribe’s recent work, raises a question that would seem central to the study of constitutions but is rarely considered: How does the Constitution constitute? After all, Tribe points out, the Constitution leaves many gaps that will inevitably give rise to disputes. However, it does not also in its text give a rule for its interpretation.<sup>3</sup> Tribe makes a case for the existence of propositions and precepts not written in—but nonetheless part of—the Constitution, arguing for the “existence of extratextual content” as part of the Constitution.<sup>4</sup> In other words, Tribe sees smoke (the existence of certain patterns of behavior by those acting in response to the Constitution) and infers fire. Describing that fire is the aim of his book.

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2. See, e.g., *id.* at 22.

3. *Id.* at 4.

4. Margaret Raymond, Book Review, 50 AM. J. LEGAL HIST. 466, 466 (2008–2010) (reviewing Tribe’s *The Invisible Constitution*).

Tribe, in his own words, is not trying to add to the body of literature on *who* is doing the interpreting or what is invisible *around* the constitution. In investigating this “invisible constitution,” Tribe means to exclude what he considers outside the text, the “complex superstructure of rules, doctrines, standards, legal tests, judicial precedents, legislative and executive practices, and cultural and social traditions that together constitute what people call ‘constitutional law.’”<sup>5</sup> Instead, he focuses on what must be “‘in’ the United States Constitution but cannot be *seen* when one reads only its text.”<sup>6</sup> In, outside, around: metaphors of space are indispensable to Tribe’s project but are left undefined by him.

In the discussion to follow, I use the basic question Tribe raises, “How does a Constitution constitute?”, to undertake a broader reconsideration of culture in comparative law. Reexamination entails redrawing some of the boundaries by which Tribe marks what is intrinsic or extrinsic to his discussion. Most generally, Tribe says “culture” falls outside of the scope of his discussion. In examining his data and his claims, however, I find his material is indistinguishable from “culture,” as technically defined by anthropology. I then try to restore to him tools that the prior study of culture has developed to make sense of it, tools of which he robs himself by separating his topic from “culture.” The subsequent parts of this section explain how I get from point A to point B, and why it matters.

#### B. *Invisible Constitution and Culture*

To begin, let’s consider Tribe’s challenge and how he tackles it. Tribe, convinced that the “invisible Constitution” is at the heart of the Constitution’s meaning, aims to move “the nation’s constitutional conversation away from debates over what the Constitution *says* and whether various constitutional claims are properly rooted in its written text and toward debates over what the Constitution *does*.”<sup>7</sup> To do this, he undertakes to describe the content, “both written and unwritten,” of the Constitution.<sup>8</sup>

In this pursuit, he makes several analytical moves. First, he identifies a set of axiomatic propositions that “go beyond anything that could reasonably be said to follow simply from what the Constitution expressly *says*,”<sup>9</sup> for example:

Ours is a “government of the people, by the people, for the people.”

Ours is a “government of laws, not men.”

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5. TRIBE, *supra* note 1, at 10.

6. *Id.* at 13.

7. *Id.* at 22.

8. *Id.*

9. *Id.* at 28.

We are committed to the “rule of law.”

Courts must not automatically defer to what elected officials decide the Constitution means.

Government may not torture people to force information out of them.

In each person’s intimate private life, there are limits to what government may control.

Congress may not commandeer states as though they were agencies or departments of the federal government.

No state may secede from the Union.<sup>10</sup>

After discussing evidence (in doctrine and judicial decisions) that for him supports that each one of those propositions exists, Tribe describes logical processes by which, per his inference, the content of the invisible Constitution has been generated. He identifies three constructive principles: geometric construction (“connecting the dots”);<sup>11</sup> geodesic construction (surfaces that surround an interior defined by a core right or principle whose realization requires “space buffered from outside forces by a suitably designed shield”);<sup>12</sup> and global construction (“comparison of our national experience with the experiences and experiments of other nations and of international groupings, institutions, and practices”).<sup>13</sup> He adds three deconstructive “modes of construction,” deconstructive in that they “entail imagining how the Constitution would break down or fall apart unless certain assumptions were made”.<sup>14</sup> geological construction (unearthing the roots or presumptions of textually identified rights);<sup>15</sup> gravitational construction (“the ‘anti-slippery-slope’ mode”);<sup>16</sup> and gyroscopic construction (a Constitution stabilized by both centripetal and centrifugal vector forces).<sup>17</sup> In short, Tribe observes the smoke of axiomatic propositions and infers the fire of cognitive patterns (or “principles,” in his terminology) that explains their generation. In what genre do his “principles” fall, and through what paradigm of analysis might they be apprehended?

Although Tribe specifies that culture lies outside of the domain he wants to consider, I propose that instead that “culture,” canonically defined, is exactly what he is attempting to describe. “Culture,” as a technical term in anthropology, is canonically characterized as “all the elements in man’s [sic]

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10. *Id.* at 28–29.

11. TRIBE, *supra* note 1, at 157.

12. *Id.* at 172.

13. *Id.* at 181.

14. *Id.* at 155–56.

15. *Id.* at 189.

16. *Id.* at 198.

17. TRIBE, *supra* note 1, at 207.

mature endowment that he has acquired from his group by conscious learning or by a conditioning process.”<sup>18</sup> This might mean a “systematic body of learned behavior” transmitted from prior to subsequent generations.<sup>19</sup> In the tradition of American anthropology, culture is understood as material and ideational,<sup>20</sup> manifest in institutions, material objects, and thought patterns.<sup>21</sup> Tribe identifies two phenomena, 1) propositions<sup>22</sup> that form the content of the invisible Constitution, and 2) forms of logical reasoning or principles of constitutional construction—in other words, patterns of cognition—that Tribe speculates give rise to the propositions. I propose that both of these phenomena would be considered integral to culture in the canonical understanding of “culture” in anthropology.

My first challenge to his model is to a distinction he draws between interior and exterior. Tribe locates both the propositions and the cognitive patterns, or “principles,” “in” the Constitution although they are not seen or written there, interior yet invisible.<sup>23</sup> In this, he distinguishes them from other devices (a “complex superstructure” of practices and “cultural and social traditions”) that are neither in the written Constitution nor even his “invisible” Constitution.<sup>24</sup> He may be using the word “culture” colloquially, but it is worth pointing out this point of dissonance. The propositions and the principles Tribe identifies are patterns of cognition and practice that anthropology would identify as manifestations of culture. If Tribe’s extratextual propositions are “in” the Constitution, then culture is in the Constitution.

Incidentally, in considering patterns of cognition, Tribe shares ground with other recent forays in legal scholarship that identify patterns of thought and use them as bases for explanation of outcomes of legal argument or policy

18. MELVILLE J. HERSKOVITS, *CULTURAL DYNAMICS* 3 (abr. ed. 1964).

19. Margaret Mead, *Preface* to RUTH BENEDICT, *PATTERNS OF CULTURE* xi, xi (Houghton Mifflin Co. 1989) (1934).

20. See, e.g., Franz Boas, *The History of Anthropology*, address at the International College of Arts and Science, St. Louis, September 1904, as published in 5 CONGRESS OF ARTS AND SCIENCE 468 (H. J. Rogers, ed. 1906), reprinted in A FRANZ BOAS READER: THE SHAPING OF AMERICAN ANTHROPOLOGY, 1883-1911, 23, 23 (George W. Stocking, Jr., ed., 1974) (“[A]nthropologists occupy themselves with problems relating to the physical and mental life of mankind as found in varying forms of society . . .”).

21. HERSKOVITS, *supra* note 18, at 3.

22. These propositions, see *supra* text accompanying note 10, seem to be of different genres: some precepts, others ideologies, others hypotheses, etc. Without delving into further analysis, I refer to them generally as “propositions.”

23. TRIBE, *supra* note 1, at 13–29.

24. *Id.* at 10.



debate.<sup>25</sup> The most prolific of these recent efforts, unlike Tribe, does identify cognition as a manifestation of culture.<sup>26</sup>

C. *Question Asked Versus Question Answered*

I propose that two research questions are central to Tribe's project: the question he raises, and the question he answers. Summarizing from his description of his project, the basic question that he raises is, how does the Constitution constitute?<sup>27</sup> Tribe hypothesizes the existence of invisible elements that are not written in the Constitution, but that somehow control how the Constitution is interpreted and thus are inextricably a part of it. Those elements may be received unspoken cues; they recall the cues in Bateson's example that tell a bear cub when its sibling is biting in play versus when its sibling is biting in aggression, which determine the interpretation of two different communicative acts that in their formal aspects look identical.<sup>28</sup> Alternatively, those elements may be patterns of thought or habits of mind that give rise to the same or similar inferences in different individuals reading the same text. Putting aside for a moment the exact nature of the extratextual phenomena, I will refer to them for now in general terms as "metadiscursive devices." Accordingly, I would rephrase Tribe's central research question as, how do metadiscursive devices generate the invisible Constitution?

That, however, is different than the question I find that he answers in his work. The question he answers is, instead, more along the lines of, assuming that an "invisible Constitution" exists, i.e., assuming a set of metadiscursive cues do guide constitutional interpretation but are not specified in the Constitution itself, which ones can I identify as the content of the invisible Constitution? Taking his set of propositions, his answer to that question, as true for the sake of argument, we are still left with the questions of how and whence those principles or patterns of cognition arise. Tribe seems to be making an argument about discourse formation in U.S. constitutional jurisprudence, suggesting relationships between language and patterns of cognition.

This leads back to the intellectual heritage of anthropology. Language specialists and American cultural anthropologists have long investigated

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25. See, e.g., Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1294-95 (2003).

26. For work using cognition as a manifestation of culture more generally, see THE CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL, [www.culturalcognition.net](http://www.culturalcognition.net) (last visited Sept. 27, 2012).

27. TRIBE, *supra* note 1, at 1-8.

28. For analysis of signaling devices taking animal biting in play versus aggression as its central example, see Gregory Bateson, *A Theory of Play and Fantasy*, in GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 179 (Chandler Pub. Co., 1972).

relationships between language and cognition,<sup>29</sup> developing conceptual tools for the task. In this Part, I have argued that, under technical definitions offered by anthropology, Tribe has misdiagnosed his problem and may thus have missed some tools that could aid his project. In the next Part, I describe some of them. First, I propose a possible starting point for those considering the concept of culture in comparative legal analysis, and then I describe a few examples of the conceptual tools it may place at their disposal.

## II. THE WORK OF CONSTITUTING

### A. *Getting Started*

I propose as a first step towards reconceptualizing culture, we draw an analogy from physics. One may think about culture, I propose, in the way that contemporary physics conceives the atom.<sup>30</sup> An atom is composed of building blocks, i.e., protons, neutrons, and electrons. To visualize where an electron may be located in relation to the protons and neutrons of a nucleus, physics proposes the image of a cloud,<sup>31</sup> denser in some areas than others, depicting the set of probabilities that an electron may be observed; the denser the cloud, the more likely an electron may be observed. A set of probabilities, then, describes the relationship between nucleus and electrons. We might similarly think of culture as a set of probabilities of relations. These could be relations between people, between ideas, or other building blocks. The building blocks or the relations between them could then be subject to analysis.

A related methodological suggestion comes from British social anthropologist Adam Kuper, who harbors some skepticism about the concept of “culture.”<sup>32</sup> Kuper suggests that an investigator think through carefully what she has in mind and analyze the components of what is lumped under the term “culture” separately and specifically. Instead of “culture,” for example, Kuper suggests analyzing language, religion, family, law, or another component of culture relevant to the question at hand.<sup>33</sup>

Taking Kuper’s advice—not using “culture” as an explanatory principle and instead breaking down and analyzing components of culture relevant to a

29. See, e.g., BENJAMIN LEE WHORF, *Science and Linguistics*, in COLLECTED PAPERS ON METALINGUISTICS 1, 5 (1952); Edward Sapir, *Conceptual Categories in Primitive Languages*, 74 SCI. 578, 578 (1931).

30. The information for this analogy comes from *Nuclear Energy*, SNEWS, available at <http://snews.bnl.gov/popsi/nuclear-energy.html>.

31. The “cloud” is a metaphor for Schrödinger’s “wave function.” See generally Erwin Schrödinger, *An Undulatory Theory of the Mechanics of Atoms and Molecules*, 28 PHYSICAL REV. 1049 (1926).

32. See generally ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS’ ACCOUNT* (1999). See *infra* Part III for discussion of a few of my points of caution.

33. *Id.* at 245.

particular research question—I return to looking at law as a discursive practice and in particular looking at how constitutions constitute. To illustrate how Kuper’s approach might work, in the rest of this Part, I isolate one component of culture relevant to Tribe’s project, language, to look at how speech, language, and other communicative practices work to construct social reality.

### B. *Performative Speech*

One component particularly relevant for the project of explaining how metadiscursive cues help to construct an invisible Constitution is speech or speech acts. John Austin’s work on performative speech acts may get us started. Austin distinguishes cases in which language is used to represent reality, “constative utterances,” from cases in which words create reality, “performative utterances.”<sup>34</sup> In law school, much of what we study is how to execute effectively performative speech acts: a contract is a performative speech act; a verdict is a performative speech act. These are not instances of language representing but of language creating. That is my first proposal from reflecting on how constitutions constitute: constitutions constitute through performative speech acts.

Austin indicates that not every attempted use of speech to create reality does create reality. What aspects distinguish the performative deployment of a sign-type? He identifies “felicity conditions,” conditions that must be satisfied for a performative to be effective in creating social reality.<sup>35</sup> One is convention: “accepted conventional procedure”<sup>36</sup> must be followed to execute a performative utterance. Following convention may be interpreted as evidencing a certain inner state,<sup>37</sup> which is itself a separate felicity condition.<sup>38</sup> To be taken seriously, as opposed to, say, joking or writing a poem, a speaker must render a performative utterance, in accordance with an accepted custom, as an “outward and visible sign, for convenience or other record or for information, of an inward and spiritual act.”<sup>39</sup>

The felicity of an Austinian performative depends on a third pre-existing social form, authority. One test of the felicity of a performative utterance for Austin is whether the particular persons and circumstances in a given case are

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34. J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 47 (photo. reprint 1967) (1962). For description, and critique, of a logical parallel from the history of comparative law, see Monica Eppinger, *Governing in the Vernacular: Eugen Ehrlich and Late Habsburg Ethnography*, in *LIVING LAW: RECONSIDERING EUGEN EHRLICH* 21, 24–25 (Marc Hertogh ed., 2009).

35. AUSTIN, *supra* note 34, at 14–15.

36. *Id.* at 14, 26. Austin refers to convention elsewhere by such terms as “ceremon[y],” *id.* at 76, or “formula,” *id.* at 60.

37. *Id.* at 9.

38. *Id.* at 15.

39. *Id.* at 9.

appropriate for the invocation of the particular procedure involved.<sup>40</sup> This makes the effect of an utterance dependent on a historical moment and a social and cultural setting; for example, the social roles of speaker and listener determine the appropriate convention for a performative utterance. Authorized (or “ratified,” in Erving Goffman’s term)<sup>41</sup> speakers derive authority from an implicit feature of Austin’s model, context.<sup>42</sup>

The felicity conditions may provide points of focus for our work in comparative law. In Austin’s suggestions for how to evaluate effectiveness of performatives, we are directed to mechanisms—convention, affective state, authority—that determine what kinds of propositions rise to a sense of an “invisible constitution” and which ones sink to “sound and fury, signifying nothing.”<sup>43</sup> Examination of the substance of those felicity conditions inevitably leads us to other components of culture that should then be included in our analysis.

Let me offer an example: I conducted fieldwork in law and social change, i.e., in how performative speech acts work to constitute social reality, in post-Soviet Ukraine.<sup>44</sup> It was through performative speech acts that a giant, well-armed country disappeared from world maps without a shot fired, and reality was changed. Did Soviet structures of thought, action, self-formation, or identity disappear overnight, in all ways, for everybody? No. Structures remained, evacuated of some content, but structuring structures nonetheless. We can observe what new content is filling those structures, areas of slippage, innovations in performance, and through those observations, we can “reverse engineer” and infer who created the authority to create what came next. We can understand how power is getting constituted within this ruptured context. As this example shows, analyzing one component of culture with tools developed for the task can illuminate broader aspects of law, culture, and society in comparative perspective.

While Austinian performatives offer a promising start, searching the history of utterances for performative felicity—identifying performative speech acts—is not entirely satisfying, in part because it is not peculiar to constitutions. It is the way law generally works. It is also, by the way, how some parts of religious tradition also work. (In some religious stories of the Judeo-Christian tradition, for example, we put words into the mouth of God,

40. *Id.* at 15, 34.

41. Erving Goffman, *The Neglected Situation*, in LANGUAGE AND SOCIAL CONTEXT 61, 65 (Pier Paolo Giglioli ed., 1972).

42. AUSTIN, *supra* note 34, at 76 (one of the devices that can convey that a given utterance is meant to be performative is “the circumstances of the utterance”).

43. WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5.

44. For a summary of the research project, see Monica Eppinger, *Parliamentarians, Farmers, and Other Legal Subjects: Law and Experimentation in Independent Ukraine*, ANTHROPOLOGY NEWS, December 2012, at 5.

casting God in the role of maker of performative speech. “‘Let there be light,’ and there was light,”<sup>45</sup> is a paradigmatic example of how words create, in our cosmology.) Performative speech acts work in different kinds of language communities, not just legal communities—in religious communities, and other kinds of communities.

The bill that Representative Paul Curtman introduced into the Missouri legislature outlawing the use of “foreign law” in Missouri court decisions<sup>46</sup> (a project discussed with Representative Curtman at the 2012 CICL Symposium),<sup>47</sup> reminds us that there are different spheres of authority, and there are different ways that authority gets constituted. Representative Curtman may be wrong in conflating religious community with legal community and in perceiving a minority community’s speech acts as threatening, or even relevant, to the majority secular legal community; but Curtman’s alarm still signifies a certain kind of structural assessment of commensurability of performative speech, and thereby of legitimacy of authority, and in that, perhaps, a form of respect.

### C. *Performance*

This begs the question, then: If words can create social reality, and if the felicity of a performative utterance depends on certain features like authority, convention, and context, then where do those features come from? In addition to Austinian performative speech, linguistic anthropology suggests another way that words create reality, this time over longer duration, in a body of work called performance theory.<sup>48</sup> In analyzing performance, we see how repetition over time also creates reality. It takes a short ceremony, punctuated by a brief set of performative utterances, for two people to become newlyweds. It takes significantly longer to establish the convention or ceremony by which two people may become married. It takes reiteration, a kind of repeat performance over time; it also takes acceptability, performing in a way that will be accepted by the audience.<sup>49</sup> The features of Austin’s felicity conditions—those features upon which performatives are premised, like convention and authority—take time to accumulate. This indicates one relationship between performance and

45. *Genesis* 1:3.

46. Mo. H.B. No. 1512, 96th General Assembly, Second Regular Session, “An Act to Amend Chapter 506, RSMo, by Adding thereto One New Section relating to the laws of other countries,” (2011).

47. Rep. Paul Curtman, Remarks at Saint Louis University School of Law Symposium: Invisible Constitutions (Mar. 2, 2012), <http://slu.edu/school-of-law-home/faculty-and-administration/news-and-events/events/culture-religion-and-memory/videos>.

48. See, e.g., ERVING GOFFMAN, *Performances*, in *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 17 (1973).

49. *Id.* at 17 (“When an individual plays a part he implicitly requests his observers to take seriously the impression that is fostered before them.”).

performativity. The felicity of performative speech acts depends on frames of performance,<sup>50</sup> which are themselves created over time by repetition.

In this understanding of “performance,” a performance frame is not something that one enters, as into a temporary, artificial setting only to exit back to reality. Rather, in this understanding of performance, one steps from frame into frame. “All the world’s a stage,” as Shakespeare tells us,<sup>51</sup> or at least all the world’s one stage after another, wherein each stage is a set of probabilities that the performance that one is making might not be accepted by one’s audience. As Professor An-Na’im points out, we all have—or rather, perform—multiple identities.<sup>52</sup> An uncountable and sometimes uncomfortable number of identities. We cultivate or embody multiple identities in part in order to engage in the co-creation of reality with the people with whom we interact. Culture in both its ideational and material manifestations provides the setting for performance, the framing. Frames of performance define the domain, or fields, of probability that the audience will participate in the co-creation of reality over long duration. This is not to claim that every performative speech act or performance bears equal weight or influence on subsequent ones. It is, however, to give each performance its due as an experience in its own right and for its role in the reproduction of performance frames. To re-purpose Bruce Ackerman’s term,<sup>53</sup> in the practice of law, then, each moment is a small-c constitutional moment, a moment of constitution, construction, re-creation, creation anew.<sup>54</sup>

What is at stake in all of this? Speech acts are the building blocks of discourses of inclusion and exclusion. They create in-groups and out-groups. Are we going to outlaw the application of some foreign law doctrines in state court? Are we going to say that certain kinds of speech acts are not going to be performative in our context? What is “our” context? Does that not depend on who we think “we” are? And does not our answer determine who “we” will or can be tomorrow? It is via a dialogic process between speakers and audiences that social reality is constituted. When we repeat speech acts in certain

50. See ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 22 (Northeastern University Press 1986) (1974).

51. WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7.

52. Abullahi An-Na’im, *Banning Sharia is a “Red Herring”: The Way Forward for All Americans*, 57 ST. LOUIS U. L.J. 295 (2013).

53. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 87 (1998).

54. In this formulation of the temporality at issue, at least, I find common ground with Tribe. See TRIBE, *supra* note 1, at 6 (stating a major difference between other scholars’ approaches and his is that “they focus on the way crucial turning points in our constitutional history (‘constitutional moments’) depend for their legitimacy on sources of law outside the Constitution’s text, whereas I focus on the way the Constitution at every moment depends on extratextual sources of meaning”).

discursive traditions, we are making choices about who's in and who's out, who is authorized to create certain forms of reality and who is not. Culture and individuals are, in this vision of the constituting process, co-creative.

The prior Parts aimed first at using Tribe's "invisible constitution" to illustrate some conceptual tools American anthropology has developed from past study of culture and then at equipping the comparative legal scholar with them. Despite the utility of bringing the concept of culture to bear on comparative legal analysis, some serious misgivings about arguing for its adoption arise. To address some of them, the next Part issues a few caveats about the limits and possible misuses of the concept of culture.

### III. CAUTIONING AGAINST CULTURE: FOUR COMMON PITFALLS

#### A. *Stasis*

Caution would warn us away from taking our notion of culture too literally, for several reasons. Culture, understood as learned or inherited elements,<sup>55</sup> has long been easily confused with tradition. The repetition or reproduction of culture without change (literally, stereotyping<sup>56</sup>), has proved untrue in every known human group yet studied. There is no such thing as a human group living unchanged over time. Tradition may function as a performance frame, but it too changes with reiteration. The existence of tradition should not be confused for its tyranny. When faced with groups that seem to have something in common with our imagination of our own past, or our imagination of the other group's past, then we are apt to overlook iterability, emergence, or slippage. Given long prior association of the concept of culture with the idea of tradition, the tendency for confusion is rampant. The concept of culture should be avoided if it abets an assumption of stasis.

#### B. *Reification*

Using the concept of culture is even more problematic when we observers and scholars enlist it in self-deception, allowing our understanding of culture, a construct in the mind of the beholder<sup>57</sup> to become confused with culture as an *a priori* object. As one anthropologist warned a half-century ago,

55. See Mead, *supra* note 19.

56. Originally, "stereotype" referred to a duplicate printing plate in a press, used to stamp identical copies of typography. See WALTER LIPPMANN, PUBLIC OPINION 54–55 (1922) (adopting of this image as a metaphor for human perception of others).

57. See, e.g., PAUL RABINOW, *Humanism as Nihilism: The Bracketing of Truth and Seriousness in American Anthropology*, in THE ACCOMPANIMENT: ASSEMBLING THE CONTEMPORARY 13, 29 (2011) ("What we do as anthropologists is construct interpretations of what we take to be other peoples' realities. The writing of ethnography is what makes us anthropologists. We create fictions. These ethnographic fictions are constructs of other people's constructs.")

[W]hen culture is closely analyzed, we find but a series of patterned reactions that characterize the behavior of the members of a given group. That is, we find *people* reacting, *people* behaving, *people* thinking, *people* rationalizing. Under these circumstances, it becomes clear that what we do is to reify, that is, objectify and make concrete, the experiences of individuals in a group at a given time. These we gather into a totality we call their culture. And, *for purposes of study*, this is quite proper. The danger point is reached when we reify similarities in behavior that only result from the similar conditioning of a group of individuals to their common setting into something that exists outside man . . . This does not mean that we deny the usefulness, for certain anthropological problems, of studying culture *as if* it had an objective existence. But we must not allow the recognition of a methodological need to obscure the fact that we are dealing with a construct . . .<sup>58</sup>

A second reason for caution, then, is that we have tended to reify “culture” as if it has an objective existence.

### C. *Excuse*

Third, and more dangerous, when used to explain observed differences in behavior or outcomes, “culture” can become a counterproductive substitute for thought. Here, “culture” could fall into the same category, or be pressed into the same service, as Gregory Bateson’s “black box.” Bateson explains, via an imaginary dialogue between a father and daughter:

A ‘black box’ is a conventional agreement between scientists to stop trying to explain things at a certain point. I guess it’s usually a temporary agreement . . . . It’s a word that comes from the engineers. When they draw a diagram of a complicated machine, they use a sort of shorthand. Instead of drawing all the details, they put a box to stand for a whole bunch of parts and label the box with what the bunch of parts is supposed to *do*.

Daughter: So a ‘black box’ is a label for what a bunch of things are supposed to do . . . .

Father: That’s right. But it’s not an explanation of *how* the bunch works.<sup>59</sup>

A “black box,” then, can stand for a series of elements understood to stand in relation to each other without attempting to explain how, in conjunction with each other, they work. If used thoughtlessly (i.e., without careful consideration about what is meant within), the “black box” of “culture” can become a default stand-in for explanation, inquiry, or thought, actually empty of content. The use of the term “culture” in comparative legal scholarship often stands as an example of the lure of the empty referent. When we do not understand why a law works one way in Missouri but a different way in Mississippi or yet a

58. HERSKOVITS, *supra* note 18, at 13; *see also* RABINOW, *supra* note 57, at 15.

59. GREGORY BATESON, *Metalogue: What is an Instinct?*, in *STEPS TO AN ECOLOGY OF MIND* 38, 39–40 (1983).



different way in Ukraine, “culture” may be offered as a reason, without further elaboration or specificity. As a facile substitution for explanation, then, the term “culture” can become a parking lot for sloppy thinking about causality.

In this usage, “culture” can also become a blanket label for difference, and when used in that way, it can do us a disservice in a number of different ways. One is that it lumps together others’ differences into an unanalyzed and unanalyzable mass. Another is that it allows us to take for granted our own culture, the way we are, even who “we” are. It can facilitate the unexamined reception of normative categories. In that, it can strip us of the opportunity to exercise “comparative consciousness.”<sup>60</sup> “Culture,” if offered as an explanation in and of itself, can become a substitute for thinking carefully or specifically.<sup>61</sup>

#### D. *Orientalizing*

One more related word of caution regarding culture: “culture,” used carelessly, can become a technology for essentializing. To repeat Herskovits’s admonition: “The danger point is reached when we reify similarities in behavior that only result from the similar conditioning of a group of individuals to their common setting into something that exists outside man . . . .”<sup>62</sup> This is related to the assumption that a culture is (or can be) a “bounded” group which one still may meet. Anthropologists warn that investigation into culture can, with reification, turn into asserting “essential” qualities of one’s own group or others’.<sup>63</sup> The use of the concept of culture as cover for essentializing approximates what Edward Said called “Orientalizing,” which he warned against, more than three decades ago.<sup>64</sup> In this, too, deploying the term “culture” in comparative law can become dangerous when it is accepted as a substitute for thinking.

60. Laura Nader, *Comparative Consciousness*, in ASSESSING CULTURAL ANTHROPOLOGY 84, 86 (Robert Borofsky ed., 1994).

61. This is the most significant objection Adam Kuper raises against “culture” that I share. See KUPER, *supra* note 32.

62. HERSKOVITS, *supra* note 18, at 13.

63. See, e.g., Andrew Apter, *Africa, Empire, and Anthropology: A Philological Exploration of Anthropology’s Heart of Darkness*, 28 ANN. REV. ANTHROPOLOGY 577, 580–81 (1999) (“[D]oes not an implicit racial logic—cloaked in the essentializing categories of native administration and customary law—slip unnoticed through the back door? Insofar as modern Africanist ethnography has sought pristine models of social structures . . . and systems of thought . . . has it not endorsed the fundamental objectifying, essentializing, and even implicit racializing of imperial science at large?”); see also, e.g., Thomas Abercrombie, *To Be Indian, to Be Bolivian: “Ethnic” and “National” Discourses of Identity*, in NATION-STATES AND INDIANS IN LATIN AMERICA 95, 97–98 (Greg Urban & Joel Sherzer eds., 1991) (warning against falling victim to an “essentializing stereotype of ‘the Indian’” and against “essentializing a Hispanic urban culture”) (“In the Andes, an ‘urban,’ ‘Hispanic’ or ‘European’ culture exists, like an ‘Indian’ one, only when we are studying stereotypes.”).

64. EDWARD W. SAID, ORIENTALISM 5 (1979).

How susceptible are we to “essentializing” or “Orientalizing”? The title I choose for this Article is one example. The original title ran along the lines of “Bringing Comparison Home.” As I thought about comparative law and the concept of culture, I realized that the lure of the exotic “other” is part of the construct, part of the air we breathe and water we drink (a metaphor that works as long as we understand that it is air we have engineered for ourselves and water we have synthesized). The title of this Article should arouse suspicion. The perplexing erotic might be a draw;<sup>65</sup> the elision of erotic and exotic, if history is a guide, is a danger.

The foregoing argues that the concept of culture, and tools developed for studying it, has much to offer comparative analysis. However, this endorsement issues cautiously, and the argument proceeds to identify several common pitfalls in drawing on concepts of culture. One helpful start may be taking a “components approach,” and zeroing in on a particular facet of culture in working on a particular problem, for example, language and speech acts to understand how constitutions constitute. Even this approach bears a caveat against assuming a fixed category, a reified object, or stasis. Language, in living usage, is not a fixed set of combinations of phonemes. It is more like an aggregation of the probabilities of finding certain things in relation to each other, or finding certain patterns, probabilities with which speakers pragmatically play.

And here, one last caveat is in order, parting company with Kuper. Once analysis of a particular component has been undertaken, it can also distort the picture if one fails to “put the pieces back together,” to reassemble a wider picture to see how the component under analysis works within a broader frame. This returns us to the tradition in American anthropology of taking a holistic view of culture. As “proof of concept,” the following Part briefly describes how the concept of culture has been deployed by two American anthropologists in the service of larger projects.

#### IV. THE CONCEPT OF CULTURE, DEPLOYED

##### A. *Culture Against Race*

It would be useful at this point to review how the concept of culture has been deployed in larger arguments, and to what effect. This review offers two examples. In the first, from early in its history, American anthropology uses the concept of culture in a fight against a particular manifestation of ethnocentrism, racism. This project is most prominently associated with the German-Jewish father of American study of culture, Franz Boas. The

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65. William Desmond, *Being, Determination, and Dialectic*, in *BEING AND DIALECTIC: METAPHYSICS AS A CULTURAL PRESENCE* (William Desmond and Joseph Grange, eds., 2000).

challenge that faced Boas in the late 1800s and early into the 1900s was that Americans and Europeans observed differences in material culture, between groups that produced particular material goods like guns or locomotive engines, and others that did not. From observations of difference in material culture, Boas's contemporaries evinced a tendency to draw inferences about racially-based aptitudes. Why did Americans and Europeans have certain weapons, or modes of transport, or other seeming advantages in technology and forms of material culture as compared with other groups, in other parts of the world? Some inferred that the capacity to create certain forms of technological innovation was based on racially based aptitudes.

Boas entered the fray with systematic study of groups' differences based on long-term residence, careful observation, and close discussion with the people that he studied to learn the ways that they categorized their own experience.<sup>66</sup> Boas argued that the scope of human history—the stuff of anthropology, considering what makes us human since the early origins of the species—argues against any kind of racial determinism.<sup>67</sup> He reminded his audiences and readerships of the empirical evidence of great building projects in human antiquity, among groups that subsequently lost technological advantage over others who in turn left their own impressive relics.<sup>68</sup> He also reminded his contemporaries that even the great building civilizations of antiquity, of Mesopotamia or the upper Nile, were never composed of one “racial” group but rather incorporated cosmopolitan mixes of peoples.<sup>69</sup> Boas ruled out race: of the many things that might lead to certain kinds of technological breakthroughs or relative advantages, race was not among them.<sup>70</sup> In its place, he argued “culture.” It was a shared, learned body of knowledge passed down from person to person within a group, rather than a set

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66. See, e.g., Franz Boas, *A Year among the Eskimo*, 19 BULL. AM. GEOG. SOC'Y 383 (1887), reprinted in A FRANZ BOAS READER: THE SHAPING OF AMERICAN ANTHROPOLOGY, 1883-1911, 44-45, (George W. Stocking, Jr., ed., 1974).

67. See, e.g., Franz Boas, *Human Faculty as Determined by Race*, Address as Vice-President of Section H before the Section of Anthropology of the American Association for the Advancement of Science at the Brooklyn Meeting, August 1894, in 43 *Proceedings* 301 (1894), reprinted in A FRANZ BOAS READER: THE SHAPING OF AMERICAN ANTHROPOLOGY, 1883-1911, 221, 221-42 (George W. Stocking, Jr., ed., 1974) [hereinafter Boas, *Human Faculty*].

68. See, e.g., Franz Boas, *The History of Anthropology*, Address at the International Congress of Arts and Science, St. Louis, September 1904, in 5 CONGRESS OF ARTS AND SCIENCE, 468 (H.J. Rogers, ed., 1906), reprinted in A FRANZ BOAS READER: THE SHAPING OF AMERICAN ANTHROPOLOGY, 1883-1911, 23, 34 (George W. Stocking, Jr., ed., 1974) [hereinafter Boas, *History of Anthropology Address*].

69. *Id.* at 29.

70. See, e.g., Franz Boas, *Human Faculty*, *supra* note 67; see also George W. Stocking, Jr., *The Basic Assumptions of Boasian Anthropology*, in A FRANZ BOAS READER: THE SHAPING OF AMERICAN ANTHROPOLOGY, 1883-1911, 1, 6 (George W. Stocking, Jr., ed. 1974) [hereinafter Stocking, *Basic Assumptions*]; Rabinow, *supra* note 57, at 14.

of aptitudes based on racial superiority or inferiority, that determined what got built and what did not, what forms of material culture became manifest or not in a given place.<sup>71</sup>

After Boas, generations of anthropologists have redeployed the concept of culture in the argument against racism.<sup>72</sup> Part of the anthropological tradition of ethnography, an attempt at holistic treatment, supported the insight that more visible manifestations of culture like buildings or machines are not safe grounds for inferences about simplicity or complexity of less visible manifestations, such as cosmology, of human reasoning, aptitude, or thought. Boas's legacy includes a second step in his deployment of the concept of culture as an alternative explanation for differences that others linked to race or ethnicity. He also argued not only that our measures were misleading, but that the yardstick itself was rigged; that we measured others by a yardstick that was itself a product of our own culture whereas others are only fairly measured by their own yardsticks.<sup>73</sup> He deployed the concept of culture against a cognitive bias that we now refer to as "ethnocentrism,"<sup>74</sup> the second step in his larger project of arguing against racial or other sub-group bases of superiority or inferiority. The widespread acceptance of the concept of cultural relativism is one of the great achievements of Boas's work,<sup>75</sup> accomplished with the conceptual tool of the concept of culture.

#### B. *Culture Against Ideology*

Recall that Boas found culture manifest in material items and in ideas. He used the concept of culture to argue against contemporaries who looked at differences in material manifestations of culture—e.g., certain forms of technology—and inferred the superiority or inferiority of groups. Materially based, racist logic may be more suspect today, but a parallel to the logic that Boas encountered does hold currency among some today: inferring superiority or inferiority of groups based on perceived differences in ideational manifestations of culture. A second major project in which I find the concept of culture deployed is in argument against this tendency.

71. See, e.g., Boas, *History of Anthropology Address*, *supra* note 68; see also Stocking, *Basic Assumptions*, *supra* note 70, at 3.

72. See, e.g., *Race: Are We So Different?*, AM. ANTHROP. SOC'Y, <http://www.understandingrace.org/> (last visited Feb. 22, 2013) (public education project on race conducted under the aegis of the American Anthropological Society).

73. See, e.g., Boas, *History of Anthropology Address*, *supra* note 68, at 31.

74. See, e.g., Stocking, *Basic Assumptions*, *supra* note 70, at 6; Rabinow, *supra* note 57, at 18.

75. Rabinow, *supra* note 57, at 20.

I find one example of this work in contemporary anthropologist Laura Nader's analysis of the function of an ideology of "the rule of law."<sup>76</sup> Just as some of Boas's contemporaries sought to export perceived advantages of material culture, some of Nader's contemporaries perceive others as lacking "the rule of law" (or forms of economic development thought contingent upon it), and therefore in need of intervention.<sup>77</sup> Just as some of Boas's contemporaries were moved to act out of a sense of charitable pity, efforts to export the "rule of law," moved by others' perceived lack, become self-justifying. Nader's work could be seen as building on Boas's project, deploying the concept of culture to explore dubious inferences about origins of perceived inferiority in material conditions or systems of ideas.

This is where we see an advantage to reassembling pieces of the puzzle Kuper has had us take apart. Both Boas's and Nader's argumentation shows how the culture, conceptualized holistically, can challenge certain forms of cognitive bias. In these interrelationships, traceable because of a holistic consideration of difference, the workings of power to shape the frame within which discourses are produced become more visible.

### C. *Bringing Comparison Home: Culture in Comparative Law*

In the previous Parts, after cautioning against troubles that can result from misuse of the concept of culture, I attempted to show how tools developed to study culture might be used in comparative law. I suggest that the tools of anthropology might be adapted for use in comparative law, and advocate two different steps. The first would be to take Kuper's suggestion to analyze components of culture relevant to a given problem. The second would be to reassemble as many components as one can synthesize to get a more holistic picture of how both problem and solutions get produced.

To outline the analytic that could result from my proposals, let us consider as an example a hypothetical project researching the mystery Tribe's work raises, how a Constitution constitutes. The investigator could look with specificity at a particular component of culture, authorized speech acts like laws or constitutions, to analyze probabilities that certain elements occur in relation to one another: for example, the probability of a relationship between certain assertions and certain signals of acceptance (as constitutional,

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76. See generally UGO MATTEI AND LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

77. See, e.g., NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* (2004) (explaining Feldman's own participation in the U.S.-installed Coalition Provisional Authority after the U.S. invasion of Iraq in an effort to draft a new Iraqi constitution, and calling for a more humble approach to U.S. efforts at "nation-building"); see also Kareem Fahim, *Have a Nice Country*, *THE VILLAGE VOICE* (June 22, 2004), <http://www.villagevoice.com/2004-06-22/news/have-a-nice-country/1/> (describing Feldman's drafting efforts).

legally binding, or authoritative). She could then identify ideologies—formulated as precepts or propositions—that have become instrumental in their institutionalization, as Tribe has done, and infer, as Tribe has also done, cognitive processes that may have given rise to those propositions and precepts. This would provide adequate grounding to step back and examine the frames of performance in which authority and convention are produced, to ascertain whose speech acts hold authority and why, or which ideologies end up within an “invisible Constitution,” which do not, and why.

This process could end up telling us something about how a given constitution, including its unwritten dimensions, constitutes. Culture, instead of being a peremptory answer, then becomes a heuristic, a means to understanding, frames of performance within which discourse produces literal meaning and in parallel produces and reproduces speech act communities. To speak more generally, examining component parts of culture can illuminate broader processes like the constitution of power, authority, or ideology; or probabilities of acceptance, rejection, reiteration, breakdown, or institutionalization.

#### CONCLUSION

Althusser points out for us that to continue producing something, one must reproduce the thing itself but one must also reproduce the things that are necessary for reproduction.<sup>78</sup> To continue producing shoes, one must not only continue making shoes; there must be a system for reproducing leather, laces, lasts, and even the know-how and workforce that fashions those materials into shoes. Likewise, to reproduce discourse, one must not only produce the discourse itself but also the things necessary for discursive production. In not looking at what produces the frame within which discourse is produced—in not looking at *how* the propositions that make up his “invisible Constitution” get produced—Tribe and others wishing to understand how invisible Constitutions constitute miss out on something fundamentally constitute: power.

Comparative law has traditionally suffered, at least in the United States, from overly restricting itself to geographically based jurisdictions as its unit of analysis, as the performance frame on which it relies to define its subject. The traditional comparative law project would be to compare some aspect of the law of different jurisdictions, say, the law of France to the law of China. The utility of thinking about culture, when we are thinking through questions of law, religion, and invisible constitutions, is that culture allows us to slice at a different angle. It opens the door to new projects; we can compare the speech

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78. LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses: Notes towards an Investigation*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 85, 86 (2001).

acts of a religious community to the speech acts of a legal community within one locale and see where there are overlaps, where there are not. Among other benefits, whereas comparative law has traditionally concentrated on different jurisdictional practices, the concept of culture and other tools of anthropology developed to investigate particular components of culture allow us to bring comparison home and to look comparatively at frames of discursive performance that constitute communities of speech, and forms of authority and power within them.