
SYMPOSIUM

A SYMPOSIUM ON RAN HIRSCHL'S *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW*

BIG QUESTIONS COMPARATIVE LAW

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INTRODUCTION

Ran Hirschl's *Comparative Matters* is a wonderful and inspiring manifesto on the comparative method.¹ As a scholar of comparative property law, I have always had a strong interest in how and why we compare legal concepts and institutions. While I believed comparative lawyers had reason to be satisfied with what the comparative method had already achieved, I have always been eager to see the field taken further. The reasons we employ the comparative method have been insightfully laid out by prior work.² We compare to learn about other legal systems—not simply for the sake of knowledge, but also because it helps cure ethnocentric biases and fosters critical examination of the

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¹ RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (2014).

² See, e.g., KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 34 (Tony Weir trans., 3d rev. ed. 1992) (“Often it is the feeling of dissatisfaction with the solution in one’s own system which drives one to inquire whether perhaps other legal systems may not have produced something better. Contrariwise, it may be the pure and disinterested investigation of foreign legal systems which sharpens one’s criticism of one’s own law and so produces the idea or working hypothesis.”).

underlying assumptions of one's own legal system. We compare to "harmonize" areas of law that are critical to the efficient functioning of the market or the effectiveness of the welfare and social protection systems in multi-state polities and multi-level systems of governance. Finally, we compare to expand our institutional imagination, by providing policymakers with a broader menu of existing legal institutions capable of achieving desiderata such as greater distributive justice, efficiency, and democratic participation.

I was also satisfied with the variety of available methods for comparing legal systems. Between the First International Congress of Comparative Law held in Paris in 1900 and the 1990s, several comparative methods had been developed and refined so that scholars could pick and choose tools from a rich methodological toolbox to best achieve the objectives of their inquiry.³ Functionalism, the comparison of rules or institutions that perform a similar function in different legal systems, is often a good place to start because it helps the researcher identify manageable research questions.⁴ Culturalism, which compares legal systems as "cultural wholes," sheds light on the rich cultural fabric of legal institutions, allowing comparativists to develop richer causal explanations for legal change and warning lawmakers about the risks of hastily "transplanting" legal institutions.⁵ Structuralism debunks the myth of *the* legal rule by showing that each rule is a complex structure composed of different "formants": the rule formulated by the legislature, the rule as interpreted by courts, the implementation of the rule by administrative agencies, the discussion of the rule by law professors, etc.⁶ It also makes plain

³ See David S. Clark, *Nothing New in 2000?: Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 872 (2001).

⁴ For an introduction to the functionalist method, see ZWEIGERT & KÖTZ, *supra* note 2, at 34, a book that has become a classic. For a recent discussion of functionalism, see Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 340 (Mathias Reimann & Reinhard Zimmermann eds., 2006) ("The debate over the functional method is indeed much more than a methodological dispute. It is the focal point of almost all discussions about the field of comparative law as a whole . . .").

⁵ On culturalism and its mapping of legal systems as cultural wholes, see RENÉ DAVID & JOHN. E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 17-20 (3d ed. 1985) ("It is a superficial and indeed false view to see law as being only composed of the totality of [legal] rules. . . . Each law in fact constitutes a *system*: it has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques of expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of law in that society.").

⁶ Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1, 22 (1991) [hereinafter Sacco, *Installment I*] ("[E]ven the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there can be only one rule in force, recognizes implicitly that living law contains many different elements . . . elements that he keeps separate in his own thinking. In this essay, we

that each rule consists of both an operative prescription and a justification for that prescription, thereby emphasizing the role played by ideology and rhetoric.⁷ The critical approach to comparative law relies on comparison to expose the implicit biases and assumptions of the observer's own system and to denounce the illusory and ideological nature of "legalism," namely, the claim that law is both neutral and necessary.⁸ Finally, comparative law and economics seeks to explain in precise terms the convergence of legal rules by using efficiency as a key metric. Comparative law and economics also gives a comparative twist to the notion of efficiency, showing that the same rule may be efficient in one system but not in another, because efficiency is a matter of fit in a larger institutional framework.⁹

Of course, I was also excited to see the comparative method make further advances. I felt a sense of urgency and responsibility toward the fundamental questions that had drawn me to the study of property law, such as the dramatically rising levels of societal inequality in the areas of income, wealth, and power, and the dilemmas of sustainable resource use. I was eager to see comparative lawyers turn to these questions,¹⁰ as they seemed like the types of

will call them . . . the 'legal formants.'"). The structuralist method in comparative law was first developed by Rodolfo Sacco. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343, 393 (1991) ("We will be surprised only if we fail to reflect upon a more general truth. If we wish to classify all facts about society as either economic (and therefore structural), or as noneconomic (and therefore superstructural) we must place law in the second subdivision along with language, fashion and so forth."). For a more recent and radically different type of structuralism, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds., 2006) ("[F]ramework and context are misleading terms for describing the relationship between legal and economic activities. This is because economic activity can't be understood as something autonomous in relation to a set of passive institutional and legal conceptual constraints Legal institutions and ideas have a dynamic, or dialectical, or constitutive relationship to economic activity.").

⁷ See Sacco, *Installment I*, *supra* note 6, at 34 ("[T]here is a basic distinction between those legal formants that are themselves rules of conduct and others that are developed in order to provide abstract formulations or justifications of rules and conduct."). For a sample of critical approaches to comparative law, see Symposium, *New Approaches to Comparative Law*, 1997 UTAH L. REV. 255.

⁸ See generally UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997) (utilizing economic principles to conduct a comparative law analysis among countries). For a more recent assessment of three decades of comparative law and economics work, see Ralf Michaels, *The Second Wave of Comparative Law and Economics?*, 59 U. TORONTO L.J. 197, 197-200 (2009).

⁹ See Ugo Mattei & Alberto Monti, *Comparative Law & Economics: Borrowing and Resistance*, GLOBAL JURIST FRONTIERS, Vol. 1, Issue 2, Art. 5, Nov. 2001, at 1, 5.

¹⁰ Historians Jo Guldi and David Armitage recently wrote a methodological manifesto advocating a return to the study of "big" questions over the long-term. JO GULDI & DAVID ARMITAGE, *THE HISTORY MANIFESTO* (2014). They write:

issues that would benefit from a comparative analysis of long-term structural social transformations. I believed comparative private law scholars had specialized knowledge on these questions that could be usefully shared with colleagues in history, political economy, and comparative policy analysis. I also thought that a comparative long-term analysis would deliver both greater clarity about patterns of change and causation, as well as fundamental insights about the future. I was eager to see discussion about the new methodological tools necessary for this type of inquiry.¹¹

However, as my academic career progressed, I became disillusioned with the comparative method. Instead of taking up “big” questions, comparative law scholars were tirelessly rehearsing old debates about the comparative method itself. Is comparative law a “sick science,” as Gustav Radbruch famously put it, because it is too obsessed with its own methodology?¹² Is comparative law just a method or is it now also a discipline?¹³ These debates over method are not insignificant, but they deflected scholarly attention away from the urgency of “big,” real-world questions that bear on public conversations and legal reform.

Ran Hirschl’s book *Comparative Matters* made me fall in love with the comparative method again. The book is a compelling call for comparative constitutional studies and warns scholars that maintaining the disciplinary

In the last decade, across the university, the rise of big data and problems such as long-term climate change, governance, and inequality are causing a return to questions about how the past develops over centuries and millennia, and what this can tell us about our survival and flourishing in the future. This has brought a new sense of responsibility, as well as urgency, to the work of historians who “should recognize that how they tell the story of the past shapes how the present understands its potential, and is thus an intervention in the future of the world,” as one practitioner of history’s public future has noted.

Id. at 9 (quoting Richard Drayton, *Imperial History and the Human Future*, 74 HIST. WORKSHOP J. 156, 167 (2012)).

¹¹ Guldi and Armitage see three important benefits from “big” question, long-term historical studies: a sense of agency, the ability for counterfactual thinking, and the documentation of alternative utopias. *See id.* at 30-37.

¹² *See* David W. Kennedy, *The Methods and the Politics*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 345, 351 (Pierre Legrand & Roderick Munday eds., 2003) (observing that comparative law’s obsession with method and the proliferation of an eclectic array of methods has resulted in the increasing de-politicization of comparative law). Radbruch’s comment is quoted in ZWEIGERT & KÖTZ, *supra* note 4, at 33 (quoting GUSTAV RADBRUCH, *EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT* 253 (12th ed., 1969)).

¹³ Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 683-84 (2002) (“Suffice it to note that fifty years ago, when leading scholars considered comparative law merely a method, their view may have been justified because back then the discipline consisted mainly of a particular way of looking at the law and of a research agenda. Yet, when leading scholars today continue to subscribe to this view, the actual *knowledge* accumulated in the meantime makes their position indefensible.” (footnotes omitted)).

divide between comparative constitutional law and other closely related disciplines is limiting in two ways.¹⁴ First, the divide artificially limits the kind of questions we ask, and second, it limits the range and quality of the answers we are able to provide.¹⁵ In other words, *Comparative Matters* is a powerful call for a comparative social science committed to asking “big questions.” “Big questions” has become a term of art in the social sciences meaning “questions about large-scale outcomes that are regarded as substantively and normatively important by both specialists and non-specialists.”¹⁶ Examples of “big” questions that have occupied social scientists include: (1) What are the causes and consequences of revolutions, historically and in the modern developing world?¹⁷ (2) How do welfare systems develop? When do countries adopt welfare programs, and when and why do they expand them or contract them?¹⁸ (3) What explains the establishment of democratic regimes or authoritarian ones?¹⁹ What balance of power between the classes, or system of social alliances, results in democracy and what in authoritarianism?

¹⁴ HIRSCHL, *supra* note 1, at 6, 13.

¹⁵ *Id.* at 13.

¹⁶ James Mahoney & Dietrich Rueschemeyer, *Comparative Historical Analysis: Achievements and Agendas*, in *COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES* 3, 7 (James Mahoney & Dietrich Rueschemeyer eds., 2003).

¹⁷ For examples of historical-comparative studies of revolutions, see JACK A. GOLDSTONE, *REVOLUTION AND REBELLION IN THE EARLY MODERN WORLD* (1991); CHALMERS JOHNSON, *REVOLUTIONARY CHANGE* (1966) (developing an analytical framework for determining when political violence constitutes a revolution and applying the analysis to real-world situations); JEFFERY M. PAIGE, *AGRARIAN REVOLUTION* (1975) (examining contemporary rural social movements as they relate to both class differences and the socioeconomic role of agriculture); THEDA SKOCPOL, *STATES AND SOCIAL REVOLUTIONS* (1979); Robert Dix, *The Varieties of Revolution*, 15 *COMP. POL.* 281 (1983) (addressing the two categories of revolutions set forth by Samuel and positing a third category to explain the recent revolutions in Latin America); John Foran, *A Theory of Third World Social Revolutions: Iran, Nicaragua, and El Salvador Compared*, 19 *CRITICAL SOC.* 3 (1992).

¹⁸ For examples of comparative studies of the welfare state, see GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990) (separating the welfare state into three different regimes—the liberal welfare state, the corporatist welfare state, and the social democratic welfare state—and analyzing each one); EVELYNE HUBER & JOHN D. STEPHENS, *DEVELOPMENT AND CRISIS OF THE WELFARE STATE: PARTIES AND POLICIES IN GLOBAL MARKETS* (2001) (positing that partisan politics was the most important influence on the development of welfare states in advanced industrial democracies in the thirty years after World War II); *THE NEW POLITICS OF THE WELFARE STATE* (Paul Pierson ed., 2001) (focusing on the economic, electoral, and political dynamics that influence the politics of the modern welfare state).

¹⁹ For examples of comparative studies on democratic versus authoritarian regimes, see JEFFERY M. PAIGE, *COFFEE AND POWER: REVOLUTION AND THE RISE OF DEMOCRACY IN CENTRAL AMERICA* (1997) (examining the historical differences between Central American political systems and their recent development into representative democracies); DIETRICH RUESCHEMEYER, EVELYNE HUBER STEPHENS & JOHN D. STEPHENS, *CAPITALIST*

These questions are all what James Rule would call “first order” questions.²⁰ “First order” or “big” questions are those “that draw people to study social life in the first place, and that are constantly raised anew in the minds of nonspecialists.”²¹ Theda Skocpol has argued that answering these big questions is a “doubly engaged” enterprise²²: these questions seek to address momentous real world occurrences and inform public conversations and reforms, but simultaneously require raising, and taking a position on, larger theoretical questions about frameworks and the method itself.²³ *Comparative Matters* is an invitation to pursue this type of doubly engaged scholarship.

I will devote this comment to what I call the “big” questions of comparative law. Part I of this comment places the return of big questions in comparative law within the context of larger developments in the social sciences. The following Parts each focus on asking and answering big questions through qualitative, comparative historical social science. In Part II, I will first discuss the type of big questions we could address through comparative historical social science within my field, comparative property law. In Part III, I will examine different ways of doing research in comparative historical social science. Finally, in Part IV, I will address and respond to a number of critiques of comparative historical analysis that have been raised in different corners of the social sciences.

I. THE RETURN OF BIG QUESTIONS IN THE SOCIAL SCIENCES

Modern social science, from Adam Smith to Max Weber, Emile Durkheim, and Karl Marx, has been all about “big questions.”²⁴ The works of the founders

DEVELOPMENT AND DEMOCRACY (1992) (exploring the social origins of democracy and dictatorship); David Collier & Robert Adcock, *Democracy and Dichotomies: A Pragmatic Approach to Choices About Concepts*, 2 ANN. REV. POL. SCI. 537 (1999) (examining the conceptualization of democratization with a focus on reaching more precise analytic differentiation than previous scholars).

²⁰ JAMES B. RULE, THEORY AND PROGRESS IN SOCIAL SCIENCE 46 (1997) (“We can thus view such first-order questions as the social equivalents of certain basic questions in ethics They are the kinds of questions that draw people to study social life in the first place, and that are constantly raised anew in the minds of nonspecialists seeking reasoned bases for action in the face of endemic social tensions.”).

²¹ RULE, *supra* note 20; see also Mahoney & Rueschemeyer, *supra* note 16, at 7 (explaining that both specialists and non-specialists are drawn to big questions and that such questions have been used historically and to address new substantive issues).

²² Theda Skocpol, *Doubly Engaged Social Science: The Promise of Comparative Historical Analysis*, in COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES, *supra* note 16, at 409.

²³ *Id.*

²⁴ Mahoney & Rueschemeyer, *supra* note 16, at 3; Theda Skocpol, *Sociology’s Historical Imagination*, in VISION AND METHOD IN HISTORICAL SOCIOLOGY 1 (Theda Skocpol ed., 1984); see also Theda Skocpol & Margaret Somers, *The Uses of Comparative History in Macrosocial Inquiry*, 22 COMP. STUD. SOC’Y & HIST. 174, 174 (1980)

of modern social science were historically grounded and comparatively oriented efforts to come to grips with the causes and effects of the rise of capitalism.²⁵ They were committed to making sense of questions such as: What accounted for the rise of capitalism in Europe? How did the emergence of modern liberal capitalist society transform class relations, political dynamics, and moral values? How will capitalism evolve over time, and how will European capitalist expansion affect the rest of the world?²⁶ Their brand of modern social science was, at its core, a type of historical comparative inquiry that focused on large-scale structures and long-term developments.²⁷ It sought to understand the transformation of the fundamental economic, social, and political structures of modern society with an eye towards the interplay between meaningful actions and structural determinants.²⁸ This early comparative historical social science was not pursued for its own sake, but rather for the sake of determining practical future actions.²⁹ It was social science in service of reform. In its early life, comparative law also sought to tackle historically and comparatively “big questions.” Raymond Saleilles, one of the fathers of comparative law, was also a historian and devoted himself to the comparative and historical study of the transformations of law in modern industrial society.³⁰ Saleilles’s historical and comparative investigation was similarly oriented towards the future and practical action. He believed that the comparative historical method would help modern lawyers shape a new legal system responsive to the needs of modern industrial society.³¹

However, over the course of the twentieth century, modern social science seems to have lost some of its commitment to studying big structural transformations from this angle. Historical comparative social science divided into separate, highly specialized academic disciplines, each with their own specific questions and methods, which were often inconsistent.³² Sociology

(“[P]ractitioners of comparative history from Alexis de Tocqueville and Max Weber to Marc Bloch, Reinhard Bendix, and Barrington Moore, Jr. have typically been concerned with understanding societal dynamics and epochal transformations of cultures and social structures.”).

²⁵ See Skocpol, *supra* note 24, at 1.

²⁶ See *id.* (“Would industrializing capitalist societies break asunder or generate new forms of solidarity and satisfaction for their members? How would changes proceed in the rest of the world under the impact of European expansion?”).

²⁷ Skocpol, *supra* note 23, at 410.

²⁸ Skocpol, *supra* note 24, at 1.

²⁹ GULDI & ARMITAGE, *supra* note 10, at 19-20 (arguing that orientation towards practical action and the future has long characterized historical writing).

³⁰ Christophe Jamin, *Saleilles’ and Lambert’s Old Dream Revisited*, 50 AM. J. COMP. L. 701, 704-05 (2002) (discussing Saleilles’s commitment to the historical method).

³¹ See *id.* at 706 (discussing Saleilles’s idea that the comparative-historical method would help improve the civil law).

³² Cf. GULDI & ARMITAGE, *supra* note 10, at 49 (discussing history’s anxiety about specialization); Skocpol, *supra* note 23, at 410.

lost touch with history and became dominated by a mode of ahistorical, abstract structural functionalism that did not renounce big questions, but sought to understand “modernization” through a grid of abstract categories, regardless of time and place.³³ Several decades later, history started abandoning the long term (and the big questions) and began retreating into the study of a “Short Past” that, focusing on the local and the specific, required specialization and mastery of discrete archives.³⁴ Comparative lawyers followed suit and narrowed their inquiry to small questions, comparing legal concepts and doctrines according to their own social science methods, such as functionalism or structuralism.³⁵ In other words, despite a superficial, and largely rhetorical, commitment to interdisciplinarity, comparative law shared the fate of the other specialized disciplines affected by the syndrome of “academic introversion”³⁶: it became overly occupied by its own little questions, methods, and sectarian diatribes, and thus incapable of asking and answering big questions.

Why did the social sciences, and comparative law with them, lose sight of the long term and big questions? Part of the explanation has to do with institutional developments in academia, namely the increasing specialization of academic disciplines over the course of the twentieth century. With changes in academic institutions’ funding and a shrinking job market for graduate students, specialization and expertise promised to improve scholars’ job prospects by providing knowledge and rigor.³⁷ Larger cultural and ideological trends also played an important role in the move away from big questions and the long term. The rise of a post-modern sensibility that rejected “grand narratives” and utopias, and its later linguistic turn, encouraged focus on the small, the local, and the construction of everyday social experience through language.³⁸ Finally, political dynamics played their own part. The United States’ hegemony in the world order after World War II and the Cold War facilitated the spread of ahistorical functionalist theories of “modernization” in

³³ See Skocpol, *supra* note 24, at 2-3 (discussing functionalism in sociology).

³⁴ GULDI & ARMITAGE, *supra* note 10, at 45 (“Biological time-scales of between five and fifty years became the model for field-breaking work in history. . . . [A] flood of doctoral dissertations since that time has concentrated on the local and the specific as an arena in which the historian can exercise her skills of biography, archival reading, and periodization, within the petri-dish of a handful of years.”).

³⁵ See generally Kennedy, *supra* note 12 (discussing the dominance of functionalism in mainstream comparative law and the depoliticization of comparative law).

³⁶ For a discussion of “academic introversion,” see Skocpol, *supra* note 23, at 410-11.

³⁷ GULDI & ARMITAGE, *supra* note 10, at 42-43.

³⁸ See *id.* at 11, 46-47 (“To get a job as a historian, one needed to engage in an innovative reading of the past The generation of 1968 landed in the middle of an already ongoing social turn, a revolution in looking at history ‘from the bottom up’ and away from the history of elites to the experiences of ordinary people, the subaltern, the marginalised, and the oppressed.”).

sociology departments.³⁹ Functionalism emphasized an abstract pattern of modernization, akin to the development of the United States and along which all developing nations would eventually move, an emphasis that was nurtured by the political climate of the time.⁴⁰ And, in the 1980s, the postmodern rejection of grand narratives and utopias was embraced and reinforced by both neoliberalism and a disenchanting left.⁴¹

But big questions are back. Hirschl's book calls for big questions in comparative constitutional law, and is not alone in doing so. In sociology departments, interest in historical comparative analysis has experienced a dramatic revival in recent decades.⁴² Even during the general eclipse of historical sociology, the big questions and the long term never really went away—they were kept alive by a group of oppositional and unorthodox scholars including Perry Anderson, Reinhard Bendix, Theda Skocpol, E.P. Thompson, Charles Tilly, and Immanuel Wallerstein.⁴³ In recent decades, empirically grounded comparative historical analysis seems to be booming. Scholars have produced dozens of new works committed to providing a comparative and historically grounded explanation of large-scale and substantively important outcomes. The topics of these studies range from social provision and the welfare state, to state formation and state restructuring, to democratization and regime transition, as well as to “racial and ethnic relations and national identities.”⁴⁴ The return of comparative historical analysis is not without challenges. In particular, it has ushered in a number of difficult questions, most importantly, how to integrate micro-units (individuals and small groups) into the study of macro-structures, and how to balance the tension between historical particularity and theoretical generalization.⁴⁵ Much work needs to be done in some fields. Notably, law remains overlooked by this resurgence of comparative historical analysis.⁴⁶ In history, big questions and the long term are also resurging. The historians Jo Guldi and David Armitage have recently published an inspiring manifesto calling for an engaged, long-

³⁹ Skocpol, *supra* note 24, at 3.

⁴⁰ *Id.* (“In due course, they would supposedly come to resemble what the United States was happily conceptualized to be in the 1950s and early 1960s: economically expanding and innovative, highly educated and achievement-oriented, politically pluralistic, and pragmatically nonideological.”).

⁴¹ See Martín Hopenhayn, *Postmodernism and Neoliberalism in Latin America*, BOUNDARY 2, Fall 1993, at 93, 98 (discussing, in general, the service the postmodern discourse lent to the political and cultural offensive of neoliberalism).

⁴² Mahoney & Rueschemeyer, *supra* note 16, at 3.

⁴³ Skocpol, *supra* note 24, at 6.

⁴⁴ Mahoney & Rueschemeyer, *supra* note 16, at 4.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.*

term history capable of speaking to urgent global challenges, such as wealth and power inequality, and the future of the environment.⁴⁷

So far in comparative law, the most visible sign of the return of big questions has been the proliferation of an impressive new body of empirical scholarship that uses quantitative, large-sample research designs to tackle a variety of big questions, including whether the historical origin of a country's laws, such as civil law or common law, has any impact on economic outcomes or the longevity of constitutions adopted by occupying powers in occupied states.⁴⁸ This new body of work is truly interdisciplinary as it is closely related to at least three bodies of literature—empirical legal studies, comparative politics, and comparative law—and uses cross-country legal data to test causal theories in an explicit hypothesis-testing framework.⁴⁹ Typically, these studies cover several countries and collect a narrow set of information from each country.⁵⁰ The appeal of this work is the dramatic increase in the amount of information available in the cross-country dimension and the different analyses it makes possible, which more than compensates for the loss of information from each country.⁵¹ This new strand of “comparative law by numbers,” as Ralf Michaels called it,⁵² has proven extremely influential, yielding citation numbers unheard of among comparative law scholars and encouraging legal reform in many countries. However, it has been met by traditional comparative law scholars with a good dose of indifference.⁵³ Comparativists who have seriously engaged this work have been largely critical of it. One objection is that this quantitative comparative law takes the “law in the books” too seriously, ignoring both the “law in action” and informality, which are difficult

⁴⁷ See GULDI & ARMITAGE, *supra* note 10, at 9.

⁴⁸ The literature is vast—Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer have conducted the most well-known study assessing the impact of the historical origin of a country's laws. Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008) (summarizing evidence “suggesting that the historical origin of a country's laws is highly correlated with a broad range of its legal rules and regulations, as well as with economic outcomes” and attempting “to reach a unified interpretation”). For examples of comparative constitutional law scholarship in this vein, see ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009); Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul . . . : Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1141-42 (2008).

⁴⁹ Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131, 132 (2015).

⁵⁰ *Id.*

⁵¹ Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. L. 797, 798 (2009).

⁵² Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765 (2009).

⁵³ *Id.* at 766-67.

to measure.⁵⁴ Another criticism is that comparative law by numbers ignores the deeper context of law, namely, politics and culture.⁵⁵ A final quibble is that quantitative comparative law is really nothing more than a refinement of the functionalist method that comparative lawyers have long relied upon.⁵⁶ One particular strand of this literature, the so-called “legal origins” literature, which argues that legal origin impacts economic growth, has also been the object of substantive criticism for its preference for deregulation and market solutions over other competing values such as solidarity and distributive justice.⁵⁷

Hirschl devotes significant attention to this empirical, quantitative comparative law, welcoming the gains in perspective that it allows, particularly the focus on broad trends and the broadening of the comparative inquiry beyond “a small number of ‘usual suspect’ constitutions” and countries.⁵⁸

I join Hirschl in welcoming quantitative research designs to comparative law, but I would like to devote the rest of this comment to another way of asking and answering big questions: qualitative, comparative historical social science. I read Hirschl’s *Comparative Matters* as a much-needed call to revive comparative historical social science which comparative lawyers, trapped in their “academic introversion,” have failed to pursue. The recent spate of quantitative comparative law that has revolutionized the field’s methodology should not eclipse the need for qualitative comparative historical analysis. A rich body of literature already exists, from Charles Tilly to Theda Skocpol, that can inspire a new wave of comparative legal history. Also, so far, “big questions” comparative law, whether quantitative or qualitative, has happened almost exclusively in the comparative constitutional law context, which has been a laboratory of methodological experimentation. My hope as a comparative property law scholar is that Hirschl’s call for big questions comparative law will be heard and taken up beyond the circle of comparative constitutional law.

In the next Part I will discuss the type of comparative historical analysis I call for, with special regard to my field, comparative property law. What big questions could we address through comparative property history? And how do we do comparative property history? I will also examine and respond to a number of critiques of the comparative historical analysis I advocate, critiques that have been raised in different corners of the social sciences.

⁵⁴ *Id.* at 776 (“This focus on formal law was clearly deficient from a comparative law perspective, which has long emphasized the importance of law in action over law in the books and on how law is applied in fact as opposed to merely what its rules say.”).

⁵⁵ *See id.* at 771-74, 786, 789-91.

⁵⁶ *See id.* at 777 (“The proximity between functionalist comparative law and economics has been recognized before.”).

⁵⁷ *Id.* at 773.

⁵⁸ HIRSCHL, *supra* note 1 at 267-81 (discussing large-*N* comparative constitutional law).

II. BIG QUESTIONS FOR PROPERTY LAW AND COMPARATIVE HISTORICAL SOCIAL SCIENCE

Why is comparative historical analysis useful to understanding property law? To what use can we deploy comparative history in property and what big questions does it allow us to ask and answer? Theda Skocpol notes that, while some recent methodological discussions have collapsed distinct types of comparative history into a single methodological logic (analogous to the mode of hypothesis-testing through multivariate analysis done by quantitative scholars), “there are, in fact, at least three distinct logics-in-use of comparative history”: “comparative history as macro-causal analysis, . . . comparative history as the parallel demonstration of theory[,] and comparative history as the contrast of contexts.”⁵⁹ The first two are particularly relevant to the study of property law.

To begin with, comparative history can be used to “mak[e] causal inferences about macro-level structures and processes.”⁶⁰ This allows the researcher to test the validity of existing causal explanations or to develop new ones.⁶¹ In property, this mode of analysis can be used to make causal inferences about the relationship between property and large structural, social, and economic transformations. For example, what is the relationship between property and the emergence of modern liberal market democracies in the West? Robert Brenner’s pioneering study on the impact of class structure on long-term trends in income distribution and economic growth opened up a new path of investigation.⁶² Brenner examined the relationship between property relations and economic development in early modern Europe and argued that “it was the emergence of the ‘classic’ landlord/capitalist tenant/wage-labourer structure which made possible the transformation of agricultural production in England, and this, in turn, was the key to England’s uniquely successful overall economic development.”⁶³ By contrast, Brenner found that, in France, where the state developed as an “*independent* extractor of surplus” of labor production, in competition with the landlords, economic development did not pick up.⁶⁴ Brenner’s work has been expanded by other historians, but comparative law scholars have been largely reluctant to take up Brenner’s line of research.

⁵⁹ Skocpol & Somers, *supra* note 24, at 174-75

⁶⁰ *Id.* at 181.

⁶¹ *Id.*

⁶² Robert Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe*, 70 PAST & PRESENT 30 (1976), reprinted in THE BRENNER DEBATE 10, 49, 55 (T.H. Aston & C.H.E. Philpin eds., 1985) (discussing the factors that contributed to the agricultural transformation and “successful overall economic development” in England).

⁶³ *Id.* at 49.

⁶⁴ *Id.* at 54-55 (contrasting the reasons for development in England with those for limited production in France).

However, this line of research is a critical one, and one to which law scholars can make unique contributions. It is critical both for the purpose of offering a full historiographical account of the development of property law and the role property has played in society, as well as for its implications regarding contemporary debates about equitable and sustainable access to resources. Understanding the role property law has played in major social and economic transformations helps illuminate and refocus public conversations about property reform, and it is an inquiry that would greatly benefit from a closer examination and technical analysis. For Brenner,

Class structure . . . has two analytically distinct, but historically unified aspects. First, the relations of the direct producers to one another, to their tools and to the land in the immediate process of production Second, the inherently conflictive relations of property—always guaranteed directly or indirectly . . . by force—by which an unpaid-for part of the product is extracted from the direct producers⁶⁵

Property doctrines and concepts fashioned by courts, legislatures, and, at times, social actors themselves, help design, sustain, and alter property relations.⁶⁶ Through property doctrine and concepts the domain of property is expanded or shrunk.⁶⁷ Doctrine also determines and changes the criteria of ownership, thereby potentially creating a new class of owners.⁶⁸ And it is through property doctrines that the entitlements of property are shaped along three major dimensions: the number of owners, the scope of their control, and the size of the asset.⁶⁹ A comparative historical investigation of the role property played in the rise and transformation of modern, liberal, capitalist democracies informed by legal scholars' knowledge of property doctrines and concepts can yield important results in formulating further hypotheses and explanations.

A second mode of comparative history that may be of great use in understanding property is what Skocpol calls “comparative history as the contrast of contexts.”⁷⁰ This use of comparative history brings out the unique

⁶⁵ *Id.* at 11 (footnote omitted).

⁶⁶ *See id.* at 12-13 (attributing economic development and social transition to “the reaffirmation of the old property relations or their destruction and the consequent establishment of a new structure”).

⁶⁷ Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1238-39 (2005) (explaining how property reform can at times either create “an *extension*” or “an *intensification* of property rights”).

⁶⁸ *Id.* at 1238.

⁶⁹ Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1017-18 (2008) (using this “three-dimensional [property] perspective” to challenge the “conventional understanding of property”).

⁷⁰ Skocpol & Somers, *supra* note 24, at 178 (describing a “comparative history [that] pursues through the juxtaposition of cases an almost exactly opposite objective from that of Parallel comparative history”).

features of each particular case, compared “to show how these unique features affect the working-out of putatively general social processes.”⁷¹ In property, this mode of comparative historical analysis can be used to discover the uniqueness of different societies and their property cultures.⁷² Understanding the uniqueness of different property cultures requires a rich contextualist analysis based in a single big theme, or orienting question.⁷³ For example, one could ask what the relationship is between property law and ideas about the common good or desirable social order, and then illustrate how each particular society answers this question. Along these lines, one could compare the culture of property in the United States to the culture of property in Europe. This study could help debunk some widely shared ideas about America’s property individualism and Europe’s “social” property culture by showing common themes and important differences between American republicanism and late nineteenth-century European social thought, and by illuminating how the American and the European property cultures each constitute relatively irreducible wholes, with both being unique ideological, social, and political configurations in their own right.

III. RESEARCH DESIGNS: HOW TO DO COMPARATIVE HISTORICAL SOCIAL SCIENCE

How do we answer big questions? More specifically, how do we employ the type of qualitative comparative historical analysis I am advocating, and what methodological commitments and comparative legal tools are involved? Crafting good social science research requires familiarity with diverse methodological tools, and graduate students in fields such as comparative politics, comparative sociology, and international relations are required to take methods-training courses. Books such as King, Keohane, and Verba’s *Designing Social Inquiry*⁷⁴ and, more recently, Brady and Collier’s *Rethinking Social Inquiry*,⁷⁵ which propose procedures for getting the most out of qualitative data and making reliable inferences, are canonical texts among political science graduate students. It is unfortunate that, for the most part, graduate students in comparative law have virtually no training in social science methodologies, unless they are also pursuing a graduate degree in another discipline.

The type of comparative historical analysis I encourage comparative private law scholars to pursue involves two fundamental methodological commitments. The first is a commitment to the “systematic and contextualized

⁷¹ *Id.*

⁷² *Id.* at 179.

⁷³ *Id.* at 178.

⁷⁴ GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994).

⁷⁵ *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* (Henry E. Brady & David Collier eds., 2d ed. 2010).

comparison[] of [a small number of] similar and contrasting cases.”⁷⁶ The study of a small number of cases does not produce universally applicable knowledge, but it delivers important results. It permits “a dialogue between theory and evidence of an intensity that is rare in quantitative social research.”⁷⁷ “By employing a small numbers of cases, comparative historical researchers can comfortably move back and forth between theory and history in many iterations of analysis as they formulate new concepts, discover novel explanations, and refine preexisting theoretical expectations in light of detailed case evidence.”⁷⁸

There are various strategies for comparing cases. Qualitative research largely relies upon nominal (or categorical) comparison, a strategy that “assumes a non-linear understanding of causation built around the ideas of necessary and sufficient conditions” for an outcome to occur.⁷⁹ Cases are fit into categories—for example, regime classifications, such as democratic, authoritarian, or totalitarian, and typologies of states, such as conservative, liberal, or social democratic welfare states.⁸⁰ The categories used for comparison are mutually exclusive (cases cannot be classified in terms of more than one category) and collectively exhaustive (one of the categories applies to each case).⁸¹ The comparative historian will start by eliminating potentially necessary or sufficient causes through J.S. Mill’s methods of agreement and difference, which Hirschl discusses at length.⁸² Specifically, “the method of agreement,” which posits “that cases that share a common outcome also share common hypothesized causal factors,” can be used to eliminate potential necessary causes.⁸³ By contrast, “the method of difference,” which “contrasts cases in which an outcome under investigation and hypothesized causal factors are present to other cases in which both the outcome and the hypothesized cause are absent,” despite other similarities, can be used to eliminate potential sufficient causes.⁸⁴ After “having eliminated initially plausible explanations,”

⁷⁶ Mahoney & Rueschemeyer, *supra* note 16, at 13; *see also* Skocpol, *supra* note 23, at 415 (“One response stresses the unique strengths of the comparative historical approach for building causal generalizations through contextualized comparisons and process tracing.”).

⁷⁷ Mahoney & Rueschemeyer, *supra* note 16, at 13.

⁷⁸ *Id.*

⁷⁹ James Mahoney, *Strategies of Causal Assessment in Comparative Historical Analysis*, in *COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES*, *supra* note 16, at 337, 338-39.

⁸⁰ *Id.* at 339.

⁸¹ *Id.*

⁸² *Id.* at 341; Hirschl, *supra* note 58, at 245-46 (discussing Mill’s “two standard case-selection principles used for inference-oriented, controlled comparison in qualitative, small-N studies”).

⁸³ Mahoney, *supra* note 79, at 341 n.3.

⁸⁴ *Id.* at 341 n.4.

the comparative historian will hold up as their favored explanatory argument the one that can survive these tests.⁸⁵

“In addition to comparing cases with one another, comparative historical analysts also compare processes drawn from within particular cases.”⁸⁶ “[W]ithin-case analysis” is a qualitative research practice that is used to assess competing explanatory claims.⁸⁷ This “entails examining multiple features of what was originally considered only a single case to assess [causal] hypotheses developed through cross-case analysis.”⁸⁸ Process-tracing, one variant of within-case analysis, involves identifying the causal mechanisms that link explanatory variables with the outcome.⁸⁹ Process-tracing helps qualitative researchers avoid the problem of spuriousness. “If X and Y are correlated, is this because X caused Y, or is it because some third variable caused both X and Y?”⁹⁰ In other words, process tracing helps avoid mistaking a spurious correlation for a causal explanation by helping establish “whether there is a causal chain of steps connecting X and Y.”⁹¹

The comparative historian also has a second commitment, namely to analyze historical sequences and to take seriously the unfolding of processes over time. The *longue durée*, as a historical term of art, was the invention of Fernand Braudel and the French Historical School of the *Annales*. Braudel thought of time as *durée* (duration) and distinguished between a plurality of intersecting social times: “the short term of events . . . , the medium term of conjunctures (such as, among others, economic cycles), and the long term, the *longue durée*, of structures (the regularities of social life whose change is almost imperceptible).”⁹² As Guldi and Armitage note in their *Manifesto*, the *longue durée* came out of a crisis in the social sciences that is very similar to that of the present: “[A]n explosion of knowledge, including a proliferation of data; a general anxiety about disciplinary boundaries; [and] a perceived failure of cooperation between researchers in adjacent fields.”⁹³ Yet today, Guldi and Armitage warn, the *longue durée* is not identical to its original incarnation. “The new *longue durée* has emerged within a very different ecosystem of intellectual alternatives. It possesses a dynamism and flexibility earlier

⁸⁵ *Id.* at 343.

⁸⁶ *Id.* at 360.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Andrew Bennett, *Process Tracing and Causal Inference*, in *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS*, *supra* note 75, at 207, 208 (“Process tracing involves the examination of ‘diagnostic’ pieces of evidence within a case that contribute to supporting or overturning alternative explanatory hypotheses.”).

⁹⁰ *Id.* at 209.

⁹¹ *Id.*

⁹² Richard E. Lee, *Fernand Braudel, the Longue Durée and World-Systems Analysis*, in *THE LONGUE DURÉE AND WORLD-SYSTEMS ANALYSIS* 1, 3 (Richard E. Lee ed., 2012).

⁹³ GULDI & ARMITAGE, *supra* note 10, at 15-16.

versions did not It has a new relationship to the abounding sources of big data available in our time.”⁹⁴ In the last decade, the emergence of the digital humanities has made available a variety of new tools such as Paper Machines or Google Books Ngram, which allow the measurement of aggregate information about social processes and discourses over time, and make possible the small visualization of archives otherwise too long to read.⁹⁵ These digital tools encourage historians to try out historical hypotheses across long periods of time.⁹⁶ As a result of this increased reserve of evidence, the new *longue durée* also has greater critical potential for historians, social scientists more generally, policy-makers, and the public.⁹⁷

IV. CRITIQUES OF COMPARATIVE HISTORICAL SOCIAL SCIENCE

The return of big questions comparative historical analysis has attracted significant criticism from different camps. One prominent critique comes from scholars who subscribe to a mode of analysis known as “cultural interpretivism.” These scholars argue that comparative history is too focused on explaining causation.⁹⁸ Comparative history, these critics contend, assumes a teleological attitude that seeks to attribute the causes of historical outcomes to large trans-historical processes.⁹⁹ By contrast, cultural interpretivists emphasize the need for a wholly different mode of inquiry. First, the interpretivist mode of inquiry privileges an “evenemential” attitude, focusing on a single, contingent event, rather than the macro-process.¹⁰⁰ Interpretivist critics argue that “contingency is global, that it characterizes not only the surface, but the core or the depths of social relations. Contingent . . . events . . . can undo or alter the most apparently durable trends of history.”¹⁰¹ Second, the

⁹⁴ *Id.* at 9.

⁹⁵ *Id.* at 90-91.

⁹⁶ *Id.* at 93.

⁹⁷ *See id.* (explaining that digitization of libraries and use of visual tools to show data in these libraries will help researchers to make determinations about centuries of patterns).

⁹⁸ Skocpol, *supra* note 23, at 414 (“One critique of empirical comparative historical scholarship comes from culturally oriented scholars who believe that interpretation rather than causal generalization should be the goal of contextually sensitive scholarship on human affairs.”).

⁹⁹ William H. Sewell, Jr., *Three Temporalities: Towards a Sociology of the Event* 2-3, (Consortium for the Sci. of Sociotechnical Sys. (CSST), Working Paper No. 58, Ctr. for Research on Soc. Org. (CRSO), Working Paper No. 448, 1990), <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/51215/448.pdf?sequence=1> (“Sociology was born under the sign of teleology. . . . For [] social theorists, history was shaped by transhistorical progressive laws.”).

¹⁰⁰ *Id.* at 2.

¹⁰¹ *Id.* at 17.

interpretivists' inquiry privileges interpretation over causal explanation.¹⁰² In other words, by focusing on the semiotic rather than on the causal, they seek to offer a "thick description" of the meaning of events.¹⁰³ They believe, as Clifford Geertz, the founder of interpretivism, put it, "man is an animal suspended in webs of significance he himself has spun," and, hence, social science should be "not an experimental science in search of law but an interpretive one in search of meaning."¹⁰⁴ However, some comparative historians have argued the interpretivists' criticisms are overstated and ultimately based on a misunderstanding of the two methods.¹⁰⁵

To begin with, comparative history does not ignore contextual particularity. Quite the opposite in fact—comparative history routinely relies on "thick analysis," and a detailed description of cases.¹⁰⁶ For the comparative historical researcher, description is as important as explanation. Description plays "a central role in all explanation," but preparing careful descriptions and gaining deep understanding "is fundamentally important in and of itself."¹⁰⁷ The comparative historians' thick analysis that focuses closely on the details of cases may or may not encompass subjective meaning. In this sense, Geertz's "thick description" is a specific type of "thick analysis."¹⁰⁸ Furthermore, interpretivists are not completely disengaged from the business of explanation. Scholars who seek to interpret the meaning of human actions and interactions from the actor's point of view also seek to explain them "in relation to the whole set of practices in which [they are] embedded."¹⁰⁹ As Geertz himself admits, the theoretical aspect matters to interpretivism.¹¹⁰ To be sure, there are a number of characteristics of interpretivism that make theoretical articulation more difficult. For example, in interpretivism, theory needs to stay closer to

¹⁰² See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 26 (1973) ("[T]he essential task of theory building here is not to codify abstract regularities but to make thick description possible, not to generalize across cases but to generalize within them.").

¹⁰³ *Id.* at 6 ("What defines [anthropology] is the kind of intellectual effort it is: an elaborate venture in, to borrow a notion from Gilbert Ryle, 'thick description.'").

¹⁰⁴ *Id.* at 5.

¹⁰⁵ See KING, KEOHANE & VERBA, *supra* note 74, at 37 ("In our view, however, science . . . and interpretation are *not* fundamentally different endeavors aimed at divergent goals."); David Collier, Henry E. Brady & Jason Seawright, *Sources of Leverage in Causal Inference: Toward an Alternative View of Methodology*, in *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS*, *supra* note 75, at 161, 180-81 (arguing that qualitative methods require thick analysis, while quantitative research requires thin analysis); *cf.* Skocpol, *supra* note 23, at 414.

¹⁰⁶ See Collier, Brady & Seawright, *supra* note 105, at 180 ("Indeed, some scholars consider thick analysis the single most important tool of the qualitative tradition.").

¹⁰⁷ KING, KEOHANE & VERBA, *supra* note 74, at 34.

¹⁰⁸ Collier, Brady & Seawright, *supra* note 105, at 180 & n.23.

¹⁰⁹ *Id.* at 37.

¹¹⁰ GEERTZ, *supra* note 102, at 24-28 (describing the difficulties in the theoretical development of cultural interpretation).

the ground than in other methodologies that are “more able to give themselves over to imaginative abstraction.”¹¹¹ But the interpretivist’s task, Geertz argues, is to ultimately “uncover the conceptual structures that inform [the] subjects’ act[ions].”¹¹² The interpretivist goes beyond mere interpretation by providing a conceptual vocabulary in which symbolic action can be described.¹¹³ The goal is “to draw large conclusions from small, but very densely textured facts; to support broad assertions about the role of culture in the construction of collective life by engaging them exactly with complex specifics.”¹¹⁴

The most vehement criticism of comparative historical social science comes from quantitative scholars. Despite much discussion about the possible synergies between quantitative and qualitative methods, there still seems to be real tensions and sharp disagreements between the two groups.¹¹⁵ Quantitative critics question the value of in-depth exploration and comparison of small numbers of cases because they are skeptical that valid causal inferences can be made from such a small sampling.¹¹⁶ The quantitative research, which these critics see as more fruitful and rigorous, differs from qualitative analysis in four important ways.¹¹⁷ Quantitative researchers: (1) work with large numbers of cases; (2) employ formal statistical tests in reaching their descriptive and explanatory conclusions; (3) rely on “thin analysis” (i.e. their knowledge of each case is typically thinner and far less complete); and (4) analyze linear causation and correlations.¹¹⁸ In other words, quantitative scholars argue that to maximize the possibilities for statistical tests of causal relations, investigators need to identify causes that, on average, increase or decrease the values of an outcome across a large number of cases.¹¹⁹

The response to quantitative critics is that, “[l]ost in the rush to apply statistical techniques can be theoretical ideas about reciprocal causation, path dependence, and alternative causal paths to similar outcomes.”¹²⁰ The virtue of small-N, qualitative comparative history is that it is a highly effective way to

¹¹¹ *Id.* at 24.

¹¹² *Id.* at 27.

¹¹³ *Id.*

¹¹⁴ *Id.* at 28.

¹¹⁵ *Cf.* Collier, Brady & Seawright, *supra* note 105, at 177 (“[W]e do not find two neatly bounded categories [when describing qualitative and quantitative methods], but rather four overlapping categories.”).

¹¹⁶ Mahoney & Rueschemeyer, *supra* note 16, at 17-18; *see also* Skocpol, *supra* note 23, at 414 (“To maximize the possibilities for statistical tests of causal relationships, [one group of researchers] encourages investigators to rely on large quantitative data sets . . .”).

¹¹⁷ Collier, Brady & Seawright, *supra* note 105, at 177-82 (describing four “overlapping categories” that help to draw distinctions between qualitative and quantitative analysis).

¹¹⁸ *Id.*

¹¹⁹ *See* Skocpol, *supra* note 23, at 414.

¹²⁰ *Id.* at 416.

develop theoretically general and empirically rich causal knowledge.¹²¹ Qualitative comparative historical analysis makes possible “[d]etailed case investigations and careful, theoretically defined comparisons that allow investigators to go far beyond establishing simple correlations.”¹²² Sociologist Jack Goldstone explains the benefits of qualitative analysis by comparing social scientists to explorers surveying a large territory:

If they took the large-*N* statistical approach . . . , they would have to sample enough locations to provide reliable inferences regarding the territory as a whole. If the territory is fairly homogenous . . . , such sampling would produce a fairly quick, accurate, and reliable method of determining the territory’s main characteristics.¹²³

However, Goldstone notes, if “the territory has substantial local variations, . . . sampling will be useless,” and “if the territory has six or seven distinctive zones, then sampling may just produce confusing or inconclusive results, leading observers to imagine a fictitious ‘average’ character that actually obtains nowhere.”¹²⁴ By contrast, Goldstone continues, if the explorers behave like qualitative researchers and “spread out, and each surveys and seeks to understand the character of a different zone, they can put together a map of the entire territory with far greater accuracy than an overall sample would provide.”¹²⁵ Specifically, by comparing their maps, “they may find deep regularities, or relationships among or across different zones, that no statistical averages for the entire territory would reveal.”¹²⁶

Yet another line of criticism comes from rational choice theorists who discount the relevance of macro-historical processes and seek to reconceptualize sociopolitical processes as strategic games among rival goal-seeking actors.¹²⁷ Rational choice scholars apply “strategic models to maneuvers among actors, usually individuals, situated within taken-for-granted institutional and cultural contexts.”¹²⁸ They derive their explanations mathematically, and they use historical case studies to illustrate their general

¹²¹ See *id.* at 417 (“[C]omparative historical methods . . . avoid[] many of the pitfalls of unrealistic assumptions and superficial correlation to which large-*N* techniques may be prone . . .”).

¹²² *Id.*

¹²³ Jack A. Goldstone, *Comparative Historical Analysis and Knowledge Accumulation in the Study of Revolutions*, in *COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES* 41, *supra* note 16, at 43.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See, e.g., Mahoney & Rueschemeyer, *supra* note 16, at 19 (“For some rational choice theorists, the use of inductive methods is the problem, because these methods lead comparative historical researchers to develop generalizations that apply to only specific times and places.”).

¹²⁸ Skocpol, *supra* note 23, at 414-15.

theoretical argument.¹²⁹ Among rational choice researchers, the criticism of comparative historical analysis is that it goes too far in the direction of idiographic explanation, “thick description,” and “storytelling,” and that it is “antitheoretical” because it is unable to produce overarching theoretical models.¹³⁰ However, this critique is fundamentally misplaced. Theory is central to comparative historical social science, and comparative historical researchers rely on theory to identify appropriate cases for comparison, “formulate orienting concepts, and suggest initial hypotheses about causal processes that may be important.”¹³¹ They then reject, refine, or validate these orienting concepts and causal hypotheses in light of the evidence derived from the study of their cases.¹³² Comparative historical social science, far from being anti-theoretical, is pluralistic in its use of overarching theories.¹³³ Rational choice theorists are guided by a single theoretical tradition, namely, rational choice theory.¹³⁴ By contrast, comparative historical social science seeks guidance from a wide range of theories, from class analytics, to bureaucratic-institutional analytics, to identity theory.¹³⁵

Obviously, these critiques, as well as the theoretical assumptions and research strategies of big questions comparative historical social science, deserve a much fuller treatment than what I have attempted in this brief comment. My hope is that Hirschl’s call for “big questions” comparative law will be heard by comparative private law scholars, and that Hirschl’s book will begin a new conversation in comparative law.

¹²⁹ *E.g., id.* at 415 (“Rational choice explanations are ideally derived mathematically; thus historical process and macroscopic configurations of institutions usually fade from view.”).

¹³⁰ *E.g., id.*

¹³¹ Mahoney & Rueschemeyer, *supra* note 16, at 20.

¹³² *Id.*

¹³³ *See id.* at 21-22.

¹³⁴ *Id.*

¹³⁵ *Id.* at 22 (“More generally, they do not hesitate to seek guidance from a range of other theoretical traditions, including prominently various strands of ‘structural’ analysis associated with class analytic and conflict theory, state centric theory, social movement theory, international relations theory, identity theory, and network theory.”).