
COMPARATIVE CONSTITUTIONAL LAW, LEGAL REALISM, AND EMPIRICAL LEGAL SCIENCE

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INTRODUCTION

Ran Hirschl’s book is both an important book and one whose main theses seem correct to me. Being important and being right do not necessarily go together, but in this case, they do. In addition, the book is a good read: it is immensely learned, both about historical and contemporary materials; it is thesis-driven, in the sense that there are interesting arguments being clearly made; and it is on the whole intellectually generous, in its appreciation of many works by contemporary scholars including work that is not about causal inference but rather, for example, about concept formation and reconstruction.

I. APPRECIATION

It is an important book because it lays out Hirschl’s vision of the possibilities of comparative constitutional law (and, implicitly, of law more generally) becoming a better scholarly discipline.¹ Hirschl is plainly one of the leading methodologists among comparative constitutional scholars, and this—his fully developed synthesis of an argument he first began making in his 2005 article²—is important for this reason alone.

Among his principal claims are these: First, he argues that there are significant benefits to comparative constitutional law from its scholars (and presumably lawyers and courts) being more careful about defining the claims being made and (especially for scholars) giving more attention to the various forms of empirical research that social science techniques, including capacity

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¹ RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 5 (2014).

² Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 *AM. J. COMP. L.* 125 (2005).

for large scale data crunching, provide.³ Second, Hirschl emphasizes the significance of “case selection”—what is being compared, across what countries, to what ends—in a wide variety of forms of inquiries in comparative constitutional law.⁴ Third, Hirschl argues, case selection and the development of knowledge should not be bounded only by already familiar jurisdictions largely, though not entirely, of the “West.”⁵

With all of these major arguments I am in agreement. I am also in agreement with Hirschl’s acknowledgment that some important work in comparative constitutional law—on concept formation or on thick description of foreign systems, for example—is not necessarily about causal inference.⁶ As he is both careful and generous to acknowledge, good work in comparative constitutional law does not necessarily require social science methods, but does require knowledge of law and legal institutions and capacities for insight and imagination.⁷ And as other scholars have argued, conceptual, philosophical, analytical, and jurisprudential questions remain important in the study of comparative constitutional law.⁸

But for years I have referred SJD and LLM students to Hirschl’s earlier article on case selection in comparative constitutional law,⁹ which forms the core of one of this book’s chapters,¹⁰ more than any other single work. Hirschl’s analysis and discussion of this point are enormously valuable for those engaged in genuinely comparative research projects; and his methodological argument is well elaborated here with terrific examples. His arguments on case selection, methodology, and comparison need not be limited to comparisons among different national states: think of the issue of comparing states and state laws in the United States. Consider, as examples, studies of

³ See, e.g., HIRSCHL, *supra* note 1 at 14-15, 18.

⁴ See *id.* at 224, 277-81.

⁵ See, e.g., *id.* at 192-193.

⁶ See e.g., *id.* at 5, 117, 193-94, 225.

⁷ See *id.* at 280. Ran Hirschl’s book inspired me to read around a bit in social scientists writing about empirical inquiry, and I was happy to find, in a work he cited, an acknowledgment that “[t]o provide an insightful description of complex events is no trivial task,” praising in depth case studies and arguing that “the development of good causal hypotheses is *complementary* to good description rather than competitive with it.” GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY* 44-45 (1994).

⁸ See, e.g., Christoph Möllers & Hannah Birkenkötter, *Towards a New Conceptualism in Comparative Constitutional Law, or Reviving the German Tradition of the Lehrbuch*, 12 INT’L J. CONST. L. 603, 621 (2014) [arguing that in law, “[n]ormative concepts claim a reality of their own,” one that cannot “be reduced to empirical quantitative research”).

⁹ Hirschl, *supra* note 2.

¹⁰ HIRSCHL, *supra* note 1, ch. 6.

capital punishment and deterrence,¹¹ or of social welfare rights, effective levels of social spending, and social well being.¹²

Having noted some of this book's many contributions, I now want to reflect on two questions that the book provoked as I read and thought about it. First, where does the move towards more methodological rigor in this field of legal studies fit into the broader contemporary landscape of both law and social science? Second, how do Hirschl's claims fit into the intellectual history of U.S. legal studies—and in particular, the earlier engagements with social sciences in Pound's "sociological jurisprudence,"¹³ and the Legal Realists' interests in empirical research?

II. THE CONTEMPORARY LANDSCAPE: OF LAW, SOCIAL SCIENCE, AND A "LITTLE LEARNING"

In this section I try to bring something of a comparative lens to Professor Hirschl's critiques of the contemporary state of comparative constitutional law.

First, Professor Hirschl's critiques of comparative constitutional law for not being methodologically rigorous and not embracing serious techniques of social sciences—persuasive as they are—should, perhaps, not be limited to the field of comparative constitutional law. I am asking, in other words, whether this is a problem only about comparative constitutional law or more generally about law? As other contributors to this symposium also may have suggested,

¹¹ See, e.g., Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006) (describing waves of research on the deterrence effects, vel non, of capital punishment); *id.* at 260-62 (finding "technical and conceptual errors" in recent studies, including "missing data on key variables in key states [and] the tyranny of a few outlier states and years"). For an introduction to a vast literature on crime and deterrence more generally, see Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 203-04 (2013) (stating, inter alia, that "none of the capital punishment studies take account of differences across states and over time in the severity of noncapital punishments for murder").

¹² Compare, e.g., EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013) (arguing that state constitutions have been locations for successful political mobilizations to constitutionalize positive rights), with Ran Hirschl, *Book Review: Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law by Mark Tushnet*, 40 OTTAWA L. REV. 173, 182-83 (2008) (critiquing the absence of "serious dialogue between the discourse (normative or empirical) concerning the constitutional status of positive rights and the literature concerning the political economy of welfare regimes and the modern welfare state more generally"). For an effort to explore effects through both national and subnational comparisons, see Helen Hershkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010).

¹³ See Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

his critique may be applicable far more broadly than just in the field of comparative constitutional law.¹⁴

As I reflected on this comparative question, I began to wonder, are there fields of law that display more methodological sophistication among their leading interdisciplinary scholars than do scholars such as Ran Hirschl, Tom Ginsburg, David Law, or Mila Versteeg, in comparative constitutional law?¹⁵ Are there fields in U.S. law displaying less methodological sophistication and diversity of approach? On these questions, we might compare, for example, Civil Procedure and Litigation Studies, Corporate Law, Family Law, Federal Courts, Criminal Procedure, and Criminal Law. What I am suggesting is a comparative empirical study of subfields of law. I have not had time nor do I, on my own, have the expertise with which to conduct a thorough study.¹⁶ If a more thorough study were to give rise to a descriptive inference that there were methodological differences across different fields of legal study in the United States, then there would be the further interesting question of why. (Or in Professor Hirschl's vocabulary, of causal inferences.) But I wonder whether comparative constitutional law is ahead of, behind, or about on par with other fields of law in the United States. I raise this question because I am not convinced that comparative constitutional law is so clearly behind in the field of law more generally—which across many areas could benefit from more of the methodological rigor that Hirschl advocates.

¹⁴ See, e.g., Anna di Robilant, *Big Questions Comparative Law*, 96 B.U. L. REV. 1325, 1336-39 (2016); cf. Katherine G. Young, *On What Matters in Comparative Constitutional Law: A Comment on Hirschl*, 96 B.U. L. REV. 1375 (2016) (implying that Hirschl's critique is based on contestable assumptions about what counts as "law" more generally).

¹⁵ See, e.g., David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 762 (2012); *infra* notes 51, 73 (noting the Comparative Constitutional Law project, and another coauthored work by Tom Ginsburg).

¹⁶ For purposes of this essay, I eyeballed the titles of articles in the *Journal of Empirical Legal Studies* from its founding to the present—which consists of twelve volumes. Fields that seemed to turn up repeatedly include civil litigation, corporate law, and judicial independence and judicial bias. I found only a single piece discussing family law, and virtually none on standard federal courts topics (not counting one comparing state and federal jury trials, and one citation study of the use of foreign law by federal courts). And, judging from articles' titles, there were not that many foreign jurisdictions discussed in the comparative work published. Multiple papers focused on a set of Commonwealth countries—U.K., Canada, and Australia. Multiple papers also focused on two Asian jurisdictions, Taiwan and Japan. Other papers focused on India, Spain, Korea, or Shanghai. Although there were not that many different countries referred to in titles, those that were the focus also raised some question about how "Western" is the orientation of empirical work in law. This journal, it should be noted, is likely attracting work from among the most sophisticated of scholars, as it is a peer reviewed journal; for this and other reasons, its articles may not be typical of the range of scholarly work published in comparative constitutional law in the United States.

Second, in terms of understanding Hirschl's critique in a broader contemporary landscape, one might ask if the problem is one of legal scholarship or rather (or additionally) a problem of a relative lack of interest in law by political scientists, sociologists, and historians. Notwithstanding the Law and Society movement and its scholarly meetings and publications, where do legal studies stand within these sister disciplines?¹⁷ Who should be the audience for Professor Hirschl's work? And, I suppose, my suggestion is, not only legal scholars but a broader field of scholars from other disciplines. As Hirschl's work suggests, a number of political scientists—such as Arend Lijphart,¹⁸ Donald Horowitz,¹⁹ Juan Linz and Arturo Valenzuela,²⁰ Stephen

¹⁷ For some reason to think that law and legal studies are not of first rank within political science, see, for example, *Graduate Program*, YALE U. DEP'T POL. SCI., <http://politicalscience.yale.edu/academics/graduate-program> [<https://perma.cc/HBA3-Y44C>] (describing the program as “offer[ing] training in five substantive subfields: American Politics, Comparative Politics, International Relations, Political Economy, and Political Theory”); *Political Science Department*, BROWN U., <https://www.brown.edu/academics/political-science/> [<https://perma.cc/E3YR-RMGG>] (describing “the traditional subfields of political science: American politics, comparative politics, international relations, and political theory”). In history, see *History Field Requirements*, CORNELL U. DEP'T HIST., <http://history.arts.cornell.edu/graduate-field.php> [<https://perma.cc/73M5-TJRU>], which includes a long list of fields of which none refers to law or legal studies. See *id.* (“African history, American history, ancient Greek history, ancient history, ancient Roman history, early modern European history, English history, French history, German history, history of science, Korean history, Latin American history, medieval Chinese history, medieval history, modern Chinese history, modern European history, modern Japanese history, modern Middle Eastern, premodern Islamic history, premodern Japanese history, Renaissance history, Russian history, South Asian history and Southeast Asian history. Within these broader categories, our faculty have a wide range of expertise in social, cultural, political, and intellectual history. These include the study of gender and sexuality, race and ethnicity, migration, labor, diplomatic relations, foreign policy, and science and technology.”) The websites of the graduate departments of history at Harvard, Yale, and Columbia, reviewed March 31, 2016, did not refer explicitly to law or legal studies but do refer to many regions of the world, to the history of a specific religion or people (as in Jewish history), and to several “history and” topics—history and literature, history and science, history and international or global affairs. See *Admissions*, YALE U. DEP'T HIST., <http://history.yale.edu/academics/graduate-program/admissions> [<https://perma.cc/CBU9-TB4W>]; *Fields of Study*, COLUM. U. DEP'T HIST., <http://www.history.columbia.edu/graduate/doctoral/fields.html> [<https://perma.cc/H3DZ-N535>]; *The Graduate Program*, COLUM. U. DEP'T HIST., <http://www.history.columbia.edu/graduate/index.html> [<https://perma.cc/4ASM-M6ZQ>]; *History*, HARV. U. GRADUATE SCH. ARTS & SCI., https://www.gsas.harvard.edu/programs_of_study/history.php [<https://perma.cc/Y9WB-8NZF>].

¹⁸ See, e.g., Arend Lijphart, *Consociational Democracy*, 21 *WORLD POL.* 207 (1969).

¹⁹ See, e.g., DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT*, at xv (2d ed. 2000).

²⁰ See, e.g., *THE FAILURE OF PRESIDENTIAL DEMOCRACY* (Juan J. Linz & Arturo Valenzuela eds. 1994).

Holmes,²¹ Janet Hiebert,²² Jon Elster,²³ Giovanni Sartori,²⁴ and Cindy Skach,²⁵—have made major contributions to our understanding of public law and constitutional law.²⁶ But how is political science or history scholarship *on law* generally regarded within those disciplines? Is it a high or low prestige area? Is it easier or harder to get funding than for other areas? Legal training alone is not sufficient for the competences that some of the forms of empirical work Professor Hirschl wants to encourage. Partnerships in scholarly work can be initiated in either direction. So how much of the problem, if problem there is, lies with other disciplines?

Third, although Hirschl criticizes comparative constitutional law for not engaging with the social sciences,²⁷ I am not sure I agree that the field has not done so. To be sure, much more could be done. But the modest level of existing interdisciplinary engagements is perhaps understandable in light of other demands on legal education and legal scholarship. There is something of a disjuncture between the skills law students need as legal professionals and the positive understandings of causation that are the concerns of some political scientists and legal scholars.²⁸ Law students will for the most part practice law, and for the practice of law, skills of particularly legal analysis will be a cornerstone; so coursebooks designed for use in law schools, I think, understandably include cases for analysis, though at least some of them also

²¹ See, e.g., Stephen Holmes, *Constitutions and Constitutionalism*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 189 (Michel Rosenfeld & András Sajó eds., 2012).

²² See, e.g., Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963 (2004); Janet L. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, 4 INT'L J. CONST. L. 1 (2006).

²³ See, e.g., JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995).

²⁴ See, e.g., GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES (2d ed. 1997).

²⁵ See, e.g., CINDY SKACH, BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC (2005) (analyzing hybrid, semi-presidential systems).

²⁶ For his reference to some of these scholars, see HIRSCHL, *supra* note 1, at 160.

²⁷ See *id.* at 191.

²⁸ Cf. e.g., Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1206 (1981) (noting the "dilemmas of professional education in an academic setting," including the disjuncture between the role of teaching law to those becoming advocates and the broader intellectual explorations of conflicts between objectivity and subjectivity); Pound, *supra* note 13, at 615 (discussing the need to teach both the terms of the law that the courts are applying and the social and economic context in which law must operate to be effective, including the developing public sense of justice).

include substantial excerpts from works by political scientists for students to consider.²⁹

Consider, for example, Professor Hirschl's example of the Pakistani court's treating a military coup d'état differently from the declaration of an emergency and removal of a judge. Professor Hirschl is critical of the difference, suggesting that it is a "selective" and "strategic" deployment of constitutional doctrine in politically charged cases.³⁰ No doubt this is true to some extent. But the lawyer in me thinks, well, the difference in treatment is not so surprising; when an entire regime is changed, as by coup d'état or revolution, courts generally accept the legal fact of the new basis for authority,³¹ as would some leading 20th century legal theorists.³² But the removal of a judge takes place,

²⁹ The coursebook that Professor Tushnet and I have developed includes many cases as principal readings, but also includes many principal readings drawn from scholars—and not only scholars in law, but scholars in political science—such as Jon Elster, Stephen Holmes, Walter Murphy, Gary Jacobsohn, Lee Epstein, Alec Stone, Martin Shapiro, Bhikhu Parekh, James Tully, Sankaran Krishna, and, in history, Stanley Katz, in sociology, Ronen Shamir, in political geography, Alexander Murphy, in economics, Thomas Sowell, and in philosophy, Martha Nussbaum. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW*, at xxxv-li (3d ed. 2014) (Table of Contents).

³⁰ HIRSCHL, *supra* note 1, at 169-70.

³¹ See Anhil Kalhan, "Gray Zone" *Constitutionalism and the Dilemma of Judicial Independence in Pakistan*, 46 *VAND. J. TRANSNAT'L L.* 1, 25-28 (2013) (describing Pakistan's use of the doctrine of state necessity to legitimate extraconstitutional changes in government); Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdown in Pakistan*, 1993 *UTAH L. REV.* 1225, 1236-42 (describing view of a majority in a Pakistani case, applying the doctrine of state necessity, that it was limited to who could exercise extraconstitutional powers and how long, and describing view of dissenters that the doctrine of necessity applied only to the exercise of police powers and did not justify the challenged constitutional changes). For similar uses made in other legal systems, see Tayyab Mahmud, *Jurisprudence of Successful Treason*, 27 *CORNELL INT'L L.J.* 49 (1994) (discussing similar uses in Uganda, Southern Rhodesia (Zimbabwe), Ghana, Nigeria, Cyprus, Seychelles, Grenada, Lesotho, and South Africa, as well as in Pakistan). Other uses of "state necessity" can be found in constitutional jurisprudence around the world. Cf. *Reference re Manitoba Language Rights*, [1985] 1 *S.C.R.* 721, 758-59 (Can.) (relying on analogy to the doctrine of state necessity to allow enforcement of Manitoba's laws enacted to date even though they lacked compliance with the requirement of enactment in both French and English). But, according to Lord Irvine of Lairg's Madison Lecture, in *Entick v. Carrington*, 95 *Eng. Rep.* 807 (K.B. 1765), a plea of state necessity to justify the intrusion on an individual's liberties was rejected. See Lord Irvine of Lairg, *Madison Lecture: Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 *N.Y.U. L. REV.* 1, 15-16 n.66 (2001). While the distinction between effective coups d'état and other forms of constitutional illegality can be a fine one to draw in emergency settings, there is arguably a line that courts can seek to implement.

³² See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 116-21 (Anders Wedberg trans., Russell & Russell 1961) (1945) (propounding the idea of "revolutionary legality" and

typically, within a purportedly unchanged regime of law, in which courts can rest on existing authority.³³ In other words, thinking as a lawyer, I think, well that is not so odd at all.

Finally, Professor Hirschl suggests, and I demur (although only in small ways), that “a little learning is a dangerous thing.” Alexander Pope said so in the early 18th century,³⁴ and Professor Hirschl certainly so implies in his book’s comments on those who engage in “armchair” research,” or who “conflate[]” “[d]escriptive, taxonomical, normative, and explanatory accounts,” or who “lag behind in their ability to engage in controlled comparison or trace causal links among germane variables.”³⁵ One can hear Professor Hirschl’s skepticism—perhaps disdain is not too strong a word—for those who have only “a little learning,” in another sentence, when he writes: “Adding to the confusion [about the identity of comparative constitutional law

explaining that a “revolution [including a coup d’état] occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself” and that “[f]rom a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated”).

³³ The 2007 emergency was declared by President and Army Chief Musharraf and created an arguably more ambiguous legal situation than the 1999 coup d’état, in which the existing Prime Minister, Nawaz Sharif, was ousted by Musharraf. The 2007 emergency decree could be viewed as a “coup d’état” in the sense that the order purported to act outside the Constitution and to give Musharraf powers to amend the constitution. *See* Dawn Report, *Gen Musharraf’s Second Coup: Charge-Sheet Against Judiciary; Media ‘Promoting Negativism’; Country’s ‘Integrity at Stake’; Legislatures Intact*, DAWN (Nov. 4, 2007, 12:00 AM), <http://www.dawn.com/news/274263/gen-musharraf> [<https://perma.cc/BX3U-FLJK>]. But the same person remained as head of government, and the order may have suspended only some articles of the constitution. *See id.* (stating also that both federal and provincial governments remained intact). In 1999, the federal and provincial legislatures were suspended and, as Hirschl indicates, the head of government (the prime minister) was replaced. *See* BBC, *Text of Musharraf’s Declaration*, BBC NEWS (Oct. 14, 1999), http://news.bbc.co.uk/2/hi/south_asia/475415.stm [<https://perma.cc/KJ29-Y8N9>].

³⁴ Circa 1711, from a long poem called *An Essay on Criticism*:

*A little Learning is a dang’rous Thing;
 Drink deep, or taste not the Pierian Spring:
 There shallow Draughts intoxicate the Brain,
 And drinking largely sobers us again.
 Fir’d at first Sight with what the Muse imparts,
 In fearless Youth we tempt the Heights of Arts,
 While from the bounded Level of our Mind,
 Short Views we take, nor see the lengths behind,
 But more advanc’d, behold with strange Surprise,
 New, distant Scenes of endless Science rise!*

Alexander Pope, *An Essay on Criticism*, in CLASSIC WRITINGS ON POETRY 210, 214-15 (William Harmon ed., 2003) (1711).

³⁵ HIRSCHL, *supra* note 1, at 5.

as a field] is that self-professed ‘comparativism’ sometimes amounts to little more than a passing reference to the constitution of a country other than the scholar’s own or to a small set of overanalyzed, ‘usual suspect’ constitutional settings or court rulings.”³⁶

Now, I myself have felt frustrated at times by reading casual references to comparative materials that, I feel, have missed or failed to appreciate important things, or that reflect inaccurate or incomplete research. But although I have at times shared Hirschl’s frustrations with the over-generalizations sometimes made from “a little knowledge,” my own instinct is to embrace, rather than to disdain, those who are “arm-chair” comparativists, or who make only passing references. Thirty years ago most U.S. scholars did not make even passing references.³⁷ And it can take a long time for new knowledge and research to move from a small number of folks with deep knowledge and interest to those whose principal occupations are with other aspects of the law. I am hesitant to imply that scholars need to be deeply learned, or multilingual, or methodologically sophisticated, before they can make those passing references.

Even in the social sciences, there is an important element in good work of “begin[ning] where you are,” to paraphrase John Gerring, a professor of political science here at B.U., in his book, *Social Science Methodology: A Unified Framework*,³⁸ which Hirschl’s book inspired me to read. As Gerring writes, about identifying research questions, “The easiest and most intuitive way to undertake a new topic is to build upon what one knows and who one is. This includes one’s skills (languages, technical skills), connections, life experiences, and interests.”³⁹ Now Gerring does not say one should end with this; indeed, he argues, one should also move outside, “[g]et off your home turf,” “[p]lay with ideas,” and “[p]ractice dis-belief.”⁴⁰ But this idea of building with what you know does make me a little leery of making colleagues feel uncomfortable that they do not know more than they do. So while I am all for Hirschl’s important project of increasing our methodological sensitivities and sophistication, I myself—and this is, perhaps, simply a matter of intellectual style—would take a more inclusive, encouraging approach to those who know only a little: build with what you know and then try, incrementally, to learn more.

Finally, one of the criticisms Hirschl levels against other scholars is in some tension with a distinctive characteristic of constitutional law, at least in common law systems. One of the distinctive features of the practice of

³⁶ *Id.* at 4.

³⁷ *Cf.*, *e.g.*, *id.* at 1-2 (describing the challenges Hirschl faced in the 1990s in his research in comparative constitutional law).

³⁸ JOHN GERRING, *SOCIAL SCIENCE METHODOLOGY: A UNIFIED FRAMEWORK* 40-41 (2d ed. 2012).

³⁹ *Id.* at 40.

⁴⁰ *Id.* at 41-47.

constitutional law, in jurisdictions that depend substantially on reasoned interpretation to develop the meaning of constitutional language and structures, is precisely what Hirschl calls the conflation of the positive and normative⁴¹—efforts to push the “is” of law towards the “ought,” by description and argumentation. Hirschl’s critique of such conflation may assume the solidity and rigidity of what “is”; but one of the features of law in a common law system is that what “is” the law may be subject to legitimate contest, and in those contests, normative values—which are a part of any decent legal system—may play an important role.⁴² So to speak of “conflation” in this context in a sense confuses in some respects the nature of judge-made law, especially at the margins of doctrine. And yet, it illuminates the very different perspectives of the legal scholar and the political scientist on the relationships of the normative and the positive.

This point brings me to the second question I address in this brief essay, which is not a question about the contemporary landscape as such, but is rather a question about where empirical comparative constitutional studies stands in the intellectual history and trajectory of legal studies.

III. THIS METHODOLOGICAL MOMENT AND THE INTELLECTUAL HISTORY OF LEGAL STUDIES

Where do Hirschl’s book and the efforts by Hirschl, Tom Ginsburg, Mila Versteeg, Rosalind Dixon, David Law, David Fontana, ICON·S, and others to move comparative constitutional law into closer engagements with political science, sociology, history, and psychology, fit in the broader trajectory of legal studies?⁴³ Is this legal realism redux? And if so, which part? And is the aspiration to treat comparative constitutional law—or any field of law—as a science an appropriate aspiration?

Law and the idea of a “science” is not a new thought in the development of the legal academy in the United States. It was Christopher Columbus

⁴¹ HIRSCHL, *supra* note 1, at 18.

⁴² See Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 21, at 55, 70; Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN. ST. INT’L L. REV. 319, 324-25 (2010) (describing the tendency in U.S. constitutional law to conflate positive and normative claims).

⁴³ See, e.g., *Herbert Smith Freehills Supports New Law & Economics Initiative*, UNSW AUSTL. L. (Mar. 5, 2013), <http://www.law.unsw.edu.au/news/2013/03/herbert-smith-freehills-supports-new-law-economics-initiative> [<https://perma.cc/U3F7-BKST>] (discussing Professor Dixon’s leadership role in this new effort); *Mission*, ICON·S, <https://icon-society.org/mission/> [<https://perma.cc/PY6Z-TS3U>] (explaining that the mission of the International Society of Public Law (ICON·S) is to support scholarship which combines all type of public law “with a good dose of *political theory* and *social science*”); see also *supra* note 15 and accompanying text; *infra* notes 51, 56-57 and accompanying text.

Langdell's aspiration to develop a science of the law.⁴⁴ In Langdell's time, viewing law as science did not create a large disjuncture between what lawyers and judges needed to know and what scholars needed to know, because the underlying conception of law was that its best understanding was derivable entirely from prior cases.

Legal realism is one of the most important intellectual movements in law—important in its deconstruction of the Langdellian conceptual form of jurisprudence, and in its insistence on human agency in the construction of law, and important also in its optimism about the possibility of developing better foundations for better law through joint work with social sciences. Realism's aspirations to push towards a more functionalist view of law as both emerging from human agency and as capable of changing to advance human goals have been remarkably successful; its insistence that judges are only human, and may be influenced in their judgments by factors other than an autonomous conception of law, is likewise common knowledge; but its aspiration for joint work with other disciplines, while it took root in some law faculties, and produced some quite useful knowledge,⁴⁵ has been less successful.

According to Christopher Tomlins, part of the reason for legal realism's failure to spread was its location in elite institutions, where faculty cared greatly about prestige within existing orders of appreciation, where its practitioners remained in a minority, and where the empirical questions they asked remained "marginal" to the mainstream study of law.⁴⁶ There is a degree to which the study of law—for the purpose of practice and for the purpose of developing knowledge—must focus on doctrine, on analysis of texts, and on persuasive forms of argument within the conventions of legal discourse. As

⁴⁴ See John Henry Schlegel, *Langdell's Auto-da-fé*, 17 *LAW & HIST. REV.* 149, 149 (1999) (describing and quoting Langdell's views); William Schofield, *Christopher Columbus Langdell*, 55 *AM. L. REG.* 273, 279, 281-82 (1907).

⁴⁵ See Stewart Macauley, *The New Versus the Old Realism: "Things Ain't What They Used to Be,"* 2005 *WIS. L. REV.* 365, 370-71, 374 n.34, 383 [hereinafter Macauley, *New Versus Old*]. Macauley's seven "shining nuggets" of wisdom produced from Law and Society Association are: "1. Law is not free. 2. Law is delivered by actors with limited resources and interests of their own in settings where they have discretion. 3. Many ['legal' functions] . . . are performed by alternative institutions, and there is . . . interpenetration between what we call public and private sectors. 4. People, acting alone and in groups, cope with law and cannot be expected to comply passively. 5. Lawyers play many roles other than adversary in a courtroom. 6. Our society deals with conflict in many ways, but avoidance and evasion are important ones. 7. While law matters in American society, its influence tends to be indirect, subtle and ambiguous." Macauley, *New Versus Old*, *supra*, at 383 (citing Stewart Macauley, *Law and the Behavioral Sciences: Is There Any There There?*, 6 *LAW & POL'Y* 149, 152-55 (1984)).

⁴⁶ See Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 *LAW & SOC'Y REV.* 911, 955-56 (2000).

Tomlins suggests, it is important to understand the difference between “law’s self-sufficiency as a modality of deployment of power and authority”—a self-sufficiency that implies some degree of autonomous study—and law’s “insufficiency as a modality of explanation and legitimation of the results in its interactions,” a task for which interdisciplinary encounters will be necessary.⁴⁷

So one question I have is whether Ran Hirschl’s effort—indeed, the efforts of this exciting new generation of leading scholars—will be more successful than the Legal Realists are generally regarded as having been with respect to their methodological commitment, such as it was, to the behavioral sciences. And I am cautiously optimistic in thinking that the chances for success are better for the following reasons.

First, we know somewhat more. Law and the social sciences are more methodologically sophisticated; leading researchers are unlikely simply to repeat mistakes of the past.⁴⁸ We will, however, probably make new ones, including mistaking correlations for causation because we do not realize or know that there are other missing variables.⁴⁹

Second, in today’s legal and information technology world, the speed at which data can be gathered has increased by astonishing degrees over earlier periods. We can gather more knowledge and produce useful information about it more quickly. Early 20th century Legal Realists, like mid-twentieth century Law and Society researchers, must have been frustrated by how long it took to learn anything.⁵⁰ Especially with the large databases, like that which Tom Ginsburg, Zachary Elkins, and James Melton have put together for scholarly use,⁵¹ if they are shared their existence could cut down on some of the most

⁴⁷ *Id.* at 966-67; *see also supra* note 28 (summarizing Pound on the two kinds of knowledge needed).

⁴⁸ *See* Tomlins, *supra* note 46, at 964 (citing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 239 (1996)).

⁴⁹ On the significance of omitted variables, and the tension between efforts to derive seemingly clear causal relationships (for which end simplification of assumptions and variables is often deemed necessary) and efforts at nuanced and contextual understandings, *see* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1265-69 (1999); *see also id.* at 1238-71 (more generally contrasting functionalist and expressivist approaches).

⁵⁰ *See, e.g.,* John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459, 495-519 (1979) (describing a major effort in the 1930s to study empirically the efficiency of both civil and criminal litigation in the federal courts which, due to the lengthy timeline needed to collect the data, the high cost associated with that collection, and the degree to which the empirical results were at odds with the reformist agenda that had motivated the project in the first place, led to frustration on the part of both the researchers and the funders).

⁵¹ *See generally*, COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org/> [<https://perma.cc/6GHR-98HG>] (providing

time consuming efforts of classification and coding of data (assuming that its coding decisions are also made transparent).

Large databases made up of formal legal instruments, however, also will have a tendency to sustain a focus on law in its most formal (and easily classifiable and code-able) manifestations, rather than, as some of the newer Legal Realists and Law and Society researchers would have, a study of law from the bottom up.⁵² The observed “gap” between law in books and law in action dates at least back to Pound,⁵³ and much of the intellectual impetus of the Realists and those who followed was to better understand law in action—or missing in action.⁵⁴ It would be possible to study gaps and effectiveness (and the construction of law or law-equivalents through informal social practices) in comparative settings, but it would be much more expensive and time-consuming to do so than to analyze correlations derivable from written constitutional texts. And in an academic world where the scholarly ideal seems to be that more publication is better, the incentive structure is likely to sustain obstacles to bottom-up legal studies.

Nonetheless, we can probably learn more—or gain more apparent knowledge—faster than in the past thanks to improved technology and improved access. And let us pause to acknowledge that contributing to the accessibility and ease of gathering data is the spread of English as a lingua franca even of law,⁵⁵ which may go hand in hand with the reasons for what Hirschl has criticized as an unduly Western-focused canon in comparative constitutional study.

Third, Ran Hirschl, David Fontana,⁵⁶ Tom Ginsburg, and others⁵⁷ are building an institutional and financial infrastructure that, we can hope, will not

summary and analysis of data collected for the Comparative Constitutions Project, directed by Zachary Elkins, Tom Ginsburg, and James Melton).

⁵² See, e.g., Macauley, *New Versus Old*, *supra* note 45, at 390 (“If we have learned anything from this long academic history of realism, it is . . . that we must also study law from the bottom up if we want to understand anything important about it.”).

⁵³ See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

⁵⁴ See, e.g., Macauley, *New Versus Old*, *supra* note 45, at 390-403.

⁵⁵ See, e.g., John King Gamble & Charlotte Xu, *Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice*, 3 IND. INT’L & COMP. L. REV. 233, 243-44 (1993) (finding that, since World War II, English had replaced French as the dominant treaty-making language); see also Philippe Van Parijs, *The Ground Floor of the World: On the Socio-Economic Consequences of Linguistic Globalization*, 21 INT’L POL. SCI. REV. 217, 221-23 (2000) (arguing that English is and will continue to grow as a “world-wide lingua franca,” in part because English-speaking countries are likely to attract highly skilled immigrants).

⁵⁶ Professor Fontana is the founder and organizer of the Comparative Constitutional Law Roundtable held yearly at George Washington University Law School. See David Fontana, *Curriculum Vitae*, GEO. WASH. L., https://www.law.gwu.edu/files/downloads/David_Fontana.pdf [<https://perma.cc/UHS8-C576>].

be disrupted by another world wide depression, as some suggest legal realism in its social science hat was.⁵⁸ The funding invested in law and social science projects in the post-World War II period by the Meyers Foundation, the Russell Sage Foundation, and others, had a side effect of providing support for a small number of law faculty members trained in or deeply knowledgeable about social science.⁵⁹ This effect has been multiplied in more recent years, as more lawyer/social scientists have been hired into law school faculties⁶⁰—not a dominant modality, yet, to be sure, but a more secure presence. For all these reasons, I think Hirschl's plea for more careful attention to methodological aspects of causal inferences in comparative constitutional law will fall on receptive ears.

But let me end with some words of caution. Jerome Frank, a leading Legal Realist, in his 1947 paper, *A Plea for Lawyer-Schools*,⁶¹ urged the study of psychology, the sciences, history, and behaviorism in law schools; he urged

⁵⁷ For another effort to institutionalize comparative constitutional studies, consider the Center for Constitutional Transitions, which began at NYU Law School and then moved to U.C. Berkeley with its founder, Sujit Choudhry. The Center is “the world’s first university-based center that generates and mobilizes knowledge in support of constitutional building.” See Director, CTR. CONST. TRANSITIONS, <http://constitutionaltransitions.org/director/> [<https://perma.cc/H4DM-YK2P>].

⁵⁸ See LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960, 123-30 (1986); Macauley, *New Versus Old*, *supra* note 45, at 375-77 (discussing the “impermanence of the institutionalized circumstances” of legal realism (quoting Schlegel, *supra* note 50, at 460)); Schlegel, *supra* note 50, at 572-73 (“But the Depression came, and instead of watching the Rockefeller’s largess almost fall out of the trees, Charles Clark saw the money tree wither.”).

⁵⁹ See JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 244-51 (1995). To be sure, Schlegel concludes that law professing as a field was on the whole untouched by this movement. See *id.* at 251-56 (discussing force of the preexisting role of law professor in resisting change). But Schlegel’s work came early in the period of law faculties’ hiring of “law and” faculty. See *infra* note 60.

⁶⁰ Not only has the period since the 1970s produced some degree of rapprochement between lawyers and historians, see KALMAN, *supra* note 48, at 167-246, but it has also seen a significant increase in the numbers of law faculty members holding advanced degrees in disciplines other than law. See Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506, 506 (2016) (“21% of tenure-track, entry-level hires by American law schools during the period 2011 through 2015 were J.D.-Ph.Ds.”). Of these, 28% had degrees in economics, 16% in political science, 5% in sociology, and 5% in psychology. *Id.* at 538. Those four disciplines, then, home to many who engage in large-scale empirical studies, appear to constitute more than half of the Ph.Ds. hired in law schools. Another 11% and 10% respectively, had Ph.Ds. in history and philosophy. *Id.*; see also Blake Edwards, *The Age of the PhD Law Professor Is Upon Us, Study Says*, BLOOMBERG BNA (Feb. 19, 2016), <https://bol.bna.com/the-age-of-the-phd-law-professor-is-upon-us-study-says/> [<https://perma.cc/85RS-JU6N>] (describing LoPucki study).

⁶¹ See Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

exploration of the relationship of the legal idea of causation to the idea of causation in physics and more generally of the similarities and differences between the methods of natural scientists, historians, and lawyers.⁶² But, he also wrote, that “Legal Science” and “Social Sciences” were “Words to be Shunned.”⁶³ Science, he wrote, could be taken to mean things he agreed with—“‘persistent and skilled use of the mind’ or ‘knowledge that accrues when methods are employed which deal competently with problems’”⁶⁴—but, he wrote, “‘science’ signifies a large measure of exactitude,” which is a mistake in dealing with law.⁶⁵ Law, he wrote, is like anthropology, and can be open to invention of new customs; it is not like “engineering.”⁶⁶

With Frank’s words in mind, I wonder—and worry—whether the newly popular phrase, “constitutional design”⁶⁷ has connotations of engineering; is “comparative constitutional studies,” as Professor Hirschl calls his goal of a reformulated field,⁶⁸ a form of—if not engineering—legal physics?

In the comparative endeavor, Professor Hirschl persuades, one must have some awareness of the reasons for our choice of subjects and of the potentialities and limitations of those choices, and one must give articulation to these, perhaps to a greater extent than in the study of topics within one legal system.⁶⁹ And there is much of value in Professor Hirschl’s arguments concerning the different types and goals of scholarship and the different ways of testing and developing causal theses. But we must not lose sight of the degree to which in order to understand law in society we may need to draw more on fields like anthropology and perhaps history than on the more statistically oriented social sciences.

In an intriguing passage—one that, if true in his time, is all the more so in ours—Jerome Frank wrote: “Particularly in our dynamic society are long-range social predictions difficult, because today *the time-span of continuity is shorter*.”⁷⁰ But nonetheless, he wrote, “we must not cease trying to

⁶² See *id.* at 1320-21.

⁶³ *Id.* at 1330.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See *id.* at 1332-33.

⁶⁷ E.g., HIRSCHL, *supra* note 1, at 272 (“[L]arge-N studies . . . open[] up entirely new possibilities for research and constitutional drafting, notably the possibility of a ‘scientific,’ ‘planned,’ or perhaps even *computerized* process of *constitutional design* . . .” (emphasis added)).

⁶⁸ See *id.* ch. 4 (“From Comparative Constitutional Design to Comparative Constitutional Studies”).

⁶⁹ This is perhaps a question: When comparing, for example, statutory regimes within a single country, should scholars not explain their choices? But perhaps not; if the comparison is one being made in the “primary” materials of the legal system itself that might be a sufficient reason for scholars to study the comparison.

⁷⁰ Frank, *supra* note 61, at 1337 (emphasis added).

discover . . . [the effect of legal rules] on social conduct, and also the effect of that conduct on such rules,” using a scientific approach, pursuing questions with a scientific spirit.⁷¹ He urged an attitude of “constructive skepticism”: an eagerness to find ways to improve “our democratic society,” including the functioning of law in society, and a skepticism that they will work, undergirding his support for “tentative, experimental” approaches.⁷²

That is, I think Frank was arguing that the realists should not repeat one of the Langdellian mistakes, of thinking that law—whether one thinks of interpretation, or design, or constraint on power, or structure—is a science. Law cannot be a science in the way some other disciplines can—especially in our field, of comparative constitutional law, in which we know from the empirical research by Elkins, Ginsburg, and Melton that, on average, constitutions last about nineteen years.⁷³ With the adoption of different constitutions on average once a generation, human affairs in so complex an institution as law can take many turns. We might take Frank’s advice to mean that the past is not always prologue, especially in the collective human affairs of law—or that even if the past is prologue, our ability to understand all of the relevant factors—to avoid the omitted variable problem that Mark Tushnet described in comparative constitutional law⁷⁴—is so large a problem that we must always remain humble about what we think we know.

Finally, it is important to remember that sometimes legal reasoning is not about causation but about rights, and from a deontological perspective. Even if it were claimed that discrimination against persons in a very small racial or religious minority group would leave more people better off, such discrimination would be inconsistent with the idea of the fundamental right of equality. Similarly, even if it were claimed that the use of torture would leave most of society better off, torture would be inconsistent with the idea of fundamental human dignity. Law requires grounding in both justice and society.

So, I am delighted to endorse my colleague Ran Hirschl’s many arguments towards more rigor in comparative constitutional study—but with a plea for a less exclusionary tone towards those who are novices, a humble sense of the epistemological possibilities, and an awareness that legal systems must aspire towards justice to maintain their legitimacy.

⁷¹ *Id.* at 1338; *see id.* at 1334 (urging study of the “reciprocal interaction of legal rules and social habits”).

⁷² *See id.* at 1338, 1340.

⁷³ ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS 2* (2009).

⁷⁴ *See* Tushnet, *supra* note 49, at 1265-69 (describing the omitted variable problem).