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## COMPARATIVE MATTERS: RESPONSE TO INTERLOCUTORS

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As many of the readers of this Review know from their own experience, few things in our vocation are more gratifying than serious scholarly engagement with one's ideas—it is every scholar's dream to have the fresh insights offered in his or her new book taken seriously and reflected upon by other leading contributors to the field. As writing *Comparative Matters*<sup>1</sup> was a true labor of love and a profoundly rewarding intellectual experience, the sense of satisfaction is greater. I am very grateful to Jim Fleming and his colleagues for their intellectual curiosity and energy, to the Symposium contributors for generously investing their time in writing such rich and thought-provoking reviews of *Comparative Matters*, and to the *Boston University Law Review* for providing this precious platform to examine some of the core epistemological and methodological challenges and opportunities raised by the current renaissance of comparative constitutional law. More than a book symposium per se, this multi-participant exchange presents an ideal setting to discuss the past, present, and future of this exciting area of inquiry. It sparks precisely the kind of conversation I had hoped *Comparative Matters* would generate. The four responses, as well as the groundswell of reaction elsewhere,<sup>2</sup> affirm the significance of such a discussion. Taken as a whole, this symposium reveals both the tremendous intellectual potential and the challenges present in seeking to turn the promise of interdisciplinary discourse, methodological pluralism,

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<sup>1</sup> RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (2014) [hereinafter *COMPARATIVE MATTERS*].

<sup>2</sup> See, e.g., Benjamin L. Berger, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, 49 L. & SOC. REV. 797 (2015) (book review); Rosalind Dixon, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, 64 AM. J. COMP. L. 193 (2016) (book review); Mark Kende, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, 25 L. & POL. BOOK REV. 45 (2015) (book review); Markus Kotzur, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, 13 INT'L J. CONST. L. 766 (2015) (book review); Lorne Neudorf, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, 74 CAMBRIDGE L.J. 621 (2015) (book review); Mark Tushnet, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, 64 AM. J. COMP. L. 201 (2016) (book review).

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and problem-driven inquiry into a reality for comparative constitutional studies.

It is reasonable to assume that many readers of this Symposium will not have read the book itself. Let me provide a brief outline of the book's main themes. As early as 1623, Francis Bacon, the famous philosopher, jurist, and statesman, and a key figure in the scientific revolution of the early-modern age, suggested that a system of national law as the object of scholarly judgment cannot, at the same time, provide the standard of judgment. Advocating an unbiased approach to the study of law, he argued that lawyers should free themselves from the bonds of their own national systems in order to evaluate objectively their merits and drawbacks.<sup>3</sup> Nearly four centuries later, ideas such as Bacon's comparative vision are now closer to becoming a reality. Comparative study has emerged as the new frontier of constitutional law scholarship as well as an important aspect of constitutional adjudication. Increasingly, jurists, scholars, and constitution drafters worldwide are accepting that "we are all comparativists now." And yet, despite this tremendous renaissance, the *comparative* aspect of the enterprise, as a method and a project, remains under-theorized and imprecise. In this book I address this gap by charting the intellectual history and analytical underpinnings of comparative constitutional inquiry, probing the various types, aims, and methodologies of engagement with the constitutive laws of others through the ages, and exploring how and why comparative constitutional inquiry has been and ought to be pursued by academics and jurists worldwide. Through an extensive exploration of comparative constitutional endeavors past and present, near and far, I show how attitudes towards engagement with the constitutive laws of others reflect tensions between particularism and universalism, as well as competing visions of who "we" are as a political community. Drawing on insights from social theory, religion, history, political science, and public law, I argue for an interdisciplinary approach to comparative constitutionalism that is methodologically and substantively preferable to merely doctrinal accounts. The future of comparative constitutional studies, I contend, lies in relaxing the sharp divide between constitutional law and the social sciences.

Before turning to address the key points made by my commentators, I would like to dwell a bit longer on the considerable part of the book upon which they only remark in passing, namely the social and political context within which engagement, past and present, with the constitutive laws of others developed. Many observers have acknowledged the link between America's decades-long deep culture war and the fierce debate over the use of comparative legal materials in the United States Supreme Court.<sup>4</sup> Taken as a whole, however, the

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<sup>3</sup> See generally FRANCIS BACON, *THE TWO BOOKS OF FRANCIS BACON: OF THE PROFICIENCE AND ADVANCEMENT OF LEARNING, DIVINE AND HUMAN* (Thomas Markby ed., 4th ed. 1852).

<sup>4</sup> Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299 (2006); see also Jack Balkin, *Why Are*

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history of engagement with the constitutive laws of others is much longer and richer than is reflected in the U.S.-centered debate. Similar clashes over social rifts or collective identity struggles have occurred in many other polities at different moments in history. These selective engagements with the constitutive laws of others by scholars, jurists, and political leaders have seldom been acknowledged, let alone meticulously studied by scholars of comparative constitutionalism. In the book's first part (Chapters 1-3), I present a careful inquiry into numerous encounters with comparative public law across time and place—using examples from pre-enlightenment to current comparative thought spanning the continents—to argue that *selective* engagement with the constitutive laws of others cannot be understood in isolation from the concrete culture wars, collective identity dilemmas, and contested political visions and aspirations of the time and place where a given comparative exercise was undertaken. As Marco Polo (a Venetian) puts it to Kublai Khan in Italo Calvino's masterpiece novel *Invisible Cities*: "Every time I describe a city I am saying something about Venice."<sup>5</sup>

Although Montesquieu's seminal *De l'Esprit des Lois*<sup>6</sup> has long been a touchstone for comparativists, and it has become a near-cliché to remark on the comparative inquiries of Plato and Aristotle (for forging an ideal constitution and introducing the distinction between a polity's substantive constitution and its formal one, respectively), much of the richness of past encounters with the constitutive laws of others remains unexcavated by either comparative law or comparative politics. The pioneering comparative endeavors of other daring intellectuals throughout the pre-Montesquieu era, and to a large extent following it, are seldom mentioned, let alone seriously addressed. As I show in Chapter 2, the huge body of pre-modern religious law, most notably Jewish law, contains a wealth of knowledge and a degree of theoretical sophistication that is currently *terra incognita* for today's scholars of comparative constitutionalism. Revisiting this corpus would allow us to consider contemporary debates about universalism and particularism, or principled estrangement and pragmatic engagement with the laws of others, from a whole new angle. Furthermore, as I elucidate in Chapter 3, towering early modern intellectuals such as Jean Bodin, John Selden, Hugo Grotius, Samuel von Pufendorf, Gottfried Wilhelm Leibniz, Gottfried Achenwall, Jean-Jacques Rousseau, Henri-Benjamin Constant, and Simón Bolívar—to name but a few—have made invaluable contributions to the epistemology and

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*Americans Originalist?*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* 309 (Richard Nobles & David Schiff eds., 2014).

<sup>5</sup> ITALO CALVINO, *INVISIBLE CITIES* 86 (William Weaver trans., 1974). Later in *Invisible Cities*, Calvino elaborates on the same idea (this time through the narrator): "For those who pass it without entering, the city is one thing; it is another for those who are trapped by it and never leave. There is the city where you arrive for the first time; and there is another city which you leave never to return. Each deserves a different name; perhaps I have already spoken of Irene under other names; perhaps I have spoken only of Irene." *Id.* at 125.

<sup>6</sup> MONTESQUIEU, *DE L'ESPRIT DES LOIS* (1748)

methodologies of early comparative public law. Taken as a whole, I hope that this part of the book satisfies Anna di Robilant's yearning, which I fully share, for more frequent "big thinking" in comparative historical inquiry of law and legal development.<sup>7</sup>

The diverse episodes of comparative constitutional innovation discussed in the book's first half illustrate that comparative constitutional inquiry is best understood as driven by a combination of necessity (or inevitability), intellectual innovation, and a compatible political agenda or ideological outlook. In some instances, intellectual pursuit led the way with an instrumentalist goal or ideological agenda providing added impetus. In other instances, comparative constitutional inquiry was more directly driven, to varying degrees, by political interests, ambitions, and aspirations. In other words, convergence, resistance, and selective engagement (to paraphrase Vicki Jackson's terminology)<sup>8</sup> with the constitutive laws of others, past and present, reflect broader tensions between particularism and universalism, and mirror struggles over competing visions of who "we" are, and who we wish to be as a political community. This in turn highlights the book's ultimate message: namely, that comparative constitutionalism is more than an emerging field of legal inquiry. If properly understood, as Joseph Weiler—one of this generation's most prominent scholars of comparative public law—suggests in his endorsement of *Comparative Matters*, "it is a window to, and a tool for, an understanding of the political, the social, indeed, the human condition itself."<sup>9</sup>

Because selective engagement with the constitutive laws of others is as much a political act as it is a legal one, the social sciences are clearly relevant to the systematic study of constitutions and constitutionalism across time and place. But there are other reasons for comparative constitutional law to engage with the social sciences as part of its attempt to address what Tom Ginsburg colorfully calls the "seventh inning problem"<sup>10</sup>—a fan who arrives at the baseball field just before the seventh inning begins and leaves when it concludes.<sup>11</sup> "Focusing too much on court cases in the constitutional 'game,'" Ginsburg suggests, "has precisely the same structure as the baseball fan who watches only one late inning. It means that we miss many of the most important questions—where does constitutional order come from? Who are the parties and what are they really fighting about? How does the court have the power it does? And what is the impact of the decision on real outcomes? These questions can only be examined by broadening our temporal and conceptual

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<sup>7</sup> See Anna di Robilant, *Big Questions Comparative Law*, 96 B.U. L. REV. 1325 (2016).

<sup>8</sup> See generally VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

<sup>9</sup> J.H.H. Weiler, *Endorsement* for RAN HIRSCHL, COMPARATIVE MATTERS (2014).

<sup>10</sup> Tom Ginsburg, *How to Study Constitution-Making: Hirschl, Elster, and the Seventh Inning Problem*, 96 B.U. L. REV. 1347 (2016).

<sup>11</sup> Note to the readers who are not baseball followers: a standard baseball game lasts nine innings.

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frame.”<sup>12</sup> I could not agree more. Not only is such a seventh-inning snapshot unrepresentative of the entire game from a descriptive, “captain’s log” standpoint, but it also (as may be obscured by the baseball metaphor) misses the causal aspect of things: the deep origins or reasons behind what we see, as well as the consequences that ensue. In other words, what happens prior to or after a court ruling is important not just for “setting the record straight” but also for understanding the place of a given court case in a broader causal story with a social context and root causes that predate a court case and may or may not be affected by it.

This does not detract from the power of doctrinal analysis *per se*. Comparative constitutional law professors hold a clear and undisputed professional advantage in their ability to identify, dissect, and scrutinize the work of courts and to critically assess the persuasive power of a given judge’s opinion. Understanding jurisprudence on its own terms or explicating modes of judicial resonating and interpretation has traditionally been the universe where law professors, understandably, feel most comfortable. No one is better positioned than they are to trace the relationship between patterns of convergence and the persisting divergence in constitutional jurisprudence across polities, or to advance the research on how constitutional courts interact with the broader, transnational legal environment within which an increasing number of them operate.

But theorizing about the constitutional domain within the broader world requires more than this. It requires the study of judicial behavior (an overwhelming body of evidence suggests that extrajudicial factors play a key role in constitutional court decisionmaking); an understanding of the origins of constitutional change and stalemate (a variety of theories point to the significant role of ideational and strategic factors in both); the promise and pitfalls of various constitutional designs (the relevance of the social, political, and cultural context in settings where such designs are deployed is obvious); and the study of the actual capacity of constitutional jurisprudence to induce real change on-the-ground, independently of or in association with other factors (the social sciences are essential for studying the actual effects of constitutions beyond the courtroom). Above all, the field’s potential to produce generalizable conclusions, or other forms of nomothetic, presumably transportable knowledge, as well as methodologically astute qualitative research or true “thick description” constitutional ethnographies, requires familiarity with basic concepts of social science research design and case selection principles. A close look at the gamut of social science research design and case selection principles could suggest a toolkit of methodological considerations essential to comparative constitutional inquiry. It would effectively support a broader spectrum of comparative constitutional studies, qualitative and quantitative, whether inference-oriented or hermeneutic.

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<sup>12</sup> Ginsburg, *supra* note 10, at 1349.

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The question then shifts from *why* engage in interdisciplinary comparative constitutional inquiry—few open-minded public law professors or intellectually honest political scientists would disagree that in an ideal world that would be a preferable approach—to *how* should such an interdisciplinary, multi-method inquiry be effectively pursued. If we accept this premise, a host of pressing questions soon follow. For example, how would a revised comparative constitutional studies curriculum look, how inclusive would such a gold standard of comparative inquiry be towards valuable contributions that fail to meet it (as Vicki Jackson asks, “is a little learning a dangerous thing?”), and ultimately, how realistic is such a move from comparative constitutional *law* to comparative constitutional *studies*, given the entrenched divisions of academic labor and vocational training purposes of law schools and political science departments alike?

In the book’s last two chapters, I offer a response to these “how” not “why” questions. In Chapter 5, entitled “How Universal is Comparative Constitutional Law?,” I address the geographical and ideological limitations of the contemporary self-establishing “canon” of comparative constitutional law. I ask how truly “comparative,” universal, or generalizable are the lessons of a body of knowledge that draws almost exclusively on a small—and not necessarily representative—set of frequently studied jurisdictions and court rulings to advance what is portrayed as general knowledge. I engage the “global south” critique in detail, explaining both its merits and pitfalls. The near-exclusive focus on a dozen liberal democracies in comparative constitutional law betrays not only certain epistemological and methodological choices but also a normative preference for some concrete set of values the “northern” or “western” setting is perceived to uphold. As such, it hinders the promise of a genuine transnational and cross-cultural multi-logue among jurists, scholars, and activists. While preferable to no engagement at all with the “laws of others,” expanding the scope of analysis by more systemically studying a more diverse and representative array of settings may well reveal deep disagreements, but it simultaneously holds the promise of turning comparative constitutional law into a more compelling and relevant area of inquiry.

In Chapter 6, entitled “Case Selection and Research Design in Comparative Constitutional Studies,”—the second part of my response to the set of “how” questions posed earlier—I continue the critical examination of the field’s epistemology and methodologies by addressing three additional aspects. I discuss a few basic principles of case selection, after identifying the various meanings, purposes, and modes of comparative inquiry in contemporary comparative constitutional studies. Importantly, I argue that while each of the purposes and modes of this inquiry is useful and advances knowledge in an important way, shifting from engagement with one given purpose of comparative work to engaging with another requires thoughtful adjustment of case-selection principles. I go on to suggest that while the study of comparative constitutional law has generated sophisticated taxonomies, concept formations

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that lead to theory building, and valuable normative accounts of comparative constitutionalism, it has for the most part fallen short of advancing knowledge through inference-oriented, controlled comparisons that permit both in-depth understanding of the studied phenomena and the development of general explanatory principles.

The book concludes where it started—early giants of comparative legal inquiry. In 1667, while completing his doctorate of law, Gottfried Wilhelm Leibniz—one of the great thinkers of all time—envisioned a utopian *theatrum legale mundi* (“theatre of the legal world”), an imagined repository that would include the entire corpus of the laws of all peoples in all places and at all times.<sup>13</sup> This, Leibniz speculated, would be the driving engine of comparative legal inquiry and would allow for the discovery or articulation of universal principles of law. Nearly 350 years later, Leibniz’s vision has become a reality, at least with respect to constitutional law. The universal aspiration is not shared by all, but extensive data sets and online information, powerful computer search engines, and an ever-expanding network of jurists and scholars allow those fascinated by the world of new constitutionalism easy and effective access to the constitutional laws, practices, and jurisprudence of virtually all countries in the world.

The modern materialization of such a *theatrum*—the rapid development of information technology and the tremendous improvement in the quality and accessibility of data sources on constitutional systems and jurisprudence worldwide—has already had an effect on the way in which comparative constitutional inquiries are pursued. In particular, thanks to the accessible, rich body of pertinent information, it is now possible (perhaps for the first time) to engage in serious, methodological, interdisciplinary dialogue between ideas and evidence, theory and data, normative claims and empirical analysis. It may well be that certain disciplinary or epistemic communities do not crave such an interdisciplinary conversation. But from an open-minded and intellectually honest standpoint, it is the call of the hour.

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All four contributors to this Symposium see great virtue in one variant or another of my call for a more interdisciplinary scholarship in comparative public law. Tom Ginsburg suggests that a dialogue between comparative constitutional law and comparative politics is essential in comparatively studying constitutional design problems.<sup>14</sup> Akin to my own efforts in *Comparative Matters*,<sup>15</sup> Katharine Young cites social and economic rights as an area of comparative constitutional inquiry that would benefit considerably

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<sup>13</sup> See generally Gottfried Wilhelm Leibniz, *A New Method for Learning and Teaching Jurisprudence* (1667), reprinted in *PHILOSOPHICAL PAPERS AND LETTERS* 85 (Leroy E. Loemaker ed. & trans., D. Reidel Publ’g Co. 1970).

<sup>14</sup> Ginsburg, *supra* note 10, at 1347.

<sup>15</sup> *COMPARATIVE MATTERS*, *supra* note 1, at 179-86.

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from insights from political science, economics, and development studies. Anna di Robilant calls for the revival of comparative historical social science, in particular of the qualitative breed, in addressing questions of comparative private law, while Vicki Jackson raises the possibility of a contemporary turn in interdisciplinary inquiry (as advanced by myself and other authors) as a revised and improved generation of “legal realism” or its predecessor, of sociological jurisprudence scholarship that for a variety of reasons stands a better chance to succeed than its varied intellectual forebearers. At the same time, the rich and thought-provoking contributions to this symposium raise several powerful concerns that, at least in my reading, are aimed to complement and problematize, not to dismiss, the arguments I put forth in *Comparative Matters*. For the sake of brevity and simplicity I will group these reactions into three main points and address each of them in turn.

I. IS THE SITUATION IN POLITICAL SCIENCE BETTER? DO WE NEED MORE OF IT IN COMPARATIVE CONSTITUTIONAL LAW?

All four essays, in particular the interventions by Tom Ginsburg and Vicki Jackson, ponder the efficacy of political science, in particular comparative politics scholarship to date, in dealing with comparative constitutionalism, and in particular with questions of constitutional design. Is it not true, Professor Jackson asks, that political scientists are often dismissive, perhaps even ignorant of the legal and jurisprudential aspects of the constitutional domain despite the ever-increasing involvement of constitutional law and constitutional courts in shaping the political sphere? This is a compelling point, and one that I regret having only sparsely addressed in the book. But to paraphrase a Jewish saying, “a convert achieves what the most righteous cannot attain.” Perhaps the most deft critique of political scientists’ dismissive attitude towards legal studies will be best accomplished by an “insider” as this author.

Akin to any other academic field, political science is not a unitary discipline; it has several distinct subfields (e.g., political theory, international relations, and comparative politics), various approaches and schools of thought, as well as a wide variety of acceptable methodologies and research designs.<sup>16</sup> With respect to the latter aspect, it is fair to say that consideration and awareness of the issues of research design, case selection, and data analysis are considerably more central to comparative politics than they are in comparative constitutional law.

That said, many of the doctrinal biases commonly reflected in comparative legal analysis of constitutional law and courts are mirrored in social science—in particular, political scientists’ lack of serious attention to legal doctrine and

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<sup>16</sup> See, e.g., Jeffrey C. Isaac, *Varieties of Empiricism in Political Science*, 13 PERSP. ON POL. 929, 930 (2015).



the role of legal reasoning.<sup>17</sup> And it is also true that many leading political science departments devote very limited attention to comparative public law and courts. Such a deficiency is alarming considering the ever-increasing significance of constitutional law and courts, regional and transnational human rights regimes, and international tribunals to politics and policymaking worldwide—think about the far-reaching political effects of entrenched constitutional design choices, for example in the area of electoral law or federalism; the extensive judicialization of foundational moral dilemmas; and core political quandaries;<sup>18</sup> wide-ranging restorative justice processes and tribunals; the emerging pan-European constitutional order; or the various international trade agreements and their accompanying transnational tribunals.<sup>19</sup> The volatility of constitutional wars on a broad range of issues—from hotly contested social policies to the scope of judicial intervention in high politics—suggests that nowadays, anyone who overlooks comparative constitutional law and courts does so at his or her own peril. The need for scholars of comparative politics to understand constitutional vocabulary and its comparative practice and implications may equal the urgency of the need for comparative constitutional law scholars to appreciate the social and political context within which the constitutional realm is embedded and operates. It is unfortunate that many (though admittedly not all) leading departments of political science overlook this plain truth. By so doing, they cede the comparative constitutional arena to legal scholars, who in turn rely all too often on the “case law” method of instruction at the expense of understanding comparative constitutional law in its broader social and political setting. It is time to bridge the divide.

Disciplinary divides now entrenched and presumed were not always present. The rise of the modern social sciences in the late nineteenth century coincided with growing interest in the study of constitutional law as the foundation of the

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<sup>17</sup> See, e.g., Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 261 (2006) (“[T]he positive literature has failed to see its due in large part because positive scholars often do not take law and legal institutions seriously enough.”).

<sup>18</sup> See Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts* 11 ANN. REV. POL. SCI. 93, 93 (2008) (“In recent years, the judicialization of politics worldwide has expanded its scope to encompass what we may term ‘mega-politics’—matters of outright and utmost political significance that often define and divide whole polities.”).

<sup>19</sup> For several political science analyses of these broad trends, see, for example, KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014); CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* (2010); KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011); GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000).

modern state and its government institutions. The impetus for comparative work at the time came chiefly from the social sciences, whereas today the field is thriving primarily in law schools. As I show in the book, some of the field's modern pioneers—notably, William W. Crane, Bernard Moses and John William Burgess—were political scientists, not legal thinkers.<sup>20</sup> For Burgess—author of the seminal two-volume book *Political Science and Comparative Constitutional Law*<sup>21</sup>—the drafting of constitutions was inherently a political, rather than legal, process. While fully acknowledging the importance of legal factors, in placing his treatise under the heading of political science rather than constitutional law Burgess declares that “[t]he formation of a constitution seldom proceeds according to the existing forms of law. Historical and revolutionary forces are the more prominent and important factors in the work. . . . These cannot be dealt with through juristic methods.”<sup>22</sup> His book exemplifies the idea that, as Dick Howard observes, the study of comparative constitutional law, in the scholarship of the late nineteenth and early twentieth centuries, was perceived as an extension of comparative politics.<sup>23</sup> A comparable epistemological view was shared to a large extent by prominent comparative public law authors of that time (e.g., Georg Jellinek and James Bryce), and later by Boris Mirkin-Guetzévitch, director of the Paris Institute of Comparative Law in the interwar period and initiator of comparative constitutional law scholarship in France, and Hugo Preuss, a public law scholar and chief drafter of the Weimar Constitution.<sup>24</sup> Newly published lectures on comparative constitutionalism by the renowned scholar of British constitutionalism at the turn of the nineteenth century, A.V. Dicey, suggest that even the often formalist Dicey thought it was “more profitable to compare the conceptions or ideas which underlie political arrangements” than just to compare institutions or laws.<sup>25</sup>

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<sup>20</sup> COMPARATIVE MATTERS, *supra* note 1, at 153-57 (“But even as recently as the late 19th and early 20th centuries, prior to the present disciplinary divide, American scholars of comparative constitutionalism saw the constitutional domain as an extension of, not separate from, the political domain.”).

<sup>21</sup> JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* (1893). Burgess was a professor of political science and law at Columbia University, and is considered one of the founding fathers of the discipline of political science in the United States. Among his many other contributions, in 1886 Burgess founded *Political Science Quarterly*, the oldest political science journal in the United States. Burgess had published earlier articles on comparative constitutionalism, all with a political science orientation, dating back to 1886. *See, e.g.*, John W. Burgess, *Laband's Public Law of the German Empire*, 3 POL. SCI. QUAR. 123 (1888); John W. Burgess, *Von Holst's Public Law of the United States*, 1 POL. SCI. QUAR. 612 (1886).

<sup>22</sup> Burgess, *supra* note 21, at 90.

<sup>23</sup> Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3, 4 (2009).

<sup>24</sup> COMPARATIVE MATTERS, *supra* note 1, at 156

<sup>25</sup> A.V. DICEY, *COMPARATIVE CONSTITUTIONALISM* 6 (J.W.F. Allison, ed., 2013).

In short, the epistemological difference between the comparative constitutionalism of the early twentieth century and that of the twenty-first century is substantial. Prior to the current era, which is marked by law school dominance, the ever-expanding political salience of constitutional courts, and a preoccupation among scholars and activists with rights claims—all of which have led to a considerable “juridification” of the comparative study of constitutions—great works in the field took a considerably broader perspective, adjoining the studies of comparative constitutionalism and comparative politics, and by which constitutions are basic instruments of government. Formalist and descriptive as many of these works were, they rested on a common treatment of the constitutional domain as subsumed in the political one.

Back to the puzzling present day divide between political scientists and legal scholars who study the same set of constitutional phenomena. In the book, I glance over several illustrations of the limits of doctrinal, intra-constitutional analyses without taking into account the socio-political context within which a given court is operating or a given judgment is rendered. These examples are drawn from infrequently traversed constitutional settings (e.g., Pakistan, Malaysia, Uganda, Mexico, the Philippines, and Turkey) that pierce the limitations of a uni-doctrinal and apolitical analysis of constitutional law that typically reflects back upon Europe and North America. Current newspaper headlines offer ample additional examples. It is obvious, for example, that politics is one of the main driving forces behind the recent constitutional wars in Poland (where a newly elected populist right wing government attempts to tinker with the composition and curtail the jurisdiction of the Polish Constitutional Tribunal);<sup>26</sup> in Brazil (where an impeachment process against elected President Dilma Rousseff has been launched by the opposition and reviewed by the Supreme Court);<sup>27</sup> or in Thailand (where the Constitutional Court has repeatedly backed the army and the old elites in their efforts to oust elected prime ministers Thaksin Shinawatra and later Yingluck Shinawatra).<sup>28</sup>

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<sup>26</sup> See Tomasz Tadeusz Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, BLOG INT’L J. CONST. L. (Dec. 6, 2015), <http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/> [https://perma.cc/8T3N-BV66]; Wojciech Sadurski, *What Makes Kaczyński Tick?*, BLOG INT’L J. CONST. L. (Jan. 14, 2016), <http://www.iconnectblog.com/2016/01/what-makes-kaczynski-tick/> [https://perma.cc/63CQ-VXC7].

<sup>27</sup> See Juliano Zaiden Benvindo, *Institutions Matter: The Brazilian Supreme Court’s Decision on Impeachment*, BLOG INT’L J. CONST. L. (Dec. 31, 2015), <http://www.iconnectblog.com/2015/12/institutions-matter-the-brazilian-supreme-courts-decision-on-impeachment/> [https://perma.cc/27YG-U4CC].

<sup>28</sup> See Andrew Harding, Rawin Leelapatana & Khemthong Tonsakulrungruang, *Thailand Update: The Search for Perfect Paper Continues*, BLOG INT’L J. CONST. L. (Dec. 2, 2013), <http://www.iconnectblog.com/2013/12/thailand-update-the-search-for-perfect-paper-continues/> [https://perma.cc/WK8K-H85D]; Eugénie Mériéau, *Hegemonic Self-Preservation*

One could easily extend that list to include fierce politically driven constitutional struggles elsewhere—from Hungary to Venezuela to Egypt.

At the same time, it seems equally sinful (intellectually speaking) that political scientists do not pay sufficient attention to constitutional law when it comes to key matters such as electoral processes (where entrenched constitutional rules commonly affect political outcomes); restorative and transitional justice (where constitutional courts and international tribunals have become crucial decision-making bodies); the so-called “war on terror” (where constitutional rights provisions and their judicial interpretation are said to counterbalance governments’ “trigger-happy” policies); secession and devolution (where from Quebec to Scotland to Catalonia, politics *and* constitutional law jointly govern the terrain);<sup>29</sup> or the European “debt crisis” (where supreme and constitutional courts throughout the continent have issued landmark rulings on the legitimacy of various austerity measures and bailout plans initiated by struggling governments or imposing supranational technocrats).<sup>30</sup> A political science Ph.D. student who is interested in any of these topical subjects would surely have to enroll herself in a comparative constitutional law course taught at a nearby law school in order to grasp the full significance of constitutional discourse to any and all of these issues—and indeed to many others.

The gap further widens when one moves to comparative jurisprudence—an area that is almost inherently limited to legal scholars despite its ever-increasing political significance. Within the last few years alone, the German Federal Constitutional Court, to pick one example, decided on the constitutionality of a three percent threshold in the law governing German elections to the European Parliament,<sup>31</sup> on the legitimacy of the German

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*Attempt by the Thai Army (the Agony of the Thai Deep State): The 2014 Military Coup d'état in Thailand*, PERSPECTIVES INTERNATIONALES (June 27, 2014) [<https://perma.cc/PPN3-9ZZJ>].

<sup>29</sup> See, e.g., Ran Hirschl, *Nullification: Three Comparative Notes*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (Sanford Levinson ed., 2016); see also Reference re Secession of Quebec, [1998] S.C.R. 217 (Can.). See also generally CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES (Michael Burgess & G. Alan Tarr eds., 2012); SECESSION AS AN INTERNATIONAL PHENOMENON: FROM AMERICA'S CIVIL WAR TO CONTEMPORARY SEPARATIST MOVEMENTS (Don H. Doyle ed., 2010).

<sup>30</sup> See, e.g., R. Daniel Kelemen, *Law, Fiscal Federalism and Austerity*, 22 IND. J. GLOBAL LEGAL STUD. 379, 379 (2015); Cristina Fasone, *Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective* (EUI Working Paper Law 2014/15).

<sup>31</sup> BVerfG, 2 BvR 2/13 et al., 2 BvR 2220/13 et al., Feb. 26, 2014 (Ger.), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/02/es2014\\_0226\\_2bve000213en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/02/es2014_0226_2bve000213en.html).

government aid measures for Greece and the Euro rescue package,<sup>32</sup> and on the legislature's obligations to make comprehensive arrangements under budgetary law to ensure that Germany could meet the capital calls under the European Stability Mechanism.<sup>33</sup> Within a span of one year, the Supreme Court of Canada, to pick another example, decided on the right to die with dignity,<sup>34</sup> on judicial appointments to the Supreme Court,<sup>35</sup> and on a government-proposed Senate reform<sup>36</sup>—the latter two rulings addressing the amending formula enshrined in Canada's constitution head on.<sup>37</sup> Meanwhile, despite being a multi-ethnic country, Malaysia's highest court upheld a law banning Christian citizens from using the word "Allah" when referring to God,<sup>38</sup> just as the Constitutional Court of Bolivia ruled that President Evo Morales could run for a third term even though the Bolivian constitution includes a two-term limit.<sup>39</sup> The political significance of any and all of these rulings (and scores of others) is obvious. Yet, the inexplicable disciplinary divide between law schools and political science departments aided by the all-too-easy dismissal of the constitutional sphere as not fully autonomous renders full grasp of these rulings, or even awareness of their existence and acknowledgment of their importance, virtually unattainable for most political scientists.

Tom Ginsburg's essay focuses on constitutional design—a field that has evolved considerably over the past decade, in no small part thanks to

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<sup>32</sup> BVerfG, 2 BvR 987/10, Sept. 7, 2012 (Ger.), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/09/rs20110907\\_2bvr098710en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/09/rs20110907_2bvr098710en.html).

<sup>33</sup> BVerfG, 2 BvR 1390/12, Sept. 12, 2012 (Ger.), [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912\\_2bvr139012en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html).

<sup>34</sup> *Carter v. Canada* (Att'y General), [2015] S.C.R. 331, 335 (Can.).

<sup>35</sup> *Reference re Supreme Court Act*, [2014] S.C.R. 433, 435 (Can.).

<sup>36</sup> *Reference re Senate Reform*, [2014] S.C.R. 704 (Can.).

<sup>37</sup> *Reference re Supreme Court Act*, [2014] S.C.R. 433, 435 (Can.) ("By specifying that three judges shall be appointed 'from among' the judges and advocates . . . of the identified institutions, s. 6 impliedly excludes former members of those institutions and imposes a requirement of current membership."); *References re Senate Reform*, [2014] S.C.R. 704, 708 (Can.) ("Introducing a process of consultative elections for the nomination of Senators would change our Constitution's architecture, by endowing Senators with a popular mandate which is inconsistent with the Senate's fundamental nature and role as a complementary legislative chamber of sober second thought.").

<sup>38</sup> See *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menturi Dalam Negeri & Ors*, [2014] 6 C.L.J. 541 (Malay.); see also Jaclyn Neo, *What's in a Name? Malaysia's "Allah" Controversy and the Judicial Intertwining of Islam with Ethnic Identity*, 12 INT'L J. CONST. L. 751, 751 (2014).

<sup>39</sup> *Bolivia's President Evo Morales Can Seek Third Term*, BBC NEWS (Apr. 30, 2013), <http://www.bbc.com/news/world-latin-america-22351190> [<https://perma.cc/PM3Q-ARQU>]. The Court accepted the argument that Morales' first term, commencing prior to the constitutional reform of 2009, should not be taken into account. *Id.*

Ginsburg's own groundbreaking work.<sup>40</sup> En route to critically assessing some of Jon Elster's ideas on social science and constitutional design, Ginsburg muses over whether the social science scholarship on constitutional design has actually been successful in advancing nomothetic, generalizable knowledge in that area. It is hard to quantify the independent effects of any given body of scholarly literature, certainly with respect to the murky area of constitutional engineering. It is an admittedly complex area of inquiry and practice that is filled with contingencies and idiosyncrasies, an increasing number of international "experts" and know-hows who frequently advance their own agenda while often lacking context-specific knowledge, all fueled by high hopes alongside modest-at-best success rates (never mind that it is not at all clear what should count as "success") and chronic underestimation of domestic politics and interests as a key variable in determining whether constitution-making processes in troubled places actually yield the desired results. I would readily agree that the field's future depends to a large extent on fruitful cross-disciplinary work produced by political scientists, economists, anthropologists, *and* scholars of comparative constitutional law, all backed by data and evidence.<sup>41</sup> But their modest record notwithstanding, I would still argue that, to date, social scientists deserve credit for most of what we do know in the area of constitutional design.

Tracing the complex interrelations between institutional factors and societal or cultural factors in explaining policy and political outcomes has occupied political science scholarship for generations. Virtually all the grandmasters of twentieth-century constitutional design literature—Arend Lijphart, Donald Horowitz, Juan Linz, Alfred Stepan, Giovanni Sartori, and Guillermo O'Donnell, to mention a few—are political scientists by education or by vocation, and some happen to teach in law schools. The same generally holds true with respect to the literature on the transition to and consolidation of democracy that followed waves of democratization in Latin America, Asia, and most notably Southern, Central, and Eastern Europe. Many of the prominent authors in this area—for example, Samuel Huntington, Jon Elster, Stephen Holmes, Adam Przeworski, and Andrew Arato—are political scientists, or hold joint appointments in law schools but are not doctrinal lawyers. And the same also holds true with respect to the closely related fields of democratization, where Samuel Huntington's work is considered a must

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<sup>40</sup> See generally *COMPARATIVE CONSTITUTIONAL DESIGN* (Tom Ginsburg ed., 2012).

<sup>41</sup> Tom Ginsburg's own work, for example, on the endurance of written constitutions, the efficacy of constitutionally entrenched term limits, or the difficulty of constitutional amendment provides a prime illustration for such interdisciplinary work in action. See generally Zachary Elkins, Tom Ginsburg & James Melton, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009); Tom Ginsburg, Zachary Elkins & James Melton, *Do Executive Term-Limits Cause Constitutional Crises?*, in *COMPARATIVE CONSTITUTIONAL DESIGN*, *supra* note 40, at 350; Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 *INT'L J. CONST. L.* 686 (2015).

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read, or in democratic theory more generally, where prominent political scientists such as Robert Dahl and later Ian Shapiro have led the way. Symbolically, the first three recipients of the Swedish Johan Skytte Prize in Political Science—dubbed the Nobel Prize of that discipline—were Robert Dahl, Juan Linz, and Arend Lijphart, three of the most significant contributors to the “institutional versus societal factors” debate.

But constitutional design as an intellectual enterprise has at least as much to do with social and political inquiry as with legal or constitutional inquiry for substantive reasons, not merely by virtue of the training or affiliation of its main contributors over the years. The significance of politics and society to constitutional design seems intuitive. The root causes of ethnic, religious, or linguistic strife (or alternatively of inter-ethnic or inter-faith collaboration) in any given setting are not constitutional or juridical but social, economic, and political.<sup>42</sup> Simply put, there cannot be an effective constitutional design for a failed state such as Somalia, a new political entity such as South Sudan, a polity in transition such as Myanmar, or a deeply divided country such as Belgium, without a profound understanding of each of these polities’ pertinent societal and political perimeters. Just as no urban planning or economic policy-making exercise would be credible without a careful examination of the concrete setting that it purports to address, no dependable “constitutional engineering” exercise for any given polity can proceed without close attention to that polity’s history, demographics, economics, and politics.<sup>43</sup>

The need for closer interdisciplinary collaboration in the area of constitutional design further intensifies as we turn our gaze to constitutional deficiencies in the “global north”: chronically low voter turnout; electoral systems that many see as perpetuating democratic deficits; the constitutional powerlessness of megacities, a modern phenomenon unanticipated by the framers of the American or the Canadian constitutions; or rigid constitutional amending formulae that make formal constitutional change near impossible. A close look at the constitutional experiences of comparable jurisdictions overseas may enrich the constitutional discourse of established democracies, providing ample guidance and food for thought. Likewise, closer engagement between pertinent constitutional law and comparative politics research is warranted if we were to address these collective challenges.

In the end, Ginsburg and I arrive at a similar conclusion: despite the social sciences’ embedded imperfections, comparative constitutional studies need

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<sup>42</sup> For a substantiation of this point, see, for example, DAVID D. LAITIN, *HEGEMONY AND CULTURE: POLITICS AND RELIGIOUS CHANGE AMONG THE YORUBA* (1986), ASHUTOSH VARSHNEY, *ETHNIC CONFLICT AND CIVIC LIFE: HINDUS AND MUSLIMS IN INDIA* (2002), and STEVEN I. WILKINSON, *VOTES AND VIOLENCE: ELECTORAL COMPETITION AND ETHNIC RIOTS IN INDIA* (2006).

<sup>43</sup> In that respect, as I have argued elsewhere, constitutional design ought to be understood and assessed in the context of other “design sciences.” See Ran Hirschl, *The “Design Sciences” and Constitutional “Success,”* 87 *TEX. L. REV.* 1339, 1341 (2009).

more rather than less social science. Any constitutional design curriculum that is driven by intellectual common sense, not by doctrinal zeal, would include theoretical works by political scientists;<sup>44</sup> key insights by public law scholars;<sup>45</sup> empirical analysis of the broad picture;<sup>46</sup> ethnographies of particular constitutional history and constitutional design settings;<sup>47</sup> and pertinent constitutional and international jurisprudence.<sup>48</sup>

## II. “COMPARATIVE HISTORICAL ANALYSIS” AND COMPARATIVE LAW

Despite its renaissance in recent years, it remains unclear whether comparative constitutional law is or ought to be treated as a subfield of comparative law, a subfield of constitutional law, or an altogether independent area of inquiry. What is evident, however, is that comparative constitutionalists have largely overlooked possibly relevant debates within comparative law,<sup>49</sup> most notably the debate between “universalists,” who emphasize the common elements of legal (and constitutional) systems across time and place, and “particularists” who emphasize the unique and idiosyncratic nature of any given legal (and constitutional) system, as well as the scholarly debate within comparative law concerning the dynamics of legal transplants.<sup>50</sup>

It is no doubt a matter of personal intellectual taste, but I must confess that I have never fully grasped comparative law’s obsession with genealogies of legal traditions, or its preoccupation with the so-called “functionalist” approach to comparative law.<sup>51</sup> What is more, for the better part of the

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<sup>44</sup> *E.g.*, DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (2d ed. 1985); AREND LIJPHART, *THINKING ABOUT DEMOCRACY: POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE* (2008).

<sup>45</sup> *See, e.g.*, ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL (2007).

<sup>46</sup> *See, e.g.*, Elkins, Ginsburg, & Melton, *supra* note 41; Ginsburg, Elkins, & Melton, *supra* note 41.

<sup>47</sup> *See, e.g.*, CHAIHARK HAHM & SUNG HO KIM, *MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND KOREA* (2015); DONALD HOROWITZ, *CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA* (2013).

<sup>48</sup> *See, e.g.*, Sejdić & Finci v. Bosnia & Herzegovina, App. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1; *see also* Christopher McCrudden & Brendan O’Leary, *Courts and Consociations, or How Human Rights Courts May De-stabilize Power-Sharing Settlements*, 24 EUR. J. INT’L L. 477 (2013).

<sup>49</sup> *See* Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1304 (Michel Rosenfeld & András Sajó eds., 2012) (discussing the general lack of focus on constitutional borrowing within the field of comparative constitutional law).

<sup>50</sup> For the essentials of the debate, see generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974), and Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52 (1996).

<sup>51</sup> For critical surveys of this approach see James Gordley, *The Functional Method*, in *METHODS OF COMPARATIVE LAW* 107 (Pier Giuseppe Monateri, ed., 2012) (applying the



twentieth century and up until very recently, comparative law scholarship focused almost exclusively on private law with little or no attention paid to public law. What the field of comparative law has excelled at is self-reflection and, often, self-lamentation. Most of the writings that have contributed to this abound with sophisticated analysis and highbrow jargon but ultimately are found wanting in the proportion of substance-to-ink. For all my sins, I wish that comparative law would move beyond its often descriptive, taxonomic-style, or legal families-based accounts of the laws of others toward concrete, data-based, explanatory accounts that suggest why, how, and when laws change or evolve, and how to account for the dynamic between increasing global convergence and the enduring divergence of the world's legal systems. In that respect, Anna di Robilant's conceptualization of *Comparative Matters* as an invitation for reviving what she terms "comparative historical social science" in the study of comparative law and legal institutions is not only a considerable compliment to this author, but also a most welcome expansion of the book's call for more social science-like thinking in comparative constitutional inquiries.

Professor di Robilant seems to be advocating an approach to comparative inquiry that comes close to what several leading scholars of comparative politics have termed "analytic narratives"—an attempt to combine historical narratives with rational choice-like explanations.<sup>52</sup> She cites the work of Marc Bloch, Charles Tilly, and Theda Skocpol (and I would add the likes of Alexander Gershenkron, Barrington Moore, and Robert Putnam) as illustrative of the type of thorough small-N comparative accounts of political and economic history that she would like to see deployed in comparative law—a field that, as di Robilant observes, has been largely trapped in its "academic introversion."<sup>53</sup> Most of these important authors do not refer to comparative law directly or only address it in passing. But some of scholarship that follows the methodological genre endorsed by di Robilant does speak to comparative law and legal change more directly; the potential for cross-fertilization is tremendous. So is the possibility of extending insights from public law to private law and vice versa, and daring to expand the analysis to non-state actors and multiple sources of law.

Alongside other possible new horizons of comparative inquiry, early religious law and its relations with its immediate legal surroundings provides what appears to be very fertile terrain for placing contemporary debates in

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functional method to an arbitrarily chosen work so as to better understand its methodology), and Ralf Michaels, *The Functionalist Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, 339, 342 (Mathias Reimann & Reinhard Zimmerman eds., 2006) (evaluating the functional method of comparative law by comparing it to functionalist approaches used in other disciplines).

<sup>52</sup> ROBERT H. BATES ET AL., *ANALYTIC NARRATIVES* 10 (1998) (describing the approach as analytic in that it "extracts explicit and formal lines of reasoning," and narrative in that it focuses on "stories, accounts, and context").

<sup>53</sup> Di Robilant, *supra* note 7, at 1330.

comparative (constitutional) law in a broader, richer, and more sophisticated context.<sup>54</sup> Prominent legal historians, for example, “suggest that the initial streamlining and unification of religious law under canon law, and the expansion of its territorial applicability throughout much of medieval Europe, planted the seeds of modern law, with its hierarchical structure and unified, central authority.”<sup>55</sup> Noted medievalists have argued that the structure of the medieval church and the medieval state (e.g., tensions between central and local government) also bore influence on the development of modern constitutional thought and institutions.<sup>56</sup> Concurrently, Canon law’s ontological and epistemological structure, modes of adjudication, and application are forebears of modern law in many respects as well. Before this process of codification occurred, and until the eleventh century, most law was customary, and very little of it was written down.<sup>57</sup> The migration of legal ideas was a routine, ordinary occurrence. In many respects, this was a golden age of practical (or applied) comparative legal studies, as legal systems did not enjoy complete hegemony, did not stress exclusivity, and were for the most part fairly tolerant of other legal systems.<sup>58</sup> There were no problems of legislative sovereignty as there was typically no single legislative center,<sup>59</sup> no professional judiciary, no professional class of lawyers, and no distinct “science” of law existed. As Harold Berman notes, there was “no independent, integrated, developing body of legal principles and procedures clearly differentiated from other processes of social organization and consciously articulated by a corps of persons specially trained for that task.”<sup>60</sup> De facto legal pluralism was an everyday reality.

But in the late eleventh and early twelfth centuries a wave of legalism spread throughout Europe. The main driving force behind this sudden transformation was the assertion of papal supremacy over the entire Western church and the push for church independence from secular control. This change, known as the Papal Revolution, was marked by a formal declaration

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<sup>54</sup> I develop this argument at some length in Ran Hirschl, *Early Engagements with the Constitutive Laws of Others: Possible Lessons from Pre-Modern Religious Law*, 11 L. & ETHICS HUM. RTS. 71 (2016).

<sup>55</sup> *Id.* at 77.

<sup>56</sup> See BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650, at 1 (1982) (“[T]he juridical culture of the twelfth century—the works of the Roman and canon lawyers, especially those of the canonists where religious and secular ideas most obviously intersected—formed a kind of seedbed from which grew the whole tangled forest of early modern constitutional thought.”).

<sup>57</sup> See Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 380 (2008).

<sup>58</sup> *Id.*

<sup>59</sup> MAURIZIO LUPOI, THE ORIGINS OF THE EUROPEAN LEGAL ORDER 429-36 (Adrian Belton trans., 2000).

<sup>60</sup> HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 50 (1983).

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by Pope Gregory VII in 1075.<sup>61</sup> The so-called “investiture controversy” between the papacy and the Holy Roman Empire over authority to appoint church officials triggered a battle over the legal consolidation and control of Europe.<sup>62</sup> Neither monarchs nor civil authorities were willing to accede to the declaration without a fight, and bloody wars were fought between the Holy Roman Emperor’s faction (led by Henry IV) and the papal faction throughout Europe, with the latter emerging triumphant (Henry IV famously “walked to Canossa” in 1077 in contrition) toward the end of the twelfth century.<sup>63</sup> Canon law, and with it modern law, was born.

Because it was more or less universally applied, internally coherent, and cumulative, the church’s canon law, which was administered by ecclesiastical courts overseen by bishops, enjoyed an advantage over its possible competitors. It claimed jurisdiction over most imaginable issues in criminal, civil, and family law and offered a relatively straightforward system of appeals up the ecclesiastical hierarchy towards Rome.<sup>64</sup> As Berman notes, over the course of this process the “folk law” of the peoples of Europe disappeared almost completely and was replaced by and consolidated into sophisticated legal systems, belonging first to the church and later to secular political orders—canon law, urban law, royal law, mercantile law, and feudal and manorial law.<sup>65</sup> Studies of concrete legal practices—for example, Marianne Constable’s account of the English “mixed-jury” doctrine that spanned from the Middle Ages to the nineteenth century—also reveal the disappearance of “law as practice,” the actual usages and customs of communities, and its replacement with the law determined by officials.<sup>66</sup>

Likewise, comparative historical analysis of the type di Robilant advocates may be helpful in addressing questions of legal divergence and law’s adaptation to local circumstances. Uriel Simonsohn’s comparative study of Christian and Jewish legal behavior under early Muslim rule (focusing on the late seventh to early eleventh centuries in the region between Iraq and present-day Tunisia), for example, exposes considerable fluidity among different communities. Simonsohn shows how a disregard for religious affiliations threatened to undermine the position of traditional religious elites; and how, in response, they acted vigorously to reinforce communal boundaries, censoring recourse to external judicial institutions, and even threatening transgressors with excommunication.<sup>67</sup> Similarly, variance in the organization and

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 520.

<sup>63</sup> *Id.* at 96.

<sup>64</sup> *Id.* at 50-51.

<sup>65</sup> *Id.* at 50.

<sup>66</sup> See generally MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994).

<sup>67</sup> URIEL I. SIMONSOHN, *A COMMON JUSTICE: THE LEGAL ALLEGIANCES OF CHRISTIANS AND JEWS UNDER EARLY ISLAM* 14 (2011).

implementation of *waqf* endowments (property devoted to collective religious or charitable purposes) between two communities in Greater Syria (modern day Tripoli in Lebanon and Nablus in Palestine) during the late Ottoman period may be explained, argues Beshara Doumani, by the differences in the political economy of inheritance patterns in the two communities.<sup>68</sup> Whereas in Nablus religious practice was dominated by a small male elite concerned mostly with using *waqf* as a funding source for projects that asserted its authority, the Tripoli community was less stratified, and this led to a more diverse usage of *waqf* funds directed at targeting communal goals.<sup>69</sup>

Or consider the work of comparative economists concerning the origins and consequences of institutional (and legal) change. Famously, Douglass North and Robert Thomas argue in *The Rise of the Western World* that “[e]fficient economic organization is the key to growth; the development of an efficient economic organization in Western Europe accounts for the rise of the West.”<sup>70</sup> “Efficient organization entails the establishment of institutional arrangements and property rights that create an incentive to channel individual economic effort into activities that bring the private rate of return close to the social rate of return. . . . [I]f a society does not grow, it is because no incentives are provided for economic initiative.”<sup>71</sup> On this account, emphasis on rationality and efficiency have led to the adoption of legal mechanisms that enhance investors’ trust, mainly the constitutional protection of property rights, and have in turn led to economic growth in various historical contexts. Douglass North, for example, has illustrated how legal limitations on rulers’ arbitrary power in early capitalist Europe increased legal security and predictability of external lenders who were protected by law from the seizure of their capital.<sup>72</sup> This allowed polities where such limitations existed to borrow capital and to better their position vis-à-vis rival polities where the arbitrary power of the ruler (“irrational systems,” in Weber’s terminology) had not been restricted by law.

Along the same lines, contemporary political scientists see the development of constitutions and independent judiciaries as an efficient institutional answer

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<sup>68</sup> Beshara Doumani, *Endowing Family: Waqf, Property Devolution, and Gender in Greater Syria, 1800 to 1860*, 40 COMP. STUD. SOC. & HIST. 3, 41 (1998).

<sup>69</sup> *Id.* at 19.

<sup>70</sup> DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD* 1 (1973).

<sup>71</sup> *Id.* at 1-2.

<sup>72</sup> Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 824 (1989) (“[T]he credible commitment by the government to honor its financial agreements was part of a larger commitment to secure private rights. The latter was clearly a major factor for the institutional changes at the time of the Glorious Revolution.”).

to the problem of “credible commitments.”<sup>73</sup> Political leaders of any independent unit want to promote sustainable long-term economic growth and encourage investment that will facilitate the prosperity of their polity. Two critical preconditions for economic development on this account are the existence of predictable laws governing the marketplace, and a legal regime that protects capital formation and ensures property rights. The entrenchment of constitutional rights and the establishment of independent judicial monitoring of the legislative and executive branches are seen as ways of increasing a given regime’s credibility and enhancing the ability of its bureaucracy to enforce contracts. This encourages the trust of investors, and enhances their incentive to invest, innovate, and develop. More recent empirical studies have established a positive correlation between the existence of institutional limitations on government action (for example, constitutional provisions and judicial review) and economic growth.<sup>74</sup> Despite the great relevance of this line of inquiry to comparative (constitutional) law, with few exceptions, the entire realm of public law and political economy has not taken flight in comparative constitutional scholarship.<sup>75</sup> This is yet another frontier that would benefit significantly from more sustained interdisciplinary exchange.

Likewise, small-N comparative economic history has yielded important insights concerning the significance of informal, quasi-legal institutions. Informal “private-order contract enforcement institutions” within close-knit communities have been shown to have enabled these communities to overcome systemic problems of economic coordination and enforcement. A significant obstacle for trade development in medieval and early-modern days was merchants’ difficulties in monitoring and rewarding agents operating in distant locations (consider the Silk Routes and similar examples). As Avner Greif illustrates, the trading practices of the eleventh century Jewish Maghribi community, for example, where any agent accused of dishonesty was shunned by the entire community, can allow agents to be hired for lower rewards and reduce systemic monitoring costs.<sup>76</sup> Jewish predominance in the diamond

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<sup>73</sup> Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 286 (1993); Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

<sup>74</sup> See, e.g., TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* 270 (2003).

<sup>75</sup> See, e.g., DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE* (2008); *NEW CONSTITUTIONALISM AND WORLD ORDER* (Stephen Gill & Claire Cutler eds., 2014); Stephen Gill, *New Constitutionalism, Democratisation & Global Political Economy*, 10 PACIFICA REV. 23 (1998).

<sup>76</sup> Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders’ Coalition*, 83 AM. ECON. REV. 525, 543 (1993); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST.

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trade, for example, spans several centuries and continents. Even the modern-day industry is concentrated in Jewish communities populated by the ultra-Orthodox. This dominance, argues Barak Richman, is attributable to Jewish merchants' ability to reliably implement diamond credit sales without having to turn to courts for enforcement, using instead reputation mechanisms supported by a "distinctive set of industry, family, and community institutions."<sup>77</sup> An intra-industry arbitration system makes known the promises that were not kept; not keeping a promise therefore becomes a death knell for any merchant involved in the trade. Intergenerational legacies similarly induce merchants to deal honestly through to their very last transaction, so that their children may inherit valuable livelihoods. And ultra-Orthodox merchants, for whom participation in their communities is paramount, provide important value-added services to the industry without posing the threat of theft and flight. Furthermore, because maintaining the community's good name brings credibility and security to everyone, internal sanction is paramount to maintaining trade with those "outside" the community.<sup>78</sup>

I could go on and on about the list of small-N comparative historical studies that are relevant to comparative law. With a few notable exceptions within comparative legal sociology (e.g., the works of Roberto Unger, Mirjan Damaška, and Martin Shapiro<sup>79</sup>), comparative studies of legal transformation have not been part of that field's canon. I join di Robilant in calling on comparative law to tackle questions concerning the origins and consequences of legal change in property, contract, and other private law domains through the deployment of carefully crafted and well thought out small-N comparative historical studies along the lines of the illustrative examples discussed above.

### III. "LARGE-C" CONSTITUTIONALISM, "SMALL-C" CONSTITUTIONALISM, AND "LEGAL NEO-REALISM"

Katharine Young and Vicki Jackson, each with their own emphasis, offer some cautiously optimistic observations about the prospects for engaging in an epistemologically and methodologically broader, more holistic mode of comparative constitutional inquiry. Jackson revisits some of the classic debates within North American legal academia concerning the nature and purpose of

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857, 881 (1989). *See generally* AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE (2006).

<sup>77</sup> Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 L. & SOC. INQUIRY 383, 395 (2006).

<sup>78</sup> *Id.* at 408 ("[M]aintaining the community's credibility in dealings with outsiders brings wealth to the whole community.").

<sup>79</sup> *See, e.g.*, MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976).

legal education.<sup>80</sup> She suggests, in a nutshell, that the trend towards more interdisciplinary and empirically grounded comparative public law inquiries may signal a return to key formative debates in the early modern history of the American law school (in an admittedly more nuanced, data-based guise) by reviving the old question of what is meant by “scientific” in the context of law. Clearly, the new comparativists are not neo-Langdellians, so something else is at play here. In this context, she argues, following the intellectual footsteps of those who have challenged the orthodox view of law as an insulated system of rules and principles that is purely autonomous from society and politics, power and history, comparative constitutional scholars of a realistic or socio-political bent, now armed with the new tools of multi-method research techniques in a far more dynamic and globalizing legal universe are bound not to repeat the Langdellian mistake of thinking that law—whether one thinks of interpretation, design, structure, or constraint on power—is a science.<sup>81</sup> Legal reasoning, she argues, is often not about causes but about deep moral commitments expressed in law as rights from a deontological perspective.<sup>82</sup> While I agree with Professor Jackson’s point, this still doesn’t rule out the urgency and necessity of calling for more astute methodological clarity when moving from normative to positive (explanatory or casual) claims. This is one of the core messages I aimed to convey in *Comparative Matters*.

Professor Young suggests that I may be conflating, at least to some degree, the need for a more methodologically astute *comparative* constitutional inquiry with the need to move away from what has been termed “big C” constitutionalism (focus on formal elements of the constitutional domain) to “small c” constitutionalism, which is often invoked to refer to real-life constitutional practices, traditions, and norms that are as important for understanding the constitutional realm as the focus on formal aspects of a given constitutional system.<sup>83</sup> While she supports the latter, broader notion of constitutionalism as a guiding principle in studying constitutional phenomena across time and place, she suggests that “big-C” constitutional studies should not be limited to a quest for “explanation” or for “causality”:

[W]e need the kind of inclusivity towards knowledge—of paying attention to explanation but also to understanding as *verstehen*, interpretation, and justification—as demanded by our field of law. We need the category questions, the normative questions, and the interpretive questions answered, as well as questions of explanation and causation.<sup>84</sup>

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<sup>80</sup> Vicki Jackson, *Comparative Constitutional Law, Legal Realism, and Empirical Legal Science*, 96 B.U. L. REV. 1359 (2016).

<sup>81</sup> *Id.* at 1372.

<sup>82</sup> *Id.*

<sup>83</sup> Katharine G. Young, *On What Matters in Comparative Constitutional Law: A Comment on Hirschl*, 96 B.U. L. REV. 1375 (2016).

<sup>84</sup> *Id.* at 1391-92.

Both Young and Jackson, then, are concerned with the potentially “imperialistic” effect of a quest for explanation on legal scholarship, and perhaps also with the possibility of a “numerical” comparative constitutional law that may overshadow other, more traditional and, at least equally important, modes of comparative legal (and constitutional) inquiry.<sup>85</sup> While I appreciate the concern, it strikes me as overly defensive, at least inasmuch as it is directed at my quest for understanding the various meanings of the “comparative” in comparative constitutional inquiries, for broadening the array of methods used in comparative constitutional inquiries, and for properly aligning the type of arguments one makes with the methods used to support these arguments.

My claim in *Comparative Matters* is not that explanation, causality, or numerical comparative inquiry should serve as the field’s golden standard or intellectual Holy Grail. Rather, my point is considerably more modest: no research method should enjoy an a priori advantage over any other without taking into account the scope and nature of the studied phenomenon or the question the research purports to address. For this reason, I argue that attempts to outline an “official” comparative method, or calls for the adoption of a stringent, “correct” approach to research methods, are not only unrealistic but also unwise. I argue that, by way of an alternative, comparative constitutionalists should settle on a set of four more sensible guiding principles. Scholars should: (i) define clearly the study’s aim—descriptive, taxonomical, explanatory, and/or normative; (ii) articulate clearly the study’s intended level of generalization and applicability, which may range from the most context-specific to the most universal and abstract; (iii) encourage methodological pluralism and analytical eclecticism when appropriate; and (iv) ensure that the research design and methods of comparison reflect the analytical aims or intellectual goals of specific studies, so that a rational, analytically adaptive connection exists between the research questions and the comparative methods used.

In other words, my argument is not that a quest for explanation or causality is the only or even the primary game in town; rather, it is that causal claims cannot be presumed correct while untested, and at any rate cannot be made in a casual, blasé fashion that would never fly in other, more methodologically rigorous human sciences. Law professors who master sophisticated analyses of legal arguments, court rulings and judicial reasoning would not be overly impressed, one would assume, with a shallow or unsubstantiated political

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<sup>85</sup> See Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. LAW & SOC. SCI. 131, 132 (2015); see also Malcolm Langford & Sakiko Fukuda-Parr, *The Turn to Metrics*, 30 NORDIC J. HUM. RTS. 222, 224 (2012); Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 CURRENT ANTHROPOLOGY S83, S83 (2011). For a discussion of the “turn to metrics” in international law, see Jakob v. H. Holtermann & Mikael Rask Madsen, *Toleration, Synthesis or Replacement?: The “Empirical Turn” and its Consequences for the Science of International Law*, 29 LEIDEN J. INT’L L. (forthcoming 2016).



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science analysis of these research subjects if it involved little or no attention to the structure of the legal arguments employed by the different parties to a legal dispute, the value of precedent, or the quality of the dissenting and concurring opinions. Similarly, when explanatory arguments concerning the origins or consequences of a given constitutional phenomenon are put forward in comparative constitutional law, there is a legitimate expectation that such arguments are supported by suitable research design, compatible case-selection principles, and proficient data collection and analysis. And if they are not, like an analysis of case law that ignores the minute maneuvers of legal reasoning, it is foreseeable that such studies would be seen as lacking in rigor. For the social scientist, the concern is that without judiciously following the rich array of research design principles (as is relevant for the specific question investigated), the comparative constitutionalist's causal claims, plausible as they may be, remain just that—assertions in need of proof and substantiation.

The criticism of the behavioral revolution in the social sciences is widely documented and must be taken seriously. Explanation and causality are certainly not the only end goals of academic inquiry. And comparative accounts of constitutional phenomena that rely on statistical analysis of large data sets undoubtedly overlook many important nuances and context-specific factors. If this were the only method of inquiry, we would face a serious concern. But it is not. It remains the exception, not the rule, and could be seen as providing the landscape's panoramic view, leaving plenty of room for small-N comparative constitutionalism studies, ethnography-like, single-country accounts that contribute to general theory-building, as well as more traditional comparative constitutional inquiry that is geared toward self-reflection and betterment through analogy, distinction, and contrast.<sup>86</sup> That said, I still maintain that the introduction of methodologically astute empirical testing to comparative constitutional inquiry is generally speaking a good thing given the clear dominance of other modes of research and teaching in the field. The reality of comparative legal scholarship in North America (and considerably more so in the generally more doctrinal and formalist continental European comparative law) is very distant from any conceivable "tyranny" of social scientific explanatory or numerical modes of inquiry. Such a scenario is completely fictitious and does not pose even a remote threat to the hegemony of more traditional approaches to comparative legal (and constitutional) scholarship.

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<sup>86</sup> It is also material to note that not all "numerical" comparative constitutional law is concerned with causality. In some areas where data sets have been used (e.g., the study of judicial reference to foreign sources), the analysis has been confined to descriptive statistics and quantitative measurements of the scope and nature of the studied phenomenon. *See, e.g.*, ELAINE MAK, *JUDICIAL DECISION-MAKING IN A GLOBALISED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS* (2013); *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

As a Jewish proverb has it, “the righteous have their work done by others.” In a recent collection of essays on the practice and theory in comparative public law, representatives of two different generations of constitutional scholars express concerns with the lack of empirical support to some of the common insights of (comparative) constitutional law. Mila Versteeg, one of the leading young voices in what may be termed “empirical constitutional studies” suggests that “the field of comparative constitutional law is filled with causal claims, including, inter alia, the following notions: constitutions constrain government; judicial review protects human rights; socio-economic rights are unenforceable; and constitutional law is converging upon a global paradigm. These claims, which often take the form of unarticulated assumptions, are essentially empirical claims that have largely gone untested.”<sup>87</sup> Along similar lines, Frederick Schauer, one of America’s most prominent constitutional thinkers, suggests that the intuitions and hunches of law professors concerning the impact of constitutional law ought to be subject to empirical testing. He asks:

[D]oes constitutional law make a difference to official behavior? Do the texts of constitutions influence official action? Do the emanations of courts affect the actions of officials? Affirmative answers to these questions are commonly assumed, but perhaps the time is ripe to examine such assumptions more critically in comparative context . . . .<sup>88</sup>

When taken with a healthy dose of skepticism and awareness to their acknowledged limitations, empirical studies on the de facto (as opposed to de jure) effects of constitutional texts, traditions, and rulings can only contribute, not harm the state of knowledge on these matters. As Schauer puts it,

[R]esearch on the effects of law is often conducted by people interested in law. And people interested in law are often people whose interest is fueled by the belief that law matters. Thus, research on the extent to which constitutions of constitutional decisions have contributed to some outcome or end-state needs to be attentive to the possibility that in a world of multiple causation, the constitutional causes may be exaggerated by those whose interests are in constitutional matters, just as they may excessively diminished by those whose interests lie in other possible causes—economic, political, psychological, or cultural, for example— of social outcomes.<sup>89</sup>

I could not have put it better myself.

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<sup>87</sup> Anne Meuwese & Mila Versteeg, *Quantitative Methods for Comparative Constitutional Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW 230, 233-24 (Maurice Adams & Jacco Bomhoff eds., 2012).

<sup>88</sup> Frederick Schauer, *Comparative Constitutional Compliance: Notes Towards a Research Agenda*, in PRACTICE AND THEORY IN COMPARATIVE LAW, *supra* note 87, at 213.

<sup>89</sup> *Id.* at 228.

Young is correct to point out that a move from a narrow conceptualization of the constitutional domain as “large-C” constitutionalism to a broader “small-c” constitutionalism understanding of that sphere would apply to any type of constitutional law scholarship. That said, the existence of an intellectually vibrant and methodologically astute comparative constitutional law enterprise is an essential aspect of a move to a broad notion of the constitutional sphere. Besides, ultimately it is the *comparative* element that separates comparative constitutional law from its older, more established, supposedly self-contained and undoubtedly less cosmopolitan sibling—constitutional law. Hence, an understanding of the “comparative” in comparative constitutional law—its various rationales, methods, limitations and possibilities, alongside the contours and contents of the audacious comparativist’s toolkit—is essential for the field’s renaissance to persist.

A key concern is the very definition of the term “comparative.” What should one compare? In his classic *A System of Logic*, John Stuart Mill spoke of a “method of difference” and a “method of agreement” in selecting comparative cases.<sup>90</sup> In later configurations, a similar case-selection logic has informed controlled comparison in the social sciences for generations.<sup>91</sup> But, as the classicist Marcel Detienne has argued, perhaps it is the comparison of the incomparable that produces the most exciting results.<sup>92</sup> Inspired by the work of Claude Lévi-Strauss, this is an argument that searches for radically different cosmologies as the basis for comparison.<sup>93</sup> Applying common sense is essential. Clearly, an old water well and the concept of infidelity are hardly comparable. But a duck and a stork are. To restate my University of Toronto colleague Catherine Valcke’s powerful point, comparability requires unity *and* plurality.<sup>94</sup> Plurality is essential, as there is not much sense in comparing things that are perfectly identical; little would be gained by such a comparison. Likewise, there is hardly any utility in comparing things that share little or nothing in common (e.g., a shiitake mushroom and a sewing machine) other than some highly abstract or random attributes (e.g., both are objects, words, or things that begin with the letter S). Contrary to the old saying, apples and

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<sup>90</sup> JOHN STUART MILL, *A SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE* 253 (Longmans, Green, & Co. 1906) (1843).

<sup>91</sup> See ADAM PRZEWORSKI & HENRY TEUNE, *THE LOGIC OF COMPARATIVE SOCIAL INQUIRY* 31 (1970) (discussing, for example, the differences between “Most Similar Systems” and “Most Different Systems” designs in approaching comparative studies in general).

<sup>92</sup> MARCEL DETIENNE, *COMPARING THE INCOMPARABLE* (2008); see also PETER VAN DER VEER, *THE VALUE OF COMPARISON: THE LEWIS HENRY MORGAN LECTURES* (2016).

<sup>93</sup> See, e.g., G.E.R. LLOYD, *BEING, HUMANITY, AND UNDERSTANDING: STUDIES IN ANCIENT AND MODERN SOCIETIES* (2012) (exploring, from both a historical and ethnographic perspective, and across both space and time, the diversity of cosmological ideas and assumptions that humans have entertained).

<sup>94</sup> Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 720-21 (2004).

oranges (or apples and pears, as several European languages would have it) share enough in common yet are sufficiently different from each other to be fruitfully (think about it) compared.<sup>95</sup> By contrast, the analytical or theoretical yield of comparing two mid-size broccoli florets (too similar), or a broccoli floret and a manual transmission gearbox (too different) is not likely to be high. I will leave it to the readers' own creative minds to think of equivalent examples within the world of constitutionalism.

Three other points are worth bearing in mind in this context. First, longitudinal comparisons of the same constitutional setting over a long stretch of time may be as instructive as cross-national comparisons. Second, while mastery of context and language when studying a given constitutional setting remain essential, examining common patterns across different settings becomes easier as certain variants of constitutionalism become exceedingly common worldwide. A plausible proposition in this regard is that there are areas of constitutional jurisprudence—most notably the interpretation of rights—where cross-jurisdictional reference is more likely to occur than in other areas, such as the more aspirational or organic (e.g., federalism, separation of powers, and amending procedures) features of the constitution, where national idiosyncrasies and contingencies are more prevalent.<sup>96</sup> Third, comparisons should aspire to avoid the banal and the all too familiar. As Benedict Anderson has noted recently:

[W]ithin the limits of plausible argument, the most instructive comparisons (whether of difference or similarity) are those that surprise. No Japanese will be surprised by a comparison with China, since it has been made for centuries, the path is well trodden, and people usually have their minds made up already. But a comparison of Japan with Austria or Mexico might catch the reader off her guard.<sup>97</sup>

And what is the aim of comparison? Is it a better understanding of particularities by showing the differences with other social arrangements? Does one want to use comparison for self-reflection or to be able to critique certain arrangements, such as in Montesquieu's *Persian Letters* or in Margaret Mead's study of adolescence in Samoa? Is the comparison made to come to a model, or is a model the basis of a comparison? In practice, it appears that in the field of comparative constitutional law (and comparative law more

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<sup>95</sup> *Id.* For an actual chemical comparison of apples and oranges (they turn out to be quite similar), see Scott Sandford, *Apples and Oranges—A Comparison*, ANNALS IMPROBABLE RES. 1 (1995), <http://www.improbable.com/airchives/paperair/volume1/v1i13/air-1-3-apples.html> [<https://perma.cc/7F5E-B63S>].

<sup>96</sup> See generally Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 93 (2004) (“For all the richness of transnational judicial discourse about rights, there is a relative dearth of comparative judicial exploration of issues in federalism . . .”).

<sup>97</sup> Benedict Anderson, *Frameworks of Comparison*, 38 LONDON REV. BOOKS 15, 18 (2016).

generally) the term “comparative” is often used indiscriminately to describe what, in fact, are several different types of scholarship, each with its own aims and purposes: (i) freestanding, single-country studies—often quite detailed and “ethnographic” in nature—that are characterized as comparative by virtue of dealing with a country other than the author’s own (as any observer is immersed in their own (constitutional) culture, studying another constitutional system involves at least an implicit comparison with one’s own); (ii) genealogies and taxonomic labeling of legal systems; (iii) surveys of foreign law aimed at finding the “best” or most suitable rule across cultures; (iv) references to the laws or court rulings of other countries aimed at engendering self-reflection through analogy and contrast; (v) concept formation through multiple descriptions of the same constitutional phenomena across countries; (vi) normative or philosophical contemplation of abstract concepts such as “constitutional identity,” “constituent power,” “transnational/supranational/global constitutional order,” etc.; (vii) careful “small-N” analysis of one or more case studies aimed at illustrating causal arguments that may be applicable beyond the studied cases; and (viii) “large-N” studies that draw upon multivariate statistical analyses of a large number of observations, measurements, data sets, etc. in order to determine correlations among pertinent variables. These last two (alongside a combined “multi-method” approach) purport to draw upon controlled comparison and inference-oriented case-selection principles in order to assess change, explain dynamics, and make inferences about cause and effect.

Granted, this conceptual fuzziness around the term “comparative” is not unique to comparative law; it is quite prevalent in other “comparative” disciplines, from comparative literature to comparative religion and comparative psychology. But what makes the understanding of the “comparative” in comparative (constitutional) law so essential is the various vocational, jurisprudential, academic, and scientific stakeholders involved in practicing the art of comparison. Undoubtedly, the constitutional lawyer, the judge, the law professor qua professor, the normative legal theorist, and the social scientist engage in comparison with different ends in mind. A lawyer, for instance, may be forgiven for selectively using comparative evidence in an attempt to enhance her client’s case. A judge who wishes to make a good public policy decision may look carefully at other jurisdictions that have been contemplating the same issues. A law professor trying to illustrate to her students the variance across countries with regard to, say, the law of reproductive freedoms would be well advised to survey the state of affairs with respect to the right to have an abortion in a few pertinent polities. The legal philosopher is interested in formulating moral justifications or principles for best practices at the *ought* (rather than the *is*) level, and may thus be forgiven for supporting her insights with a small number of possibly unrepresentative cases. However, an attempt to explain or establish causality warrants a more methodologically astute approach. One cannot move freely from engaging with

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a specific purpose for comparative work to engaging with another without adjusting one's case-selection principles accordingly.

Appreciation of these distinctions and considerations is vital for the continuation of the field's current renaissance. Precisely because the concern with the asystematic "cherry-picking" of "friendly" examples (often raised by opponents of comparative inquiry) may not be easily dismissed, those who wish to engage in valuable comparative work ought to pay closer attention to research methods, and the philosophy of comparative inquiry more broadly.<sup>98</sup> The response to the cherry-picking concern is not to abandon comparative work; rather, it is to engage in comparative work while being mindful of key historical foundations, epistemological directions, and methodological considerations. To the extent that *Comparative Matters* proves helpful in explicating and raising awareness of these aspects of the comparative constitutional exercise, it will have earned its place among the many other works it examines that have pushed comparative constitutional studies forward over the past few decades.

The labor-intensive nature of comparative constitutional law (e.g., required linguistic skills, familiarity with several jurisdictions, and extensive travel), alongside the characteristically domestic nature of bar associations and lawyer accreditation requirements, different training trajectories and publication venues and practices, as well as other institutional and "sociology of knowledge" factors all push to preserve disciplinary boundaries. But important counter-pressures are also at play. Today's marketplace for lawyers is more international and comparative than ever before; having the confidence and knowledge base to engage with the "laws of others" is a tremendous advantage. Litigation increasingly involves cross-border and inter-jurisdictional disputes. Judges search for excellent law clerks who, in addition to their sharp legal analysis, can assist in pursuing illuminating comparative

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<sup>98</sup> As I state in *Comparative Matters*:

While increasingly common and certainly more intuitively "comparative" than freestanding, single-country studies, the comparative reference approach is still lacking in methodological coherence. When executed poorly, it amounts to little more than result-oriented "cherry-picking" of favorable cases, which is precisely the kind of practice that opponents of reference to foreign law, most notably [the late] Justice Antonin Scalia of the US Supreme Court, base their objections on.

COMPARATIVE MATTERS, *supra* note 1, at 237. In that respect, I concur with those who argue that when separated from his confrontational rhetoric, Justice Scalia's criticism of "cherry-picking" might compel comparative constitutional law scholars to think more rigorously about and to pay closer attention to questions of methodology, research design, and case selection. See, e.g., Claudia E. Haupt, *Leading by Opposition: Justice Scalia and Comparative Constitutional Law*, BLOG INT'L J. CONST. L. (Feb. 24, 2016) <http://www.icconnectblog.com/2016/02/leading-by-opposition-justice-scalia-and-comparative-constitutional-law> [<https://perma.cc/Y2WU-J3PM>] ("In the end, [Justice Scalia] forced those favoring comparative inquiry on the Court, and those in the field of comparative constitutional law generally, to more clearly and rigorously articulate their methodological intuitions—and the field is better off because of it.").

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insights. Law schools, too, offer more exchange programs abroad and internships that require basic familiarity with a system other than one's own. More and more courses and extracurricular offerings involve a comparative dimension. These are all structural (and welcome) changes that are likely to persist in the foreseeable future. Of course, not all is rosy. A major shift is still required in the legal academia toward recognizing jointly authored work and greater openness to group projects as means of addressing the limited expertise of individual scholars. Courses on the logic of comparative social inquiry, research design, and methodological proficiency that are mandatory in virtually every respectable Masters or Ph.D. program in the social sciences, remain absent from the core curriculum of even the finest of graduate programs in law. It is time they achieve similar status in at least all graduate programs offered by leading law schools. Likewise, political science departments must realize that curricular offerings with little or no attention to legal reasoning in comparative public law, or to constitutional courts and their audiences worldwide, do not do good service to students or faculty, and by extension harm the future of the field.

At the same time, in virtually all leading universities and research institutes around the world, conventional disciplinary barriers between physics and chemistry as well as between chemistry, biology, and medicine are giving way to new, interdisciplinary areas of research such as neuroscience, biochemistry, molecular genetics, or ecology. In the human sciences, meanwhile, the study of broad concepts such as "religion" spans an array of disciplines including theology, philosophy, history, and anthropology, just as notions such as "cities" are studied by economists, geographers, urban planners, sociologists, and political scientists alike. The time has come to consider a similar move in comparative constitutional studies—a process that in some respects is already underway. And so, I join Vicki Jackson in expressing cautious optimism.

If a Symposium such as this one is of any indication, we are on the right track. The participants in this exchange represent different epistemological and methodological backgrounds, speak several languages, received formal training in various countries spanning four continents, and have lectured in and written about dozens of jurisdictions worldwide. And this is clearly not an isolated event in staging a diverse scholarly community united by its keen interest in constitutional phenomena across time and place. The newly established International Society of Public Law ("ICON-S") was founded on an explicitly interdisciplinary platform. The American Society of Comparative Law ("ASCL") has begun to examine the possibilities for introducing more social science into the study of comparative law.<sup>99</sup> "Law & Courts" is now one of the largest organized sections in the American Political Science Association ("APSA"). It is my sincere hope that *Comparative Matters* helps expand and propel these developments in an attempt to further the interdisciplinary

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<sup>99</sup> This author is honored to have been appointed a member of a task force assigned with that mission.

revolution in comparative public law. Change is in the air; now is the most exciting time in decades to engage in comparative matters.