INTRODUCTION

Much has been written about the ever expanding convergence of constitutional supremacy worldwide, which has perhaps even resulted in the emergence of a global constitutional order.¹ Nearly all countries as well as several regional and transnational political entities have entrenched constitutions that celebrate a given polity’s aspirations, define the prerogatives of governmental institutions, contain a bill of rights, and establish some form of active judicial review that empowers courts to determine the constitutionality of “ordinary” statutes and decrees.² Consequently, constitutional courts and judges have emerged as key translators of constitutional provisions into guidelines for public life, in many instances determining core moral quandaries and matters of utmost political significance that define and divide the polity. This trend towards constitutionalization is arguably one of the most significant developments in late twentieth- and early twenty-first-century government.

This significant transformation has brought about an ever expanding interest among scholars, judges, practitioners, and policymakers in the transnational migration of constitutional ideas, and in the comparative study of constitutions and constitutionalism more generally. Whereas the study of constitutional law in a given country (the United States is of course a prime example) has long been dominated by jurists and legal academics based in that country, the comparative study of constitutions has taken a distinctly more cosmopolitan direction. From its beginnings as a relatively obscure and exotic subject studied by a devoted few, comparative constitutionalism has developed into one of the more fashionable and exciting subjects in contemporary legal

¹ I thank the participants of the Constitutionalism in Context conference, University of Hong Kong (June 11–12, 2017), as well as the volume editor, David S. Law, for their helpful comments on an earlier version of this chapter.


scholarship and has become a cornerstone of constitutional jurisprudence and constitution-making in an increasing number of countries worldwide.  

There are myriad indicators of this unprecedented comparative turn. Virtually all reputable high courts across the globe maintain websites where thousands of rulings, including those released earlier the same day, may be browsed with ease and downloaded within seconds. New World-Wide-Web portals allow jurists, scholars, and policymakers to retrieve and compare the entire corpus of constitutional texts around the world, from the late eighteenth century to the present. Lively discussions about current developments in constitutional law, theory, and design feature centrally in blogs devoted exclusively to comparative constitutionalism. New means of information technology have made the entire world of constitutional texts and a significant part of the constitutional jurisprudence corpus worldwide available with the click of a button.

Nor has the scholarly constitutional revolution been limited to the digital world. Learned societies devoted to the study of constitutions and constitutionalism have been formed. Scholarly books dealing with comparative constitutional law are published regularly by the world’s leading academic presses, and some have even acquired reputable status among scholars interested in other areas of legal or social inquiry. Legal academics and social scientists alike are constructing new data sets and deploying innovative research techniques in an attempt to create a more scientifically robust scholarly domain devoted to the study of constitutional law and constitutional institutions. New periodicals and symposia are dedicated to the comparative study of constitutions and constitutionalism, and top-ranked law schools in an increasing number of countries have begun to introduce their students to a distinctly cosmopolitan, comparatively informed view of constitutional law and legal institutions. Meanwhile, prominent constitutional court judges commonly lecture about, write on, and refer to the constitutional laws of other jurisdictions. Moreover, constitutional drafters from Latin America to Africa and the Middle East openly debate constitutional experiences overseas in making their choices about what constitutional features to adopt or to avoid. In many respects, then, this is the heyday of constitutionalism as a legal and political enterprise as well as a subject of lively scholarly discourse.

And yet, despite this tremendous renaissance, the methodological, research-design, case selection, and data analysis aspects of the enterprise – the questions surrounding how we should study constitutionalism as a distinct phenomenon with multiple forms and manifestations across time and place – remain largely undertheorized and, until recently, seldom discussed.  

This omission is disguised by what is often celebrated as “methodological pluralism” – essentially a diverse and open methodological enterprise with no single dominant approach (a good thing) characterized by few shared methodological standards (less so) other

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3 For a compact introduction to the field’s main themes and theoretical advances over the past few decades presented by one of the field’s preeminent scholars, see Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law*, 2nd ed. (Hart, 2018).

than some sort of collective scholarly sense of what should count as “good work.” Although there is of course some credence to that depiction, methodological pluralism – important as it is – is not the same as disregard for methodological questions and fundamental principles of research design. Whereas the former is a blessing and a crucible for intellectual flourishing, the latter is a testament to a field with no quality control or widely accepted best practices.

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. This chapter outlines a few elements that are essential to sustaining a methodologically astute scholarly inquiry of constitutions and constitutionalism across time and place.

The discussion proceeds in three main steps. Section 1 begins with an outline of the various types of studies and methodological approaches deployed in contemporary comparative constitutional inquiry. Section 2 discusses several key questions that may guide the researcher in selecting a suitable methodological matrix for any given comparative constitutional study, to wit: Who is conducting the study and in what capacity? What is the nature of the studied phenomenon? What is the study’s aimed level of abstraction and generalization? And what is the nature of the claim advanced (descriptive, taxonomical, normative, causal, etc.)? The upshot is twofold. First, there is no magic bullet or one-size-fits-all research design “formula” for a field as rich and diverse as comparative constitutional studies. Second, the sensibility and rationality of comparisons boil down to (1) the concrete perimeters of any given comparison, (2) the scope and nature of the substantive claim they purport to advance, and (3) the tailoring of the case-selection criteria deployed in a given study to the theoretical or empirical question that the study aims to address. Section 3 outlines a modest set of suggestions aimed at maintaining the methodological pluralism that has characterized the comparative study of constitutionalism, while promoting interdisciplinary inquiry, methodological literacy, and research design rigor in this intellectually effervescent yet methodologically loose scholarly domain.

1 TYPES OF CONTEMPORARY CONSTITUTIONAL STUDIES: METHODOLOGICAL PLURALISM OR METHODOLOGICAL FUZZINESS?

The better part of academic writing about the constitutional domain – often known simply as constitutional law – focuses on constitutional texts or constitutional jurisprudence, where the latter refers to the study of judicial interpretation of constitutional provisions and constitutional principles. The epistemological focus of this branch of scholarship is often on the internal logic, hierarchy, and interpretive coherence of constitutional law as an autonomous legal system. Critical assessment of constitutional rulings and judicial reasoning, innovative doctrines and their intra-constitutional effects, and debates about how a given court should have decided a given case or set of cases are, generally speaking, the prevalent scholarly genres here. Legal periodicals in North America and Europe, and to an increasing extent in leading Asian and Latin American centers of higher learning too, present countless examples of this type of constitutional scholarship. Much of this type of scholarship is read exclusively by stakeholders within the legal profession: legal academics, judges, law students, and lawyers.

So-called constitutional theory is another important branch of constitutional scholarship. It often departs from analysis of the constitutional text and its judicial interpretation to explore foundational principles and normative considerations that ought to guide the constitutional
domain and its various stakeholders. Most contributors to this area of scholarship have formal training or at least a solid background in political philosophy or legal theory. Their writings are frequently read beyond lawyerly circles, most notably by philosophers and political theorists interested in the normative foundations and moral priorities of the constitutional order and the justifiable interpretation of its constitutive texts.

A rapidly expanding body of literature – which I have elsewhere called constitutional studies – complements the legal and normative approaches to the study of constitutions by deploying more social scientific approaches and methods to the study of constitutions and constitutional development more broadly. Generally speaking, this emerging branch of scholarship sees the constitutional domain as an integral part of the broader political context, whether institutional, ideological, societal, or material, within which the constitutional domain evolves and operates. Consequently, the constitutional domain is perceived as extending beyond constitutional texts, constitutional principles, or constitutional jurisprudence, to encompass historical trends, political interests, economic incentives, strategic choices, and power struggles that affect and are shaped by constitutional institutions. Certain threads within this body of scholarship, most notably the study of constitutional design, combine social scientific empirical research with an explicitly normative outlook (peace, stability, democracy). Many contributors to this type of constitutional scholarship have acquired formal training or possess some solid background in disciplines such as history, sociology, political science, or economics. Consequently, social science research methods such as statistical analysis of large data sets, surveys, archival work, in-depth interviews, computerized content analysis, and occasionally multi-method studies are deployed in an attempt to understand the constitutional domain in its broader context.

The doctrinal, epistemological, and methodological differences between law as an academic discipline and political science and closely related disciplines are well known. Legal scholars tend to take law seriously and ignore or dismiss the significance of other vectors. Social scientists often treat law as an instrument of power and as a by-product of social, political, cultural, and economic struggles. Educational backgrounds and research practices in both fields are divergent. In addition to these basic differences, one should note that the constitutional lawyer, the judge, the law professor, the normative legal theorist, the policy analyst, the constitutional drafter, and the social scientist all engage in comparison with different ends in mind.

The advent of comparative constitutional inquiry adds another epistemological layer to the study of constitutionalism. Colloquially, the word “comparative” is often used in the sense of “relative to” (e.g., “he returned to the comparative comfort of his home”) or to refer to words that imply comparison (e.g., “better,” “faster,” etc.). The scientific use of “comparative” is defined in the Oxford English Dictionary as “involving the systematic observation of the similarities or dissimilarities between two or more branches of science or subjects of study.” These definitions seem intuitive enough, yet the meaning of the “comparative” in “comparative constitutional law” has proven quite difficult to pin down, due in part to the hybrid character of the field. It is situated between constitutional law and comparative law, and also between law and political science: constitutional law regulates political life and as such is arguably the most overtly political branch of all legal fields. Consequently, comparative constitutional law has become a bit of a catchall label for what in effect are quite different types of studies.

Even within constitutional scholarship that is widely accepted as comparative, the term “comparative” is often used indiscriminately to describe at least eight different modes of scholarship. These are: (1) 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); (2) genealogies and taxonomic labeling of types or categories of constitutional systems, old or new; (3) surveys of foreign constitutional law aimed at finding the “best,” most effective or most suitable set of constitutional rules or constitutional principles across cultures; (4) references to the constitutional mechanisms or high court rulings of other countries aimed at engendering self-reflection through analogy and contrast; (5) concept formation through multiple descriptions of the same constitutional phenomena (e.g., equality, expression, reproductive freedoms) across countries; (6) normative or philosophical contemplation of abstract concepts such as “constitutional supremacy,” “constitutional identity,” “constitutional retrogression,” “abusive constitutionalism,” “transnational/supranational/global constitutional order,” etc., often accompanied by casual reference to constitutional jurisprudence or constitutional practice in one or more jurisdictions; (7) careful “small-N” analysis of a handful of case studies aimed at advancing causal arguments that may be applicable beyond the studied cases; and (8) “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 or the spread over time and space of certain constitutional structures and practices. More often than not, these last two research modes 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. As such, these modes of inquiry are often deployed by scholars who study constitutional development over time and across space, or by scholars who are interested in the efficacy of certain constitutional mechanisms across various settings. Naturally, comparative accounts may differ in how thin or thick their engagement with different constitutional settings is depending on the concrete mode, aim, and purpose of the exercise or inquiry. Comprehending studies of a given constitutional trend or phenomenon may further adopt a “mixed methods” approach, combining several qualitative and quantitative methods and research designs in a single comparative study.

Adding to the confusion is that “comparativism” has no formalized standard. It may range from little more than a passing reference to the constitution of a country other than the scholar’s own; to fascinating yet unsystematic anecdotal evidence from here and there; or to work on a small number of overanalyzed, “usual suspect” constitutional settings or court rulings that do not necessarily represent the entire constitutional universe. Meanwhile, the constitutional experiences of entire regions – from the Nordic countries to sub-Saharan Africa to Central and Southeast Asia – remain largely uncharted terrain, understudied and generally overlooked. Selection biases, alas, are not uncommon. The result is that purportedly universal insights are sometimes based on a handful of frequently studied – and not always representative – settings or cases. Instrumentalist considerations such as availability of data or career planning often determine which cases are considered. Descriptive, taxonomical, normative, conceptual, and explanatory accounts are sometimes conflated, and epistemological views and methodological practices vary considerably.

While impressive in its ability to generate sophisticated concepts and to develop useful thinking tools, the field of comparative constitutionalism has made relatively modest strides in terms of its engagement in controlled comparison or in tracing causal links among germane variables and, consequently, in their ability to advance, substantiate, or refute testable hypotheses. The field’s potential to produce generalizable conclusions, or other

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forms of nomothetic, ideally transportable knowledge seems underutilized. Meanwhile, comparative constitutional scholarship that favors contextual, hermeneutic, and idiographic knowledge seldom amounts to a true, inherently holistic, “thick description” the way Clifford Geertz – a grand champion of thorough, contextual “symbolic interpretation” – perceived it and preached for it to be.7 “Armchair” constitutional research carried out with little or no fieldwork or systematic data collection is not uncommon, and the absence of an established tradition of rigorous and anonymous peer review in many leading law reviews suggest that oftentimes, the outcomes of such works, captivating though they may be, do not meet the standards of methodological rigor followed in most other branches of social and human science.

2 FRAMING THE INQUIRY: A FEW KEY QUESTIONS

The key question, certainly when it comes to “small-N” studies – arguably the most commonly deployed mode of research in comparative constitutional studies – is 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.8 Using this method of inferential reasoning, comparative political scientists have for generations developed and applied various case selection ideal-types in the small-N mode of theory.9 These ideal-types include: (1) the “most similar cases” principle (comparison of cases that, as much as possible, are identical but for the factors of causal interest); (2) the “most different cases” principle (comparison of cases that are different but for the factors of causal interest); (3) the “prototypical cases” principle (the studied cases feature as many key characteristics as possible that are found in a large number of cases); (4) the “most difficult case” principle (if a theory passes a “most difficult” test case, our confidence with its predictions increases; conversely, if a claim or hypothesis does not hold true in a “most likely” or a “most favorable” case, its plausibility is severely undermined); and (5) the “outlier cases” principle (studying case or cases that are not adequately explained by extant theories; because the studied phenomenon occurs frequently or significantly in defiance of the known causes or existing explanations, there ought to be another explanation).10

However, as the classicist Marcel Detienne has argued, perhaps it is the comparison of the incomparable that produces the most exciting results.11 Inspired by the work of Claude Lévi-Strauss, this argument searches for radically different cosmologies as the basis for comparison.12 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 Catherine Valcke’s

7 To be sure, some important strides have been made in this genre of scholarship in recent years. See for example the detailed single-country accounts published in the Constitutional Systems of the World book series (Hart); Wojciech Sadurski, Poland’s Constitutional Breakdown (Oxford University Press, 2019); and Anine Kierulf, Judicial Review in Norway: A Bicentennial Debate (Cambridge University Press, 2018).
10 For a detailed elaboration and illustrations of the basic logic of each of these case selection principles and their deployment in contemporary comparative constitutional studies, see Hirschl, ‘The Question of Case Selection’ (n. 4); and Hirschl, Comparative Matters (n. 4) at 224–281.
powerful point, comparability requires unity and plurality.\textsuperscript{13} 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 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.\textsuperscript{14} By contrast, the analytical or theoretical yield of comparing two midsize broccoli florets (too similar), or a broccoli floret and a manual transmission gearbox (too different) is not likely to be high. It may be a valuable exercise for readers to think of equivalent examples within the world of constitutionalism.

Three additional points are worth bearing in mind in this context. First, comparisons should aspire to avoid the banal and the all too familiar. As the late Benedict Anderson noted:

\begin{quotation}
Within 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.\textsuperscript{15}
\end{quotation}

In other words, creative comparisons involving seldom explored settings or counterintuitive pairings may sometimes generate original, thought-provoking insights.\textsuperscript{16} Second, longitudinal comparisons of the same constitutional setting over a long stretch of time may be as instructive as cross-national comparisons. This may also serve as a more general cautionary note that contemporary discussions in comparative constitutional law often proceed as if there is no past, only present and future.\textsuperscript{17} The reality is that the migration of constitutional ideas and critical encounters with the constitutive laws of others has been taking place long before the last few decades. Methodologically astute researchers should bear this in mind and draw on longitudinal comparisons when applicable. Third, 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.\textsuperscript{18}

A second key question is who is conducting the constitutional inquiry, in what capacity, and for what purpose? What makes the understanding of the “comparative” in comparative (constitutional) law so essential is the various vocational, jurisprudential, academic, and

\begin{itemize}
\item\textsuperscript{14} Ibid.
\item\textsuperscript{15} Benedict Anderson, ‘Frameworks of Comparison’ (2016) 38 London Review of Books 15.
\item\textsuperscript{17} Ran Hirschl, ‘Remembrance of Things Past’ (2015) 13 International Journal of Constitutional Law 1.
\end{itemize}
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. This is, after all, her professional and ethical prerogative. A judge who wishes to make a good public policy decision may look carefully at other jurisdictions that have been contemplating the same issues. Her goal is to write an informed, well-reasoned judgment. A comparative quest for what appears to be the “best” or “most suitable” constitutional solution is appropriate. It often involves comparisons by distinction, analogy, and contrast. Similarly, constitutional drafters in search of effective solutions for a troubled polity would be advised to comparatively explore relevant alternatives that have been tried in analogous settings. 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. Such type of comparison contributes to what may be termed “concept formation through multiple description.” It may take the form of a systematic taxonomical account of all forms and manifestations of a given constitutional phenomenon (e.g., “federalism,” “equality,” “judicial activism,” or “freedom of religion”), or a more selective account of the main displays of that phenomenon, so as to effectively accomplish the pedagogical goal. Aptly, this approach serves as the organizing principle of most leading textbooks in comparative constitutional law. Likewise, a social scientist who wishes to illustrate to her students the significance of certain constitutional phenomena (e.g., “parliamentarism,” “presidentialism,” “bi-” or “unicameralism”) rightly draws on descriptive accounts involving analogy and contrast to illustrate the point.

In contrast, a legal philosopher who is interested in formulating moral justifications or principles for best practices at the ought (rather than the is) level may be forgiven for supporting her insights with a small number of favorable yet possibly unrepresentative cases. However, an attempt to explain or establish causality warrants a more methodologically astute approach. One cannot move freely from engaging with a specific purpose for comparative work (e.g., descriptive, taxonomical, normative, causal, etc.) to engaging with another without adjusting one’s case-selection principles accordingly. Accordingly, the researcher whose aim is to understand the causes and consequences of a given constitutional dynamic must consider seriously principles of controlled comparisons, inference-oriented research design, case selection, and data analysis.

This does not detract from the power of doctrinal analysis per se. Comparative constitutional law professors enjoy 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 reasoning and interpretation has traditionally been the domain of law professors. No one is better positioned to trace the relationship between patterns of convergence or persisting divergence in constitutional jurisprudence across polities, or to advance the research on how constitutional courts’ jurisprudence or modes of reasoning interact with the broader, transnational legal environment within which an increasing number of them operate.

However, theorizing about the constitutional domain of a broader world requires closer engagement with, and openness toward, disciplines that study the broader context with which

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See e.g. Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* , 3rd ed. (Foundation Press, 2014).
constitutions and constitutional institutions constantly and organically interact. It requires some study or understanding of (1) judicial behavior (an overwhelming body of evidence suggests that extrajudicial factors play a key role in constitutional court decision-making); (2) the origins of constitutional change and stalemate (a variety of theories point to the significant role of ideational and strategic factors in both); (3) 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 (4) 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). Contributions to these types of comparative constitutional scholarship require a researcher to adjust her research design and methodological approach to better fit the study’s thematic goal or aim. The question then is not why engage in interdisciplinary comparative constitutional inquiry – few open-minded legal scholars or intellectually honest political scientists would disagree that in an ideal world that would be a preferable approach – but rather how should such an interdisciplinary, multi-method inquiry be effectively pursued.

A third key question is what is the study’s aimed level of abstraction and generalization (e.g., idiographic, nomothetic, concept formation, etc.)? A clear response to this question provides the scholar with a direction with respect to case selection and research design. At one end stand idiographic studies that draw on thorough, nuanced analysis of a single constitutional system. This type of study may yield illuminating “ethnography-like” accounts of constitutional transformation in given polities. Ideally, it may also spawn general insights or lessons for other, similarly situated constitutional settings, although the stated purpose of such studies is often more modest than that and may be confined to understanding the unique traits of the constitutional domain in a single setting. Recent examples of well-executed “constitutional ethnographies” include Michaela Hailbronner’s *Tradition and Transformation* (a meticulous account of the rise of German constitutionalism in the post-World War II era); Benjamin Schonthal’s examination of Buddhism-infused constitutionalism in Sri Lanka; Donald Horowitz’s *Constitutional Change and Democracy in Indonesia*; Brian Ray’s detailed study of social rights jurisprudence and implementation in post-apartheid South Africa; Vojciech Sadurski’s study of Poland’s democratic backslide and constitutional retrogression under the PiS right-wing populist government; and the various single-country volumes published under the auspices of the Constitutional Systems of the World book series (e.g., the volumes by Cheryl Saunders, Shigenori Matsui, and Andrew Harding on the constitutions of Australia, Japan, and Malaysia respectively, as well as the books in that series on the constitutions of Canada, France, Germany, the United Kingdom, China, Indonesia, Thailand, Vietnam, Brazil, and Israel). Each of these studies carefully

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25 Sadurski, *Poland’s Constitutional Breakdown* (n. 7).
canvasses a single constitutional system, explains its form and operation, and provides a critical evaluation of its foundations, evolution, and contemporary challenges. Unique elements in each setting are defined as such by reference to comparative anchors.

Critical reflection by an external observer on a given polity’s constitutional law and institutions is a subcategory in this genre of comparative constitutional studies. The study of constitutional system X by a researcher steeped in constitutional background Y, it may be argued, meets the basic requirement of comparative analysis – the existence of at least two targets of observation or points of view – because the observer at least implicitly perceives and describes system X in contrast with system Y. Montesquieu’s *Persian Letters* and de Tocqueville’s *Democracy in America* are prime examples of this. Within recent constitutional studies, Alexei Trochev’s detailed account of the Russian Constitutional Court’s “difficult childhood” years and jurisdictional “wars” with other courts and institutions makes a most valuable contribution to the understanding of how newly established courts in post-transition settings begin to gain traction and authority. Likewise, Lisa Hilbink’s meticulous exploration of the culture of formalism and passivity in Chilean courts is a prime illustration of how a constitutional ethnography of a single country can be carefully crafted in a way that contributes to general theory-building.

However, even without such a general contribution or other concrete payoffs, “one can unapologetically study a foreign legal system simply for its own sake.” As Tom Ginsburg has argued in the context of studying Japanese law:

> Even if one starts with a more instrumentalist premise, we cannot conceivably know whether any particular legal rule or institution will be of broader theoretical or practical interest until we know what it is we are looking at. And this requires a certain degree of local knowledge, of willingness to understand legal systems on their own terms. There is therefore virtue in having a group of scholars studying foreign legal systems for their own sake, independent of the need to resolve any particular theoretical or practical question.

At the same time, qualitative studies in comparative constitutionalism are expected to subscribe to the established norms of qualitative work in other human sciences. Within the academic domain, they should not be conflated with fabulous storytelling about constitutional loci overseas or with “over-extrapolation” from a very small yet frequently invoked set of examples (e.g., the effect of the *Brown v. Board of Education* ruling, or the constitutionalization of social and economic rights in South Africa). Advocacy of qualitative approaches in comparative constitutional studies must not be confused with methodological sloppiness or a retreat from gold-standard practices such as field or archival work, linguistic proficiency, and close acquaintance with the history, culture, law, and politics of the studied polity.

A different level of abstraction is at the basis of comparative inquiry meant to generate concepts and analytical frameworks for thinking critically about constitutional norms and practices. This mode of comparative constitutional scholarship involves a quest for a detailed understanding of how people living in different cultural, social, and political contexts deal with constitutional dilemmas that are assumed to be common to most modern

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30 Ibid. at 16.
political systems. Its focus is not on a single jurisdiction, but on a single practice (or a set of closely related practices) as carried out in or encountered by different jurisdictions. More often than not, this type of comparative scholarship takes a universalist tone that emphasizes the broad similarity of constitutional challenges and functions across many relatively open, rule-of-law polities. By studying various manifestations of and solutions to roughly analogous constitutional challenges, our understanding of key concepts in constitutional law, such as separation of powers, statutory interpretation, or equality rights, becomes more sophisticated and analytically sharp. The intellectual end often sought from this exercise is novel concept formation or the introduction of new thinking tools through multiple description.

Works dealing with innovative mechanisms designed to mitigate the tension between constitutionalism and democracy – mechanisms such as the Canadian Charter of Rights and Freedoms’ “limitation” and “override” clauses, the New Zealand Bill of Rights Act’s “preferential” model of judicial review, and the UK Human Rights Act’s “declaration of incompatibility” – provide a good substantive illustration of the “concept formation through multiple description” approach. Drawing on a comparative examination of such mechanisms, comparativists like Stephen Gardbaum and Mark Tushnet have introduced the concept of the “Commonwealth model of judicial review” or “weak-form judicial review.” In doing so, they have enriched and brought new life to the debate about the questionable democratic credentials of constitutionalism in the United States. Similar research design logic underlies other important comparative constitutional works of the concept formation genre, for example, Yaniv Roznai’s Unconstitutional Constitutional Amendments; Gary Jacobsohn’s masterful formation of the concept of constitutional identity; and Vicki Jackson’s introduction of modes of engagement with foreign constitutional jurisprudence in a transnational era. This mode of inquiry is also prevalent in edited collections devoted to the analysis of a given constitutional phenomenon across countries, often with emphasis on a particular region; here, a thematic introduction sets up the stage for a series of country chapters. Hence, concept formation through multiple description.

Another type of comparative constitutional studies differs from concept formation in that it aims to engage in theory testing and explanation through causal inference. At the most abstract level, this type of scholarship is concerned with how two or more things or processes are related, why a certain phenomenon is happening, and why it is happening the way it is. Causation, however loosely or rigorously perceived, is a key element, perhaps even the main marker of identity of this scholarly enterprise. Controlled comparison and methodologically astute case selection and research design are critical to accomplishing these goals. There must also be a clear distinction between conditionality (a given phenomenon cannot occur without condition X, but that condition is not the cause of the phenomenon) and causality, as well as between direct factors and intervening factors, and between necessary and sufficient conditions.


Gary J. Jacobsohn, Constitutional Identity (Harvard University Press, 2010).


Systematic examination of a small number of cases (small-N) and statistical analysis of large data sets (large-N) are the two main research designs deployed in this inference-oriented mode of comparative constitutional studies. As mentioned earlier, the “most similar cases” principle is the most commonly drawn upon research design and case selection principle in inference-oriented small-N studies. Tom Ginsburg’s *Judicial Review in New Democracies* – a carefully constructed comparative study of the catalysts behind the emergence of independent constitutional review regime during the early stages of democratic liberalization in post-authoritarian polities – is an example of an effective application of the “most similar cases” methodology to the study of comparative constitutionalism. Ginsburg’s argument – namely, that judicial review is a solution to and a function of the problem of uncertainty in constitutional design – is carried out through an exploration of the formation of constitutional courts, and the corresponding judicialization of politics, in three new Asian democracies: Taiwan, Mongolia, and South Korea. The three countries share a roughly similar cultural context. Each underwent a transition to democracy in the late 1980s and early 1990s, and in each, the newly established constitutional court struggled to maintain and enhance its stature within a political environment that lacks an established tradition of judicial independence and constitutional supremacy. Despite these commonalities, however, there has been significant variance in judicial independence among the three countries. Other illuminating examples of inference-oriented small-N research designs in comparative constitutionalism include Mitchel Lasser’s comparative account of constitutional reasoning styles (drawing on a “prototypical cases” principle of case selection); Charles Epp’s comparative assessment of the conditions that facilitate effective rights revolutions (drawing, inter alia, on a combination of the “most similar cases” logic – USA and India in this context; and the “most difficult case” – Canada, in this context).

At the nomothetic end of the generalization spectrum stand large-N studies that aim to generate widely transferable insights (nomothetic knowledge) through analyses of large sets of observations, and ideally even the entire studied population. In simplistic terms, the idea here is to study the entire constitutional forest, not individual constitutional trees. Such an approach might provide a response to heuristics and case-selection biases, as well as to the limited generalizability associated with single-case and small-N research. With many phenomena, the sheer number of cases makes a complete analysis infeasible. However, when it comes to studying the world’s constitutions, the full number of cases is still only in the hundreds. For many purposes, this is a manageable number, and as long as quantitative studies limit themselves to what they can plausibly extract and deduce from constitutional texts (and possibly other cross-national indicators), they should be a most welcome addition to comparative constitutional studies.

Large-N analyses are particularly useful as a means to consider broader trends in constitutionalism – to focus on the general picture, not on specific details or individual observations. If properly executed, such analyses may likewise elude the clichés, heuristics, and biases resulting from decades of overstudying a handful of cases, and instead actually test some of the canonical insights of constitutional theory or shed new light on causal links within the

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constitutional universe. This mode of inquiry becomes exceedingly relevant in the relentless global convergence toward constitutionalism and as increasingly comprehensive databases and advanced information technology make a rich body of pertinent information readily available to researchers and scholars worldwide. 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. In so doing, large-N studies of comparative constitutional phenomena may help alleviate the legitimate concerns over “cherry-picking” raised by opponents of asystematic reference to foreign legal sources and may likewise mitigate the overreliance on a small number of “usual suspect” constitutional settings (at the expense of over 150 others) by treating all constitutions as equally worthy of observation or status as data points.39

The number of large-N constitutional studies published to date remains modest, but it has been growing exponentially in recent years. Various specimens of this work have sought to assess the global decline of American constitutional legacy;40 to determine why countries adopt constitutional review;41 to trace and explain patterns of judicial decision-making in constitutional adjudication;42 or patterns of constitutional court reference to foreign law;43 to examine the global spread of economic and social rights;44 and to study the efficacy of constitutional mechanisms such as formal amendment rules or terms limits.45 A notable example of how large-N studies may contribute to comparative constitutional studies is The Endurance of National Constitutions by Zachary Elkins, Tom Ginsburg, and James Melton.46 At the core of this pioneering book is an ostensibly simple question: “Why do the Lifespans of national constitutions vary? Why is it that some live much longer than others?” To answer this, the authors build a data set of constitutions of the world from 1789 to 2005 – approximately 216 years of modern constitutionalism. The data reveal some stunning results (e.g., while constitutions are written to last, they vary considerably in terms of their endurance; only half of all constitutions last more than nine years, with an overall average of less than twenty years). The analysis further shows that while extra-constitutional factors do affect

39 This may be the right place to say that the common focus in much of the literature on the constitutional “North” betrays not only certain epistemological and methodological choices, but also a normative preference for some concrete set of values that the “Northern” setting seems to uphold. The near-exclusive focus on a dozen liberal democracies in comparative constitutional law reflects the field’s deeply liberal bent. But moving away from its normative facet to the positivist, real-life one, the relevance of the Global South critique becomes more qualified. Whether the selective Northern (or “Western”) emphasis in comparative constitutional law limits the applicability or value of canonical scholarship in the field hinges on the specific question being posed. A given constitutional setting may belong to the Global South in one context or comparative dimension, but not in another.


42 See e.g. Gretchen Helmke, Courts Under Constraints: Judges, Generals, and Presidents in Argentina (Cambridge University Press, 2005); Shai Dothan, Reputation and Judicial Tactics (Cambridge University Press, 2014); Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (Cambridge University Press, 2002).

43 For a survey of this literature, see Elaine Mak and David S. Law, ‘Transnational Judicial Communication: The European Union,’ Chapter 11 in this volume.


a constitution’s endurance, design choices matter more. All things considered, enduring constitutions tend to be specific, to emerge by virtue of a relatively open drafting stage that engenders “buy-in” by diverse constituencies, and to be adaptable as a result of amending formulae and provisions for incorporating modern practices. These three design choices “result from the constitution-making process itself, but are also features of ongoing practice. All three mutually reinforce each other to produce a vigorous constitutional politics in which groups have a stake in the survival of the constitution.”

As with any other research design and case selection approach, a comparative constitutional scholar needs to tread with caution when considering the suitability of a large-N study for her planned study. The apparent weaknesses of large-N studies have been addressed repeatedly, most notably (though not exclusively) by proponents of contextual, purportedly deeper research. Perhaps most significant for the study of constitutionalism is that large statistical data sets tend to give short shrift to context and thus ignore the crucial “law on the ground” or “soft law” aspects. Subsequently, it is quite common to take issue with large-N studies’ marked difficulty capturing the vital nuance and the multilayered – social, cultural, and political – context in which constitutional development occurs. Concepts such as “constitutional identity” or “constitutional culture” are not easily amenable to inquiry that is insensitive to details, stripped of nuance and context, and reliant on oversimplified coding schemes. Extant data sets of constitutional texts do not tell us much, if anything, about constitutional interpretation by courts or on-the-ground implementation and impact (but in fairness, these studies do not aim to address those types of issues).

More generally, large-N studies often focus on observable or quantifiable phenomena but lack the tools to deal with nonobservable, nonquantifiable ones. Consequently, they tend to focus on questions and phenomena that lend themselves a priori to quantitative analysis of concrete observations. This, in turn, may lead to what Ian Shapiro succinctly describes as “a flight from reality in the human sciences.” As well, it is sometimes argued that large-N studies pour tremendous effort into sophisticated data-analysis techniques, possibly at the expense of net theoretical yield or substantive ingenuity.

There is more than a kernel of truth in all these concerns. Yet analyses of large data sets are still a valuable addition to theory-building and testing in comparative constitutional studies. To be clear, the claim here is not that explanation, causality, or numerical comparative inquiry should serve as the field’s golden standard or intellectual Holy Grail. However, 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.”

Along similar lines, Frederick Schauer, one of America’s most prominent

47 Ibid. at 89.
48 For a critique of economics’ reliance on numbers to capture the complex nature of law in various contexts, see Pierre Legrand, ‘Econocentrism’ (2009) 59 University of Toronto Law Journal 235. Legrand begins his critique with an epigraph quote from Nietzsche: “the reduction of all qualities to quantities is nonsense.” For further discussion, see Holger Spamann, ‘Empirical Comparative Law’ (2015) 11 Annual Review of Law and Social Science 131.
constitutional thinkers, suggests that the intuitions and hunches of law professors concerning the impact of constitutional law ought to be subject to empirical testing. When taken with a healthy dose of skepticism and awareness of their acknowledged limitations, empirical studies on the effects of constitutional texts, traditions, designs, and rulings can only contribute, not harm, the state of knowledge on these matters.

In summary, three main questions provide effective guidance as to a given comparative constitutional study’s research design and case selection: (1) what should one compare? (2) who is conducting the constitutional inquiry, in what capacity, and for what purpose? and (3) what is the study’s aimed level of abstraction and generalization? Appreciation of and attention to these three key questions and the distinctions and considerations they raise are vital for the continuation of the field’s current renaissance. When executed poorly, comparative constitutional inquiry may amount 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 Antonin Scalia of the US Supreme Court) base their objections on. 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 systematic comparative work ought to pay closer attention to research methods, and to the philosophy of comparative inquiry more broadly. The response to the cherry-picking concern is not to abandon comparative constitutional work; rather, it is to engage in comparative work while being mindful of key historical foundations, epistemological directions, and methodological considerations.

3 THE ROAD AHEAD

One of the perplexing oddities of contemporary constitutional studies continues to be the disciplinary divide and consequent lack of communication between legal scholarship on constitutional law – arguably the most overtly political branch of law, public or private – and social science scholarship on constitutional history, constitutional development, and constitutional politics. This disciplinary divide between those who study constitutional law qua legal phenomenon and those who study it as a predominantly sociopolitical phenomenon is a chief reason for the methodological challenges facing comparative constitutionalism. The two sides are equally culpable. The need for scholars of comparative constitutional politics to understand constitutional vocabulary and its comparative practice and implications equals the urgency for comparative constitutional law scholars to appreciate the social and political context within which the constitutional realm is embedded and operates.

This nonideal situation has much to do with foundational epistemological differences between legal inquiry and social inquiry, if not also various training, vocational, and sociology of knowledge factors. However, as engrained as these factors may be, maintaining the disciplinary divide between constitutional law and other closely related disciplines that study various aspects of the same constitutional phenomena artificially and unnecessarily limits our intellectual horizons. It restricts the kind of questions we ask as well as the range of answers we may provide. In virtually all leading universities and research institutes around the world, conventional disciplinary barriers in other areas in both the sciences and humanities

51 “[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.” Frederick Schauer, ‘Comparative Constitutional Compliance: Notes Towards a Research Agenda,’ in Adams and Bomhoff (eds.), Practice and Theory in Comparative Law (n. 50) 212 at 213.
are giving way to new, interdisciplinary areas of research (e.g., ecology, neuroscience, cities, religious and ethnic diversity). The time has come to consider a similar move in constitutional studies, not only because of constitutional law’s key role in regulating politics, but also because the complex symbioses of today’s world admit neither constitutionalism-free political systems nor apolitical constitutional law. A good starting point would be continued celebration of comparative constitutionalism’s epistemological and methodological pluralism alongside increased awareness of and attention to questions of research design, data analysis, and overall transportability of insights across settings and across disciplines.

More generally, the underlying claim of this chapter is that the multifaceted nature of constitutionalism does not mesh well with the established disciplinary boundaries of academic inquiry. It requires instead the deployment of a collaborative, interdisciplinary approach backed by a corresponding set of research designs and methodologies. A true understanding of the constitutional universe requires familiarity with modes of legal inquiry as well as awareness of principles of case selection, research design, and data analysis drawn upon in closely related fields within the social sciences. It also requires a fair degree of knowledge about and expertise in the studied jurisdictions and their political context in addition to their legal and constitutional traditions. This is no easy task, but an interdisciplinary turn in comparative constitutional studies, and indeed a broader turn to “normal science” already underway in some important respects, seems to be the call of the hour. Such a turn is facilitated in part by the improved availability of pertinent comparative materials, and by the impressive growth of the field in recent years. It may be further supported by putting greater emphasis on jointly authored work and greater openness to collaborative group projects; by assigning higher reputational value to cross-disciplinary expertise and publications; by re-examining established yet infrequently tested insights; and by experimenting with multimethod research designs and “out-of-the-box” research techniques, ranging from archival work, in-depth interviews, and participatory observations to large-N statistical analyses and computerized algorithmic examination of textual and jurisprudential elements of constitutionalism worldwide.

To be sure, the main point of comparative constitutional scholarship is not the method it employs, but the substantive argument it makes. However, that substantive argument gains credibility when some basic principles of research design are followed. The study’s aim (e.g., descriptive, taxonomical, explanatory, and/or normative) should be lucidly defined; the study’s intended levels of generalization and applicability should be articulated upfront; and most importantly, the research design and methods of comparison deployed by the study should reflect its analytical aims or intellectual goals, so that a rational connection exists between the research questions and the comparative methods used to address them. In other words, a descriptive study of a single country’s constitutional system is neither inherently “preferable” nor “ancillary” to a quasi-scientific explanatory account that draws on a large data set of comparative constitutions.

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 counterpressures 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 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 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 doctoral 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 a disservice to students and faculty and by extension harm the future of the field.

Our collective intellectual goal, it might be said, is the advancement of knowledge and understanding of constitutional phenomena across polities, as well as a better grasp of our own constitutional system through such comparative engagement. No concept of constitutionalism’s scope and nature can be exhaustively and comparatively assessed using a single research design, approach, or method. The problem emerges when random or iconic, but not necessarily representative, illustrations are used to make generalizable causal claims, or when a large-N study purports to advance supposedly universal truths without taking into account countless nuances and differences among its various data points. In other words, the key point here is not a call for “scientification” of the enterprise or for a move to a more nomothetic mode of inquiry per se. Rather, it is a call for supporting any given aim or purpose of comparative constitutional inquiry with a thoughtful and suitable choice of research design, case selection, and methodology (or set of methodologies).

No research method enjoys an a priori advantage over any other independent of the scope and nature of the studied phenomenon, the question the research purports to address, or the level of generalization sought. Consequently, attempts to outline an “official” comparative constitutional method, or calls for the adoption of a stringent, “correct” approach to research methods in the study of constitutional phenomena across time and place, are not only unrealistic but also unwise. By way of an alternative, comparative constitutionalists would be advised to settle on a set of four sensible methodological guiding principles. Scholars should: (1) define clearly the study’s aim—descriptive, taxonomical, explanatory, and/or normative; (2) 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; (3) encourage methodological pluralism and analytical eclecticism when appropriate; and (4) 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.

To be clear, a quest for explanation or causality is not the only or even the primary goal of comparative constitutional inquiry. Whenever causal claims are advanced, however, they cannot
be presumed correct while untested, and at any rate cannot be made in a casual, blasé fashion that would never fly in more methodologically rigorous branches of the 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 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, it is foreseeable that such studies would be seen as lacking in rigor, much like an analysis of case law that ignores the minute maneuvers of legal reasoning. For the social scientist, the concern is that unless the research design principles applicable to the specific question at hand are followed, 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. If quasi-scientific analysis of the constitutional domain 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 a panoramic view of the landscape. In doing so, it leaves plenty of room for other types of scholarship and other perspectives, including detailed case law-based analyses of constitutional jurisprudence or modes of judicial reasoning; small-N comparative constitutionalism studies; ethnography-like, single-country accounts that contribute to general theory-building; novel concept formations through comparisons; as well as more traditional comparative constitutional inquiry that is geared toward self-reflection and betterment through analogy, distinction, and contrast.

4 SUGGESTED READINGS


