The State of the Field

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INTRODUCTION

The English-language study of comparative constitutional law has exploded with tremendous new energy in the early twenty-first century. Despite a long history at the core of the social science enterprise, never before has the field generated such a broad range of interdisciplinary interest, with lawyers, political scientists, sociologists, and economists making contributions to our collective understanding of how constitutions are formed and how they operate. Never before has there been such demand from courts, lawyers, and constitution-makers in a wide range of countries for comparative legal analysis. And never before has the field been so institutionalized, with new regional and international associations providing fora for the exchange of ideas and the organization of collaborative projects. All this renders the state of the field more complex than ever before and difficult to canvass succinctly. Needless to say, but worth saying anyway, is that the present effort is provisional and incomplete. It is also grounded in the English-language literature for the most part. There are, however, vibrant literatures in German, French, and Spanish – and in time, there will be one in Chinese as well – that a truly global survey would incorporate.

A good place to begin is the question of what has caused the field to explode with such interest. The growth of comparative constitutional studies reflects the confluence of two developments in the late twentieth century – one academic, and one in the real world – which coalesced to provide a fruitful environment. Sections 1 and 2 of this chapter describe the intellectual and geopolitical currents that together fueled the development of the field. Turning from the past to the present, Section 3 surveys the literature on courts, which in many ways remains the core of the comparative constitutional law field. Sections 4, 5, and 6 delve into the work that has been done on questions of constitutional design, change, and impact. Finally, Sections 7 and 8 look to the future of the field: Section 7 identifies burning questions of the day that might form a research agenda going forward, while Section 8 offers a partisan take on the methodological diversity of the field and the role of research methods.

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1 THE INSTITUTIONALIST TURN

The academic development behind the growth of comparative constitutional studies was the revival of various institutionalisms in the social sciences and the integration of this stream of social science into law. The institutionalist turn in the social sciences happened just as the fall of the Soviet Union shifted attention from ideology as the core target of political and sociological analysis, and also after the cycle of behaviorism that had dominated some fields in the preceding decades had run its course. Behaviorism was an approach in the social sciences that emerged in the 1930s and emphasized the study of observable and quantifiable behavior as opposed to formal rules and institutions. This approach has returned in full with the development of social psychology in recent years, but the early 1990s were a somewhat fallow period for this individual-focused approach.

In contrast with the behavioral tradition that it reacted against, institutionalism stood for the idea that individual agents are embedded in broader institutional structures, and that these structures are deeply consequential, in the sense of shaping outcomes. While various disciplines adopted slightly different definitions, a concise and influential formulation among economists and political scientists was that institutions demand study because they are the rules of the game that structure behavior. The sociological approach to institutionalism was slightly different, in that it took as its foil rational choice theory (which models social and political outcomes as the aggregate result of self-interested individual calculations) and sought to focus on social and cultural forces that shaped behavior. A third version, historical institutionalism, traced path dependencies and critical junctures over time. Whether defined by political scientists, sociologists, or economists, institutionalism emphasized collective structures, informal and formal, and this represented a paradigm shift in terms of the object of inquiry.

Institutional analysis had a lot of targets but eventually turned toward constitutions. As the social devices that structure the creation of rules, constitutions are the ultimate institutions. Indeed, in their ideal sense, constitutions are meta-institutions, the rules whereby rules are made. So considered, rules about rules had been a central focus of a subfield called constitutional economics, which provided both positive and normative accounts of decision-structures. This literature was not very central even within economics, and it focused more on theory than empirics, providing a set of working assumptions and hypotheses for analyzing constitutions.

Institutionalism is central to the intellectual history of comparative constitutional law because it has provided the motivating force for social science interest in law. The turn to institutionalism initially occurred outside law schools in the English-speaking world. Law, as a discipline, was relatively late to embrace the turn to social science, but by the early 2000s many American law faculty had social science Ph.Ds, and so there was a broad shift toward empirical and interdisciplinary work. In our particular subfield, scholars were pursuing a

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3 DiMaggio and Powell (eds.), New Institutionalism in Organizational Analysis (n. 2).


joint field of inquiry that Hirschl has called “Comparative Constitutional Studies.” The interdisciplinary path had been blazed by an earlier generation of law faculty who held degrees in political science, such as Martin Shapiro, Donald Horowitz, and Sandy Levinson, to name a few Americans. But law faculties really began to turn to comparative constitutional law in earnest because of demands from the real world in the wake of the Cold War. This led many mainstream constitutional law scholars to take a comparative turn and bring their distinctive inquiries and normativity to the endeavor.

2 THE IMPACT OF REAL-WORLD DEVELOPMENTS

The late twentieth century made it hard for academics to ignore constitutions. The third wave of democracy beginning in the mid-1970s brought new attention to constitutions as instruments of democratization, and the emergence of many new states (and the liberation of many others) at the end of the Cold War prompted a new round of efforts to theorize and analyze institutional design. Many of the contributions that shaped later generations’ thinking about constitutions came from this period: the names Elster, Holmes, Sunstein, Osiatynski, Sajo, among others, still form an important part of the pantheon.

A closely related development was the secular increase in the role of courts in many societies, a phenomenon known as judicialization. Courts in ever more countries were issuing ever more decisions about seemingly ever more important questions. Constitutional courts were prime locations for judicialization in many countries, and the phenomenon was initially examined by lawyers and political scientists interested in particular countries. Some of this work was implicitly comparative, but most of the work in the 1990s considered a single jurisdiction. By the early twenty-first century, scholars seeking to develop more general theories attacked the problem.

Judicialization co-occurred with the spread of rights all over the world. As Sadurski has noted, rights protection was the primary justification for judicial power. Rights have expanded dramatically in number and form, and this expansion has produced a thriving business for the new constitutional adjudicators (as well as international bodies with which

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7 Hirschl, Comparative Matters (n. 1); Ran Hirschl, ‘Methodology and Research Design,’ Chapter 3 in this volume, at Section 1.
8 Many of the figures from this period were US constitutional law faculty who turned outward for new arenas to work in. See e.g. Mark Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 Yale Law Journal 1225.
they interact, cooperate, and compete). The core of the field remains, as it always has been, the study of the constitutional adjudication of rights by courts. Yet courts do more than protect rights; they also police the separation of powers, protect democracy, exercise ancillary powers, and generally serve as monitors of government behavior. Judicialization goes well beyond rights.

The spread of judicialization, rights, and constitutionalization meant that there were both many more contexts in which the operation of the constitutional system “mattered” as well as much more demand for comparative analysis. With the rising prominence of constitutional courts as loci of major social and political decision-making, it became apparent that some of the problems courts confronted were recurring in different countries. This real-world development that began in the 1990s and accelerated in the 2000s forms the background to the present inquiry. How are we to understand the state of the field now, nearly three decades after the major intellectual and political shifts that accompanied the end of the Cold War?

3 CONSTITUTIONAL COURTS: DOWN AND OUT, UP AND IN

Over twenty-five years ago, in 1993, Martin Shapiro invited American political scientists who studied law and courts to go “down and out” (a metaphor from American football that is not worth explaining). As a way of organizing the literature and identifying its weak spots, this is a good place to start. “Down” refers to non-apex courts, while “out” refers to courts outside one’s own country, which in Shapiro’s case was the United States. One might add the need to move “up” to the supranational level, as well as “in” to the internal motivations of judges. If one prefers a more local metaphor, the ancient Mongolians oriented themselves by the “Four Directions” (Durqun Zug) which they imbued with spiritual significance. How has our field responded to the need to expand the scope of inquiry in all four of these directions?

3.1 Down

When Shapiro was commenting on the American literature in 1993, he noted an obsession with the American Supreme Court. This was to some degree natural, as the Court was coming off a period in which it played an extraordinary role in reshaping American life, beginning with the Chief Justiceship of Earl Warren. The jurisprudence of that court has been profoundly influential abroad and led to a recalibration of the outer limits of the judicial role for nearly everyone. Simply put, the role of the Supreme Court as the central rights-protecting institution in American life drew a good deal of hope and criticism. But in the USA at the time, scholars had little understanding of subnational and lower courts, including state courts, trial

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18 Ibid.
courts, and intermediate appellate courts. In particular, there were very few studies of trial courts, where most judicial work gets done.\textsuperscript{20} This is what Shapiro meant by going “down.”

By analogy, we can make the same observation today in our own broader field. In some countries, scholars have done a fairly decent job of studying apex courts, where constitutional decision-making gets done.\textsuperscript{21} But we have not looked very thoroughly at how lower courts apply constitutional norms, how they interact with the highest courts, or how they are perceived and activated by publics and government agencies. The preliminary reference system, which has proved to be so important in European law, also exists in many constitutional systems, but we have no comparative analysis of it to speak of. There are also precious few comparative studies of subnational constitutions and their interpretation, or of subnational courts.\textsuperscript{22}

Of course, it is too soon to abandon the study of apex courts. With more than six dozen constitutional courts in existence, many of which have never been studied, there is a lot of material yet to exploit. There are still many important questions to address: how such courts become institutionalized, how personnel affect their operations, how they interact with other institutions, how they build and maintain reputational capital, and, in recent years, how they are undermined and neutralized. But it is also clearly the case that there are rich fields to mine below the level of the constitutional court in each jurisdiction.

3.2 Out
When Shapiro made the reference to scholars going “out,” he had in mind studying courts and judicial politics outside the United States. This is exactly what has occurred, and it has become the core of our massive field. We now have not only a large set of country studies, too numerous to even begin to cite in a short contribution such as this one, but theoretically informed inquiries into when courts are effective and debates about what lenses are best used to analyze them.\textsuperscript{23}

One of the wonderful things about this literature is that it is truly global. We now have a large literature on constitutional adjudication in Latin America, as well as newfound work in the constitutional history of the region.\textsuperscript{24} New resources for cases and primary materials are also becoming available.\textsuperscript{25}

\textsuperscript{20} To be sure, there were some studies of the field of criminal procedure and of criminal trial courts.
\textsuperscript{22} For notable exceptions, see Matthew C. Ingram, Crafting Courts in New Democracies: The Politics of Subnational Judicial Reform in Brazil and Mexico (Cambridge University Press, 2015), and Cora Chan, ‘Subnational Constitutionalism: Hong Kong,’ Chapter 17 in this volume.
\textsuperscript{25} Manuel José Cepeda Espinosa and David Landau, Colombian Constitutional Law: Leading Cases (Oxford University Press, 2017).
There has also been an explosion of work on Asia.\textsuperscript{26} From Indonesia, to Mongolia, Taiwan, and beyond, we have good detailed coverage and some broader comparative analytic work.\textsuperscript{27} Africa too has seen greater attention to constitutional developments, especially South Africa, whose court has been thoroughly studied and is perceived as a real leader in global jurisprudence. There is thinner English language literature on other parts of the continent, providing a rich research opportunity.\textsuperscript{28} And it is also worth noting some studies that frame the problem as being “constitutionalism in the global south,” in which fruitful comparison is to be obtained cross-regionally.\textsuperscript{29}

A major theme in the literature has been transnational judicial borrowing and dialogue, which Mak and Law explore in their contribution to this volume.\textsuperscript{30} Globalization reduces the transaction costs to the flow of all kinds of ideas, including constitutional ones. Many new democracies, for example, had to deal with lustration and other issues of transition, economic transformation, and electoral issues.\textsuperscript{31} These courts quite naturally began to pay attention to how the issues were resolved in other countries, especially the established democracies with well-developed jurisprudence on similar questions. Courts were also in dialogue about the interpretation of international human rights instruments, and what limitations might be acceptable within a free and democratic society. This phenomenon of transnational judicial dialogue was in fact quite old, but received renewed attention and was heavily criticized by judicial conservatives in the United States. The critique prompted a spate of work on the appropriate role for judicial borrowing across jurisdictions.\textsuperscript{32} Indeed, in part for this reason, the early twenty-first century has seen a veritable explosion of interest in the field.

The literature is overwhelmingly normative and seeks to justify a practice that is already extant. While many scholars have made contributions in this field, it is this author’s opinion (and Mak and Law do not disagree) that the field has attracted far more attention than is merited on the normative side, and has paid insufficient attention to positive questions about who borrows and what it means. The concept of dialogue, too, is used loosely, encompassing everything from citation to interbranch conflict. The presence of a transnational citation is neither necessary nor sufficient evidence for transnational “influence,” and so there is a sense of looking for the keys under the light pole. However, a couple of contributions have theorized the politics of these borrowings and thus advance our understanding of exactly


\textsuperscript{27} See e.g. Simon Butt, The Constitutional Court and Democracy in Indonesia (Brill, 2015); Munkhsaikhan Odonkhuu, Toward Better Protection of Fundamental Rights in Mongolia: Constitutional Review and Interpretation (Center for Asian Legal Exchange, 2014); Chang, ‘The Role of Judicial Review in Consolidating Democracy’ (n. 21); Wen-Chen Chang and Jiunn-Rong Yeh, ‘The Emergence of East Asian Constitutionalism: Features in Comparison’ (2011) 59(3) American Journal of Comparative Law 805.


\textsuperscript{29} Daniel Bonilla Maldonado (ed.), Constitutionalism of the Global South (Cambridge University Press, 2014).


\textsuperscript{31} Ruti Teitel, Transitional Justice (Oxford University Press, 2000); Issacharoff, Fragile Democracies (n. 12).

\textsuperscript{32} See e.g. the sources cited in n. 30; Barry Friedman and Cheryl Saunders, ‘Editors’ Introduction to the Symposium on Constitutional Borrowing’ (2003) 3 International Journal of Constitutional Law 177.
why we ought to observe particular flows of ideas. Hirschl is noteworthy here, in the context of his broader masterpiece on the state of the field: he notes that the choice of a reference society is a self-conscious decision by the courts, reflecting a kind of epistemic politics, and he also notes that the debate about its appropriateness is to some degree a reflection of partisan concerns in the United States.

Other themes that have been pursued include inter-judicial dialogues within a particular country. We have a few studies of the interactions among the highest courts but there is much more to do. A particularly interesting case may arise when there is a separate administrative jurisdiction, as in France. The constitutional politics of decision-making among three different high courts is inevitably complex, and a comparative framework for understanding these dynamics could be welcome.

And, drawing on the strategic model of judicial behavior developed in the United States, we have some studies of the phenomenon of judicial dialogue about constitutionality, in which courts “converse” with other institutions that may or may not have the power to resist or react to the decisions. This phenomenon has been particularly important when it comes to social and economic rights, which by their nature are not always amenable to direct judicial enforcement. As Rossi and Brinks highlight in their chapter, courts in several jurisdictions, including South Africa, Argentina, and Colombia, have developed a very creative jurisprudence that takes into account the various institutional competencies of government, courts, and legislatures. In so doing, these courts provide an important corrective to the largely American literature on the inefficacy of courts in intervening in social policy.

“Out” of course has two connotations: it can mean going outside the jurisdiction to the international and comparative planes (as Shapiro used it), but it can also mean going outside the courts to other institutions within the same jurisdiction. As Maartje De Visser’s chapter on nonjudicial constitutional interpretation highlights, there are rich fields to mine outside the constitutional court in each jurisdiction. Other political institutions, including legislatures, executives, independent commissions, and local governments, engage in acts of constitutional interpretation, enforcement, and even resistance that deserve greater study. Again, the socialist context, in which the judicial role is minimized as a matter of both ideology and practice, has provided some fruitful studies here. But for many other countries, there is literally no literature on this important question, except when there are constitutional dialogues with high courts. One might construct a research program that starts inside these

34 Hirschl, Comparative Matters (n. 1).
40 Maartje De Visser, ‘Nonjudicial Constitutional Interpretation: The Netherlands,’ Chapter 10 in this volume.
other institutions, and then examine their interactions with courts in a comparative and theoretical framework.

3-3 Up

The spread of constitutional rights has also been accompanied by increasing attention to enforcement of international human rights, on which a rich literature has also developed. The interaction of constitutional law and international law has been well noted for some time, particularly in Europe where scholars noted the cooperative relationship between national judges and supranational judges in advancing both the European Convention of Human Rights and the European Union.\(^42\) Indeed, one can now conceive of the field of rights as being a rather complex but seamless one, in which national constitutional and administrative law interact with international public and private law, along with transnational adjudicative regimes. All this has meant that there is increasingly a single integrated field of global public law.

While liberal scholars saw in Europe the promise of a truly global integrated regime, Huneeus has made important correctives to this happy story.\(^43\) She notes substantial judicial resistance by high courts in Latin America to some of the decisions of the Inter-American Court of Human Rights. This macro-regional comparative finding invites further work to understand the dynamic between regional and national courts in Africa especially, where a plethora of new judicial bodies have emerged.\(^44\) We may also learn something about the dynamics of judicial empowerment by pursuing cross-regional studies that exploit the fact that some regions (Africa in particular) lack supranational jurisdictions.

3-4 In

Besides going down, out, and up, we might also say that scholars can move “inward” in their approaches to constitutional courts. What motivates individual justices, and how are individual preferences aggregated into court decisions? The simplest version of this idea is to turn to the latest incarnation of the behavioral approach, examining particular judges’ decisions as a reflection of their values, political affiliation, or status. The impact of, for example, gender on constitutional court adjudication cries out for a comparative approach.\(^45\)

Studies of judicial decision-making in this vein tend to rely on the approach of counting votes. Szente (2016), for example, examines the behavior of the Hungarian Constitutional Court, while Garoupa has pursued studies of a number of different courts with various coauthors.\(^46\) Some of these studies confirm the basic orientation of the American studies, while others find more nuanced results that suggests institutional structures and norms may matter. Of course, not every court discloses the individual votes in particular cases, and so this

\(^{42}\) Stone Sweet, \textit{Governing with Judges} (n. 12).
\(^{43}\) Huneeus, ‘Courts Resisting Courts’ (n. 15); von Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say’ (n. 15).
approach will not be available in every context but it has been successfully utilized at the international level.\(^47\) Still, there are techniques that can be utilized; for example, interview-based studies can tease out judicial self-understandings of their role.\(^48\)

The question of group dynamics and preference aggregation is one in which our general understandings are moving forward with the fields of neuroscience and social psychology (recognizing that the latter has had something of a replication crisis in recent years). It is too early to have a handle on the comparative implications of this line of work; but in the meantime, doing ethnographic studies of courts and constitutional adjudication can help to tease out group dynamics and self-understandings of those engaged in the enterprise.

### 4 CONSTITUTIONAL FORMATION AND CONSTITUTIONAL DESIGN

Until Elster (1995), constitution-making was not well studied or really conceived as a separate field worthy of focus.\(^49\) Grounding his analysis in the eighteenth-century constitutions of France and the United States, Elster’s article provided an important corrective and launched a small literature that continues to develop.\(^50\) Among other contributions, Elster systematized thinking about the process of design, distinguishing between legislature-based constitution-making and those produced in a constituent assembly, as well as constitutional conventions and roundtables. Elster’s claim that specially elected constituent assemblies are in principle the best way to proceed has come in for some criticism by scholars who have looked at more recent processes.\(^51\) The literature has gone on to emphasize the way in which constitution-making is increasingly “post-sovereign,” meaning that it involves the interplay of national and international actors and tends to unfold over time rather than in a single big bang decision.\(^52\)

One of the interesting debates in the field concerns the role of public participation in constitution-making processes. Drawing on the idea of a “right to democratic governance,” scholars and international organizations have pushed for a transnational norm that national participation is an essential element of effective and legitimate constitution-making processes.\(^53\) While the normative case seems straightforward, empirical verification has been a bit elusive. The case study literature tends to be more optimistic about the merits of participation, while large-n studies have been less conclusive.\(^54\) The latest large-n statement, by Eisenstadt et al., is more optimistic about the effects of meaningful participation on democracy,\(^55\) while Saati, in her book-length treatment, is more skeptical.\(^56\)

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\(^48\) See e.g. Law, ‘Anatomy of a Conservative Court’ (n. 21).


\(^52\) Andrew Arato, Post Sovereign Constitution Making: Learning and Legitimacy (Oxford University Press, 2016).


Obviously these results are to be treated contextually. In his study of Bolivarian constitutions in Latin America, Landau demonstrates “Constitution-making Gone Wrong,” in which too much participation can exacerbate social cleavages.\(^57\) Perhaps the ubiquity of constitutional failure is some evidence of this point.\(^58\)

As can be seen from the discussion of participation, the context of making constitutions today is quite different from that of the eighteenth century.\(^59\) One dimension of difference is the increased role of transnational influences on constitutional formation.\(^60\) A recent symposium in the UC Irvine Journal of Transnational Law tackles this topic as well. An increasingly dense network of scholars, activists, international organizations, and civil society groups are engaged in constitution-making processes when they occur. And the well-documented diffusion of various constitutional institutions means that constitutional texts are also transnationally produced in some sense.\(^61\) Constitution-making, it seems, has become an arena in which actors, institutions, and ideas compete and interact, producing varied products.

Constitutions are made in a wide array of situations, ranging from technocratic redesigns that consolidate accumulated reforms, to revolutionary situations, military coups, or foreign occupations that impose constitutions.\(^62\) They are often messy and unpredictable. The very messiness of many constitutional processes, and the importance of contextual factors, highlights Horowitz’s claim that “design” is a poor metaphor for constitution-making.\(^63\) We lack sufficient knowledge about the interaction of institutions with environments to make firm predictions as to how they will work in practice, and there has been virtually no research on the complex interaction effects of adopting multiple institutions.

At the same time, major debates over key institutions persist. While the two-decade debate over the merits of presidentialism and parliamentarism has wound down, other issues remain quite contested.\(^64\) Constitutional design became a central focus for ethnically diverse states, where there is a continuing search for institutions to ameliorate conflict.\(^65\) The parameters of that debate are surveyed by Lombardi and Pasarlay in their chapter.\(^66\) The treatment of

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\(^{59}\) Laurel E. Miller (ed.), Framing the State in Times of Transition (US Institute of Peace, 2008).


\(^{66}\) Clark B. Lombardi and Shamshad Pasarlay, ‘Constitution-Making for Divided Societies: Afghanistan,’ Chapter 5 in this volume.
international law is another design-type issue that has drawn the attention of scholars, connecting with the “up” direction noted earlier, and is the subject of Markus Böckenförde’s chapter.\(^{67}\)

In this sense, once one looks beyond law schools and law scholars, the literature writ large has done a decent job of going outside the narrow confines of courts to understand how constitutions actually work. There is more that could be done, of course: mostly we tend to take a single institution and analyze it in isolation rather than consider the interactive effects of institutional combinations. But in thinking about how to tackle this problem, one could easily assimilate the entire literature on institutions in the field of comparative politics, raising questions of the boundary of the field under discussion. Disciplinary boundaries are artificial, of course, and there is no reason to reify them. But it is helpful to note the outer limits of what is meant to be analyzed. This is one reason that an emphasis on formal constitutionalization may be a helpful criterion for some studies: it is a clear dividing line that makes comparability feasible. The determinants of what gets constitutionalized and what does not are partly conventional, but also reflect local policies and politics. Broadly speaking, if something is formally constitutionalized, it is inside the field; if it has not been, then it is not, belonging more to the small-c or informal constitution. But the question of what goes in and what goes out itself calls for analysis and theorizing.\(^{68}\)

5 CONSTITUTIONAL CHANGE

How constitutions evolve is a perennial issue for scholarly analysis. Various typologies of change, and modes of amendment rules, have drawn attention.\(^{69}\) We observe great variety across constitutional systems in the rules for and rate of constitutional change. But for a variety of theoretical and empirical reasons, the problem of explaining relative entrenchment turns out to be a difficult one to analyze.\(^{70}\) Still, it is safe to say that the problems of constitutional change – formal and informal – are among the most well studied in the field, outside of the judicial core. The chapters by Roznai and Landau in this volume convey a sense of this literature.\(^{71}\)

The judicial role in amendment processes itself comes to the fore in the important recent work by Roznai on the phenomenon of unconstitutional constitutional amendments, in which procedurally correct constitutional amendments are rejected because they violate


\(^{70}\) Ginsburg and Melton, ‘Does the Constitutional Amendment Rule Matter at All?’ (n. 69).

\(^{71}\) Yaniv Roznai, ‘Constitutional Transformation: Hungary,’ Chapter 7 and David Landau, ‘Constitutional Backsliding: Colombia,’ Chapter 22, both in this volume.
textual limitations, or a judicially constructed “basic structure” of the constitution. We have, at this point, a good empirical understanding of this phenomenon, which might be seen as the ultimate sign of judicialization. There is also some good normative theory both justifying and questioning this practice. But we still lack a positive model predicting when courts will get away with this particular move.

Popular constitutionalism is another area to explore in this regard. Bui extends the metaphor of dialogic constitutionalism to consider the role of popular movements in pushing for constitutional change. While this has long been a theme in American constitutional studies, the explosion of popular constitutionalist and democratic movements in East Asia (Japan, Korea, Hong Kong, Taiwan, and Vietnam, to name but a few contexts) suggests that there is room for comparative understanding of how constitutions are operationalized by social movements. Given their traditions of populist discourse, socialist contexts may be particularly fruitful environments for this inquiry. But any truly comparative work on this topic would be welcome.

6 THE IMPACT OF CONSTITUTIONS

The effect of constitutions on social and political life is difficult to measure, as issues of selection, reverse causation, and other thorny empirical issues pose a threat to inference. The major study looking at economic outcomes remains that of Persson and Tabellini. Others have examined the conditions under which constitutional rights make a difference, an inquiry that dovetails nicely with the human rights literature. The general literature is somewhat skeptical that inclusion of a paper right, on its own, will make much of a difference, and instead has turned to regime type, circumstances of adoption, and history as powerful conditioning variables. Elkins et al., however, speculate that the impact of constitutional provisions on practice will be greater in the realm of institutions than in the realm of rights, which by their nature are more aspirational, and lack obvious mechanisms of self-enforcement. Elsewhere, they show that one particular institution – executive term limits – tends to be effective within the set of democracies.

Asking the question at a slightly higher level of abstraction – does the constitution as a whole make a difference? – raises thorny empirical questions as to the criteria to be used and

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79 Elkins et al., The Endurance of National Constitutions (n. 8).
the benchmarks for performance. In one recent extensive assessment, International IDEA sponsored a twenty-year retrospective on the constitution of South Africa, a document adopted with great fanfare and promise, but also enormous pressures for social transformation. This kind of careful assessment inevitably invites consideration of whether the glass is half full or half empty, and invites nuanced consideration of trajectory, context, and what was realistically achievable. Speculating counterfactually, it is easy to see how things in a country like South Africa could have been immeasurably worse; but it is also easy to understand the disappointments that have set in after two decades of the new regime. A nuanced approach has to take into account what constitutions can and cannot do for a society. As Landau argues, constitution-making is not a solution to every problem, but this should not be taken as a point in favor of cynicism. Constitutions do motivate collective action and constrain what moves are possible; the question of impact is a conditional and empirical one that invites further investigation.

7 THE BIG QUESTIONS: CONSTITUTIONS AND …

The ellipsis here refers to the interaction of our topic with other major forces in the world today. Despite their normative claim to supremacy, constitutions and constitutionalism have limits when they encounter other forms of social ordering. But the interactions among macro-forces are indeed of great interest and pose a challenge for the field ahead.

In general, the limits of constitutions and constitutionalism are a relatively new topic for analysis, spurred by backsliding and “retrogression” in many parts of the world. To what extent can constitutions limit or ameliorate the breakdown or backsliding of democratic regimes? Can constitutions be abused? The recent undermining of democracy in Hungary, Poland, and Turkey, using democratic and constitutional means of change forces us to ask whether we have put too much faith in constitutions as a technology of good governance. While our field has greatly expanded, one might think that what goes up must come down, and that the trend toward constitutional restraint has peaked. However, it is important not to overstate the problem, or its novelty. Populism is on everyone’s minds these days, but raises questions about the role of constitutions in constraining unrestrained democracy that have been central to the field since ancient Athens. “What comes around goes around” may be the better aphorism.

Populism is driven by massive and intractable inequality in the rich democracies of the world, and this phenomenon forces attention to the role of liberal democratic constitutions in the economy. Generally speaking, constitutions cannot guarantee redistribution or growth, but they can provide resources for different forces to mobilize toward these ends. Speaking about the United States Constitution, Justice Oliver Wendell Holmes famously said that the constitution does not embody the theory of Mr. Herbert Spencer, a nineteenth-century thinker who foreshadowed “neoliberalism.” Yet the standard form constitutional text

Landau, ‘Constitution-Making Gone Wrong’ (n. 57).
Landau, ‘Constitutional Backsliding: Colombia’ (n. 71).
Lochner v. New York, 198 US 45 (1905) (Holmes, J. dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).
today guarantees property rights along with social and economic rights, introducing a particular set of economic theories into constitutional texts. Constitutions are distributive: they empower property holders, pensioners, women, and many other discrete groups. The existence of tensions within these “incompletely theorized agreements” can be productive, of course, but can also lead to gridlock and breakdown. Whether constitutional technology is capable of helping us manage our way out of the present crisis is not clear, but the likely answer is “partly.” So long as the constitution continues to provide a framework for the allocation of political power, there will be players who wish to preserve it.

Another “big question” starts not with democracy and its risk of breakdown, but at the other end of the polity scale. In keeping with the broader trend toward examination of authoritarian institutions, the role of constitutions and constitutionalism in authoritarian governance has drawn a good deal of attention in recent years. Authoritarian constitutions are not mere window dressing or shams but used for many different purposes, including signaling, agency control, coordination, and ideological consolidation. Of growing interest is the discrete socialist strain of constitutionalism: a number of superb studies of the People’s Republic of China have emerged – as Albert Chen highlights in his chapter – and the work of Bui Ngoc Son stands out for highlighting the distinct Vietnamese trajectory as well as delving into the internal comparison among socialist regimes. Our knowledge and awareness of the internal variation within authoritarian regimes is still quite incomplete.

The combination of a feeling of fragility in established liberal democracies and a rising use of constitutional technology by authoritarian states leads one to wonder, hyperbolically, whether the actual end of constitutional history is a pseudo-liberal soft authoritarianism. Another set of questions is not about regime type per se, but the interaction of constitutions with other major forces of social ordering. We have done well on constitutions, politics, and the economy; there are now more projects on religion as well, including well studied questions of Islam, but also now a small set of studies on Buddhist constitutionalism. The interaction between two forces that each claim the highest normative ground is one of conflict, competition, and sometimes cooperation.

Finally, there is the question of the impact of the field. Our comparative knowledge of what works and what does not in constitutional design and adjudication is in its infancy, and yet does serve to inform constitutional advice by organizations like the United Nations, International IDEA and others. The Venice Commission is an interesting example of an institution that has leveraged comparative study to articulate a European common core of constitutional principles and rules, which it then uses in a normative manner in commenting

94 Ran Hirschl, Constitutional Theocracy (Harvard University Press, 2010).

8 SCHOLARLY TRENDS AND METHODS

What is the current state of the scholarly enterprise itself? The field is vibrant with institutions, fora for presentation of work, journals, and entrepreneurial activity. In some ways this reflects the nature of our time and the many exciting questions being asked, but it also is a tribute to the energies and youth of many in the field, including the organizers of the present volume. Comparative constitutional studies is a field of entrepreneurs.

The massive increase in attention to constitutions and the phenomenon of judicialization means that there is now an almost infinite variety of material available out there. Constitutional courts are increasingly translating their material into English, and some scholarly efforts have made heretofore inaccessible jurisprudence available in the lingua franca as well.\footnote{See e.g. Cepeda Espinosa and Landau, Colombian Constitutional Law (n. 25).} Blogs (such as ICONnect,\footnote{See International Journal of Constitutional Law Blog, www.iconnectblog.com, archived at https://perma.cc/PLG6-VFNT.} the IACL blog,\footnote{See International Association of Constitutional Law Blog, www.blog-iacl-aidc.org, archived at https://perma.cc/X5CL-Y4FZ.} and Verfassungsblog\footnote{See Verfassungsblog, https://verfassungsblog.de, archived at https://perma.cc/6G97-8ENG.} have spurred a conversation online about recent developments. Technology has also spurred the availability of online texts and cases. HeinOnline’s product and Oxford’s Constitutions of the Countries of the World are both valuable, as is the Constitute Project, now available in Arabic and Spanish.\footnote{Disclosure: the author is the Co-Director of the Comparative Constitutions Project, the producer of the Constitute website.} A global searchable case law database is surely the next big step, though of course a daunting one.

All this material means that there is a greater need for organization than ever before. Like other fields, ours has interacted with a broader development in scholarship, which one might call “the encyclopedic turn.” Recent years have seen a boom in the “handbook,” which publishers have moved toward as a distillation of knowledge in various fields, and comparative constitutional law is no exception.\footnote{E.g. Michel Rosenfeld and András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012); Tom Ginsburg and Rosalind Dixon (eds.), Comparative Constitutional Law (Edward Elgar, 2013); Vicki C. Jackson and Mark Tushnet, Comparative Constitutional Law, University Casebook Series, 2nd ed. (Foundation Press, 2006).} The next stage is online compendia that do the same thing; Oxford University Press is a leader here. There are also online constitutional encyclopedia and other compendia, including the newly launched Oxford Encyclopedia of Comparative Constitutional Law, as well as the Hart series on constitutional systems of the world, which is a series of country-specific volumes that provide an overview of the entire system. To speculate, it is possible that the growth of knowledge and reduction in search costs has increased demand for concise summaries of various fields that are accessible to outsiders.

More specific to our field, the comparative nature of the enterprise invites a series of thematic volumes on subtopics in which a series of case studies are produced. One approach is to take on a particular topic – such as emergency powers, judicial review, or amendment – and then ask various scholars with knowledge of particular countries to produce chapters.
Another is to look at constitutional systems of entire regions, as in the state of Latin American or Asian constitutionalism. Further, some editors combine the two approaches to examine, for example, judicial review in Latin America or emergency powers in Asia. One would think that this process has saturated the market, but it does not seem to have done so. The present volume is in some sense a hybrid of the handbook and edited volume approaches, in which a series of case studies is used to make topical points.

It is also worth noting how the organizational field has been constructed and is exhibiting increasing institutional density. Numerous scholarly associations have emerged to coordinate and advance scholarly projects, including the truly global but idiosyncratic International Association of Constitutional Law (IACL); the relatively young but vibrant ICON-S, associated with the International Journal of Constitutional Law (ICON), with a more European orientation; and the more loosely organized Asian Constitutional Law Forum, to name just a few. Among international organizations, International IDEA stands out for its production of knowledge products that consolidate serious scholarship. And of course, there are various university-based centers that work on both constitutional scholarship and reform. The real-world demand for constitutional scholarship has given us opportunities to engage with civil society and governments around the world.

Collections, journals, edited volumes, handbooks, encyclopedias. The field is drowning in material. If he or she were good at writing on planes, it would be easy for the contemporary scholar to spend 365 days a year, bouncing around the globe, attending a series of excellent meetings and contributing to the incremental development and consolidation of knowledge. The challenge, of course, is how can we make sense of all this material and activity?

Here we come to the issue of method. Methods have themselves been the target of different scholarly compendia and collections, including several under way. Broadly speaking, the field is following Hirschl’s call for a more interdisciplinary inquiry, in which many different methods are brought to bear on particular problems. He urges scholars to be systematic and rigorous but is not overly concerned with the debate between large-n and small-n approaches, noting that each has its merits. As he argued, the field has blossomed precisely because it has taken an explicitly interdisciplinary approach, which is a criticism of a purely legal approach. Constitutional law, it is sometimes said, is too important to be left to the lawyers. Constitutions structure politics and have distributive consequences for the economy and society, but they are also products of these social forces. Teasing out causes and consequences is a nuanced task.

These claims are in some tension with the other approach to comparative constitutional law, which is not drawn from social sciences but rooted in American law schools. Many American constitutionalists turned outward in the 1990s in an effort to get leverage on problems that had bedeviled our own constitutional order, and to understand other ways of doing things. The concerns here were ultimately doctrinal or otherwise directed to courts and were reflected in the active debate over whether the US Supreme Court should cite materials from other jurisdictions. While these debates are not unimportant, they are not the whole picture. This preoccupation with courts can be analogized to watching only the seventh

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103 Disclosure: the author serves as Senior Advisor to the organization in its Constitution-Building Programme.
104 See Hirschl, ‘Methodology and Research Design’ (n. 7); Hirschl, Comparative Matters (n. 1).
inning of a baseball game, or to be more cosmopolitan, the seventieth through eightieth minutes of a football game (by which I mean soccer).\textsuperscript{106} These are important components of the game, but they do not tell us how the score came to be what it is, or who wins in the end. Studying constitutions completely requires understanding their origins, drafting, implementation, adjudication, and distributive consequences, as well as their demise.

Because of their normative importance, and the fact that the total number of texts is both large enough to provide for useful statistical tests yet small enough that one can actually learn about many of them, constitutions are a ripe target for various large-n methods. The work of Versteeg, Law, and other scholars stands out here, and this is something we have tried to facilitate with the Comparative Constitutions Project and its Constitute website.\textsuperscript{107} At the same time, careful historical study of cases is needed to tease out the mechanisms by which constitutions are produced. Small-n and single-country studies are also of tremendous value, and it is only through a process of triangulation of methods that we shall make sustained progress.

Much of the interdisciplinary literature has come at the intersection of law and political science, for the obvious reason that these are the two disciplines for which constitutions are close to the heart. There is a smaller sociological approach with Gunther Teubner (2012) making a rather dense contribution that pays some dividends if one spends enough time trying to understand it, as does Thornhill’s contribution.\textsuperscript{108} Perhaps the most significant sociological work in terms of its engagement with the rest of the field is that of Meyer and his colleagues in the World Society School.\textsuperscript{109} These scholars use standard statistical methods and so easily engage with the work occurring in law schools and social science departments. In this sense, they are more in tune with the current center of the field than the other sociological approaches.

One interesting angle is to use text analysis tools, developed in computational linguistics. Law is pursuing this most actively, but Lupu has also done a good job on this, as has Rockmore, a mathematician.\textsuperscript{110} Essentially, there are many roads up the mountain. Our field is ripe for testing new methods, even if not all will yield sustained payoffs.

At the other end of the spectrum, Scheppele has urged constitutional ethnography and has repeatedly attacked large-n methods in public, if not in print.\textsuperscript{111} Her view is that each constitutional system is discrete, and more effort should be paid to understand its internal structure, logic, and the very meaning of the constitutional in individual contexts. This position is correct but need not imply the denigration of large-n methods that she throws


\textsuperscript{107} Elkins et al., The Endurance of National Constitutions (n. 58).


onto the argument. A large methodological debate within social sciences has settled on an eclectic, “mixed methods” approach, which surely has much to commend it in our context.\footnote{See Malcolm Langford, ‘Mixed Methods,’ in David S. Law and Malcolm Langford (eds.), \textit{Research Methods in Constitutional Law: A Handbook} (Edward Elgar, forthcoming).}

Of course, no one disagrees that local knowledge is important. Anyone with a very close understanding of a constitutional system will have encountered arguments that would not pass muster in their home system, or that seem strange and unproductive. Formalism is sometimes strategically employed as a resource in partisan conflict. And it is also possible that the meaning of the “constitutional” is quite locally situated. If taken seriously, the ethnographic claim forms a real challenge to comparing cases across jurisdictions for normative insights, yet also invites us to take the language of law seriously and to understand what arguments work in which contexts. Arguments are not platonically true. They depend on convincing others. But it would be a step too far to say that the importance of delving into the particular meanings of the constitutional in particular societies renders all other work trivial.

To some extent, this interdisciplinary methodological turn has been the thrust of a formalist backlash from lawyers, particularly in civil law jurisdictions where the social sciences have not been at all integrated into legal scholarship. But the methods of comparative constitutional law must draw from both social science and law: they must reflect the outsider’s concern with causes and consequences, but also use internal understanding to get the law right. This is a daunting task, especially in a field that has become truly global in every sense of the word.

\section*{9 CONCLUSION}

The field of comparative constitutional law has indeed experienced a “renaissance” as Hirschl puts it.\footnote{Hirschl, \textit{Comparative Matters} (n. 1); Hirschl, ‘Methodology and Research Design’ (n. 7).} There is today a massive amount of material for scholars to work with, produced by courts and other constitutional players from every corner of the globe. To digest it all is impossible; perhaps the best we can do is to follow the Buddhist parable of the group of blind men trying to describe the elephant. If we each try to conceptualize the beast on our own, we will be doomed to fail. But through collective action and many hands we may end up getting closer to the truth.

\section*{10 SUGGESTED READINGS}


