Introduction: 'The C Word'

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COMPARATIVE MATTERS

*The Renaissance of Comparative
Constitutional Law*

Ran Hirschl

OXFORD

Comparative Matters

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Constitutional Law*

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UNIVERSITY PRESS

Contents

<i>List of Abbreviations</i>	x
Introduction: The C Word	i
1. The View from the Bench: Where the Comparative Judicial Imagination Travels	20
2. Early Engagements with the Constitutive Laws of Others: Lessons from Pre-Modern Religion Law	77
3. Engaging the Constitutive Laws of Others: Necessities, Ideas, Interests	112
4. From Comparative Constitutional Law to Comparative Constitutional Studies	151
5. How Universal is Comparative Constitutional Law?	192
6. Case Selection and Research Design in Comparative Constitutional Studies	224
Epilogue: Comparative Constitutional Law, Quo Vadis?	282
<i>Table of Cases</i>	285
<i>Index</i>	291

Introduction

The C Word

In the late 1990s, when I was writing my PhD dissertation at Yale University, comparative constitutional law was still at its early revival stages. News about the constitutional transformation of Europe or dilemmas of constitutional design in the post-communist world made headlines. But what was not then obvious to many was the full extent of the astounding global spread of constitutionalism and judicial review, and the ever-increasing reliance on constitutional courts worldwide for addressing some of the most fundamental predicaments a polity can contemplate.¹ Likewise, the profound understanding, now quite common, that this is one of the most noteworthy developments in late 20th- and early 21st-century government was still in its infancy.

The field's early-day difficulties were readily evident. Very few relevant sources were available online, and those that were had to be accessed through a complex dial-in process using a large, noisy, and unreliable modem (we called it the "old unfaithful")—by far the most expensive item in our rather modest graduate housing unit. To access and review constitutional jurisprudence by courts overseas, I had to borrow a rusty master key from the chief librarian, and travel some 20 miles southwest to a mid-size gray office building in the rather unspectacular city of Bridgeport, CT, where Yale Law Library stored its comparative law collection at the time. A slow, squeaky elevator ride took me to the ninth floor, where executive ordinances from Botswana, Indian legislation from the 1960s, and landmark rulings from Germany, were packed in huge carton boxes. To peruse the comparative constitutional law materials not available at that storage site

¹ In the European context, J. H. H. Weiler's influential article, "The Transformation of Europe," *Yale Law Journal* 100 (1991): 2403–83 is widely considered an early game changer. In the global context things are less clear, but Bruce Ackerman's "The Rise of World Constitutionalism," *Virginia Law Review* 83 (1997): 771–97, may be considered an early field definer.

required traveling to Cambridge, MA, where the law library of that other great university is located. I can recall countless train rides from New Haven to Boston and back to eagerly read court rulings from New Zealand, Israel, Hungary, or South Africa—many of which were freshly catalogued, although the decisions they contained had been made and subsequently published many months earlier. This was an intellectually gratifying labor of love, yet not the most user-friendly experience. It served as a mundane, small-scale testament to the difficulty of making comparative constitutional law an accessible and exciting endeavor for the greater majority of lawyers, judges, and scholars. Back at my New Haven “home court,” the razor-sharp, genuinely cosmopolitan, and knowledge-thirsty intellectual community was incredibly supportive. Yet even with the most generous conversation companions who were truly interested in listening to my enthusiastic accounts of what some British scholars or Canadian jurists had to say about the parts of the constitutional universe that lie beyond US territory, the conversation quickly reverted back to familiar home turf.

This intellectual pursuit has, of course, changed considerably. Over the last few decades, the world has witnessed the rapid spread of constitutionalism and judicial review. Over 150 countries and several supranational entities across the globe can boast the recent adoption of a constitution or a constitutional revision that contains a bill of justiciable rights and enshrines some form of active judicial review. 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 global transformation has brought about an ever-expanding interest among scholars, judges, practitioners, and policymakers in the constitutional law and institutions of other countries, and in the transnational migration of constitutional ideas more generally. 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 subjects in contemporary legal scholarship, and has become a cornerstone of constitutional jurisprudence and constitution-making in an increasing number of countries worldwide.²

² 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 pre-eminent scholars, see Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Hart Publishing, 2014).

Everyday indicators of this unprecedented comparative turn are many. Virtually all reputable peak 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 18th century to the present. Lively discussions about current developments in constitutional law, theory, and design feature centrally in blogs devoted exclusively to comparative constitutionalism. And the comparative revolution has certainly not been limited to the digital world: scholarly books dealing with comparative constitutional law are no longer considered a rarity; new periodicals and symposia are dedicated to the comparative study of constitutions and constitutionalism; and top-ranked law schools in the United States and elsewhere have begun to introduce their students to a distinctly more cosmopolitan and 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 others. And constitutional drafters from Latin America to the Middle East openly debate comparative constitutional experiences in making their choices about what constitutional features to adopt or to avoid. In many respects, then, these are the heydays of comparative constitutionalism.

And yet, despite this tremendous renaissance, the “comparative” aspect of the enterprise, as a method and a project, remains under-theorized and blurry. Fundamental questions concerning the very meaning and purpose of comparative constitutional inquiry, and how it is to be undertaken, remain largely outside the purview of canonical scholarship.³ 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

³ A few initial attempts to deal with these questions are: Vicki Jackson, “Methodological Challenges in Comparative Constitutional Law,” *Penn State International Law Review* 28 (2010): 319–26; Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law,” *American Journal of Comparative Law* 53 (2005): 125–55; Mark Tushnet, “The Possibilities of Comparative Constitutional Law,” *Yale Law Journal* 108 (1999): 1225–309.

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.

Since its birth, comparative constitutionalism has struggled with questions of identity. There is considerable confusion about its aims and purposes, and even about its subject—is it about constitutional systems, constitutional jurisprudence, constitutional courts, or constitutional government and politics? It also remains unclear whether comparative constitutional law is or ought to be treated as a subfield of comparative law, a subfield of constitutional law, or an altogether independent area of inquiry. Is the age-old debate in comparative law between “universalists” and “culturalists” relevant to the study of phenomena as widespread as constitutionalism and judicial review, and if so, how? Is there a conceptual affinity between comparative constitutional law and other comparative disciplines (e.g. comparative politics, comparative literature, comparative religion, comparative biochemistry and physiology; comparative psychology)? And what to make of the fact that the constitutional lawyer, the judge, the law professor, the normative legal theorist, and the social scientist all engage in comparison with different ends in mind?

Adding to the confusion is that self-professed “comparativism” sometimes amounts to little more than a passing reference to the constitution of a country other than the scholar’s own or to a small number of overanalyzed, “usual suspect” constitutional settings or court rulings. The constitutional experiences of entire regions—from the Nordic countries to sub-Saharan Africa to Central and South East Asia—remain largely uncharted terrain, understudied and generally overlooked.⁴ Selection biases abound. The result is that purportedly

⁴ For conscious attempts to expand the circle of studied cases, see, e.g., Albert Chen, ed., *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014); Rosalind Dixon and Tom Ginsburg, eds., *Comparative Constitutional Law in Asia* (Edward Elgar, 2014); Roberto Gargarella, *Latin American Constitutionalism* (Oxford University Press, 2013); “Perspectives on African Constitutionalism,” *International Journal of Constitutional Law* 11 (2013): 382–446; Ran Hirschl, “The Nordic Counter-Narrative: Democracy, Human Development and Judicial Review,” *International Journal of Constitutional Law* 9 (2011): 449–69; Jiunn-rong Yeh and Wen-Chen Chang, “The Emergence of East Asian Constitutionalism: Features in Comparison,” *American Journal of Comparative Law* 59 (2011): 805–39; Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, 2010); and “Symposium: The Changing Landscape of Asian Constitutionalism,” *International Journal of Constitutional Law* 8 (2010): 766–976.

universal insights are 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, and explanatory accounts are often conflated, and epistemological views and methodological practices vary considerably. Some leading works in the field continue to lag behind in their ability to engage in controlled comparison or trace 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 forms of nomothetic, ideally transportable knowledge is thus hindered. Meanwhile, comparative constitutional scholarship that favors contextual, 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. Given the prevalence of "armchair" constitutional research carried out with little or no fieldwork or systematic data collection, and the absence of an established tradition of rigorous and anonymous peer review in many leading law reviews, it is no surprise that the outcome is a loose and under-defined epistemic and methodological framework that seems to be held together by a rather thin intellectual thread: interest of some sort or another in the constitutional law of polity or politics other than the observer's own.

This book, then, takes as its premise a simple fact: the unprecedented revival of comparative constitutional studies rides on a fuzzy and rather incoherent epistemological and methodological matrix. In fact, comparative constitutional studies lack a core work that clarifies the essence of the term "comparative" as a project and a method. My hope—from the outset, an ambitious one—is that this book will help to fill that gap. In what follows, I chart the intellectual history and analytical underpinnings of comparative constitutional inquiry, probe the various types, aims, and methodologies of engagement with the constitutive laws of others through the ages, and explore how and why comparative constitutional inquiry has been, and perhaps ought to be more extensively, pursued by academics and jurists worldwide.

Structure of the book: what drives comparative constitutional inquiry and how are we to study it?

The book is divided into two main parts, each comprising three chapters. In the first part (Chapters 1 to 3) I explore what may be learned by looking into the rich history of engagement with the constitutive laws of others. What has driven comparative constitutional journeys through the ages? And why, at given times and places, have certain communities, thinkers, or courts embarked on them, while others have rejected them? Convergence, resistance, and selective engagement (to paraphrase Vicki Jackson's terminology) with the constitutive laws of others, past and present, reflect broader tensions between particularism and universalism, and mirror struggles over competing visions of who "we" are, and who we wish to be as a political community. Comparative constitutional encounters are thus at least as much a humanist and sociopolitical phenomenon as they are a juridical one. Specifically, I identify the interplay between the core factors of *necessity*, *inquisitiveness*, and *politics* in advancing comparative engagement with the constitutive laws of others through the ages. The second part (Chapters 4 to 6) revisits the disciplinary boundaries between comparative constitutional law and the social sciences. Drawing on insights from social theory, religion, political science, and public law, I argue for an interdisciplinary study of comparative constitutionalism, an approach that would be both richer and more fitting for understanding the studied phenomenon than accounts of "comparative constitutional law" and "comparative politics" as two separate entities. The future of comparative constitutional inquiry as a field of study, I argue, lies in relaxing the sharp divide between constitutional law and the social sciences, in order to enrich both.

The first main focus of this book is to highlight the interplay between necessity, inquisitiveness, and politics that surrounds the formal constitutional sphere in advancing comparative engagement with the constitutive laws of others through the ages. Constitutional journeys are driven by the same rationales as other types of journey. Hunter-gatherers are constantly on the go in search of food, water, and shelter. Their forays are driven by necessity. Likewise, few would sneak through the Mexico-US border or gamble their lives on the rough Australian seas without being driven by economic or physical survival instincts or, more generally, by a quest for better life

opportunities. What seems to be common to Copernicus' study of the skies, Charles Darwin's journey to the Galápagos Islands, and Thor Heyerdahl's voyage across the Pacific Ocean onboard his self-built raft (*Kon-Tiki*), are driven largely by sheer intellectual curiosity and scientific inquisitiveness. The space race of the 1960s and 1970s involved a series of risky voyages driven by a thirst for new knowledge alongside easily identifiable political interests and a quest for domination.

Similar rationales seem to have driven constitutional voyages. Survival instincts may push minority communities to develop a matrix for selective engagement with the laws of others in order to maintain their identity in the face of powerful convergence pressures. Intellectual curiosity may drive scholars to investigate new constitutional settings and develop novel concepts, arguments, and ideas with respect to the constitutional universe. Comparative engagement may also be—indeed, often is—driven by a desire to advance a concrete political agenda or an ideological outlook.

Of these three rationales for comparative constitutional engagement, politics is a crucial and yet infrequently acknowledged feature, a background setting that may seem to be invisible unless it is brought to the fore. From Jean Bodin's quest to transform the political and legal landscape of 16th-century France via comparative public law inquiry to Simón Bolívar's love-hate relations with French and American constitutional ideals, and to the Israeli Supreme Court's attempt to define the country's collective identity by making voluntary reference to foreign precedents, comparative constitutional inquiries are as much a political enterprise as they are a scholarly or a jurisprudential one. More broadly, I argue that the specific scope and nature of engagement with the constitutive laws of others in a given polity at a given time cannot be meaningfully understood independent of the concrete sociopolitical struggles, ideological agendas, and "culture wars" shaping that polity at that time.

This argument is pursued in three steps: (i) an exploration of how constitutional courts and judges conceive of the discipline of comparative constitutional law, what weight they accord to it, and how, why, and when they use it; (ii) a sketch of doctrinal innovation and adaptation in the pre- and early-modern, predominantly religious world as a response to encounters with the constitutive laws of others; and (iii) a thumbnail history of constitutional comparisons from the birth of the systematic study of constitutions across polities in the mid-16th century

to contemporary debates about the legitimacy and usefulness of comparative constitutional law.

Chapter 1, “The View from the Bench: Where the Comparative Judicial Imagination Travels,” explores how constitutional courts and judges—the key purveyors and consumers of comparative constitutional jurisprudence—conceive of the discipline of comparative constitutional law, what methods they use to engage with it, and how and why they vary in their approach to it. I begin by outlining the key empirical findings on *voluntary* foreign citations and examine what these findings may tell us about how and why constitutional courts engage with comparative constitutional law. The evidence with respect to foreign citation patterns is surprisingly scarce, and draws on the experience of only a handful of peak courts. However, the evidence does suggest that certain courts refer to foreign jurisprudence more frequently than others. It shows that there are areas of constitutional jurisprudence that are more informed by national idiosyncrasies and contingencies than others. In the area of rights, it would appear, cross-jurisdictional reference is more likely to occur than it is in areas such as aspirational or organic features of the constitution. The evidence also points to a decline in the status of British and American constitutional cases as common points of reference for constitutional courts worldwide, and perhaps to a corresponding rise in the international stature of other peak courts—most notably the Supreme Court of Canada, the German Federal Constitutional Court, and the European Court of Human Rights.

What explains the judicial thinking behind the selection of a reference to a given foreign court? The general literature on the subject stresses the importance of factors that include the following: global convergence and the inevitability of engagement with foreign jurisprudence; judicial prestige- or legitimacy-enhancing factors; and structural features (e.g. constitutional provisions that call for foreign citations, linguistic permeability, a legal tradition or trajectory of legal education that affects a given apex court’s ability and willingness to cite foreign jurisprudence). Whereas these accounts provide illuminating explanations for the rise and variance in the practice of global judicial dialogue, they leave out a crucial factor: the sociopolitical context within which constitutional courts and judges operate, and how this affects whether and where the judicial mind travels in its search for pertinent foreign sources to reference.

Instances of strategic, ad hoc judicial recourse to foreign law are obviously inseparable from the concrete political settings within which they take place. In post-authoritarian or newly created constitutional settings, such choices can signal a judicial commitment to breaking with a nation's less-than-dazzling past or to belong to a certain group of politics. Such choices may likewise help courts and their backers to advance certain worldviews and policy preferences that may be otherwise contested in majoritarian decision-making arenas. Alongside more traditional factors, the foreign references that peak courts in discordant constitutional settings select, reject, or ignore reflect the judicial position vis-à-vis the nation's contested collective identity quandaries.

The Supreme Court of Israel, to pick one court that I investigate in detail in Chapter 1, regularly refers to case law and scholarly commentary from the United States, Canada, Germany, and the United Kingdom, as well as to various European and international sources of law. However, rarely if ever does it refer to the law of countries such as India that share a similar experience of deep identity and ethnic-religious rifts. Likewise, it never cites rulings by the national high courts of Pakistan, Turkey, or Malaysia, even though the tensions between secularism and religiosity informing these countries' constitutional landscapes resemble tensions embedded in Israel's self-definition as a "Jewish and democratic" state. It is equally telling that Israeli secular judges (who make up the vast majority of those appointed to the bench) hardly ever treat Jewish law as a relevant source of comparative insight, despite the fact that it is actually the sole source to which the law refers judges when they encounter a lacuna. Instead, the Israeli judge prefers to look to "the West," and so to affirm the state's desire to be included in the liberal-democratic club of nations. Similar patterns of selective reference are evident in other discordant constitutional settings, from 19th-century Argentina to present-day India. These choices reflect considerable case selection biases ("cherry-picking") and other methodological difficulties. They also raise questions concerning how "comparative" a practice really is that draws on the constitutional experience of a small group of mostly liberal-democratic countries but seldom refers to constitutional experience, law, and institutions elsewhere. As I show, the "identity" dimension—the attempt to define who "we" are as a political community, and to articulate in a public way what "our image" or "our place" in the world is or should be—inevitably influences comparative jurisprudence and acts as a key factor explaining judicial choices of reference

sources. Voluntary reference to foreign precedents is at least as much a political phenomenon as it is a juridical one.

Chapter 2, "Early Engagements with the Constitutive Laws of Others: Lessons from Pre-Modern Religion Law," explores the birth of two core concepts that are cardinal for understanding the philosophy of comparative constitutional studies today: (i) acknowledgment of the legitimacy and integrity of the constitutive laws of others; and (ii) doctrinal innovation in response to a necessity-based or ideologically driven impulse to respond to or incorporate such laws. Contemporary discussions in comparative constitutional law often proceed as if there is no past, only a present and a future. However, many of the purportedly new debates in comparative constitutional law (e.g. the debates over the migration of constitutional ideas, judicial recourse to foreign law, and the emergence of a multiplicity of legal orders alongside powerful transnational convergence vectors) have early equivalents, some of which date back over two millennia. And many of these equivalents are found in religion law—Jewish law, to pick one example, provides an ideal context for studying the tension between two opposing tendencies. There may be an objection on principle to the recognition of another system's legitimacy; however, this objection may come into conflict with a pragmatist acknowledgment of the inevitability of dealing with extra-communal law. For thousands of years Jewish law has evolved as an autonomous legal tradition without political sovereignty. Because of its near-permanent "diasporic" state, Jewish law has developed a complex relationship with its legal surroundings, oscillating between principled estrangement and pragmatic engagement. Pre-modern canon and Shari'a law also grappled with aspects of engagement with the outer legal universe, leading to rifts between inward-looking, "originalist," "textualist," or otherwise strict interpretive approaches on the one hand, and more cosmopolitan or adaptive interpretive schools on the other. The wealth of knowledge and degree of theoretical sophistication found in this body of pre-modern opinions, essentially a *terra incognita* for today's scholars of comparative constitutionalism, allow us to consider contemporary debates about engagement with the constitutive laws of others from a new angle.

The chapter outlines some specific doctrinal innovations in respect of engagement with the foreign laws that emerged in the ancient and pre-modern world. Examples include the official policy of legal diversity introduced in Ptolemaic (Hellenic) Egypt; the Roman Republic's *praetor peregrinus*, a municipal officer who engaged in legal comparisons

to settle disputes to which non-citizens were party; and novel approaches in medieval Jewish law to governing encounters with the often hostile “outer” world. These diverse examples are not meant to provide an exhaustive or even near-exhaustive survey of areas where pre-modern, religion-infused law may enrich or shed new light on discourses on contemporary comparative constitutional studies. Taken as a whole, however, these examples suggest that the history of engagement with the constitutive laws of others is much longer and thicker than that of the current trend of constitutional convergence. Moreover, these examples illustrate that alongside inquisitiveness *per se*, instrumentalist factors—from community survival to political economy—matter a great deal in explaining purportedly principled, doctrinal debates over openness toward, or rejection of, the constitutive laws of others, past and present.

Chapter 3, “Engaging the Constitutive Laws of Others: Necessities, Ideas, Interests,” explores a few key junctures in the intellectual history of comparative public law in the early-modern and modern eras. I highlight how the interplay between intellectual inquisitiveness and instrumentalism has influenced many of the field’s epistemological leaps, from the first attempts to delineate a universal public law and to study comparative government in a methodical fashion, to the current renaissance of comparative constitutional inquiry. Many political and legal thinkers have contributed to the birth of what is now termed comparative public law. A detailed intellectual history of this field would occupy several volumes and many hundreds of pages, so the analysis here is intentionally stylized and bounded in scope. To that end, I focus on several pre-eminent figures and substantive transformations, each of which exemplifies the main intellectual and political challenges of its time.

Following the early engagements of religious legal systems with comparative challenges, our intellectual journey fast-tracks to early modern Europe. Here the changing political and intellectual landscape led thinkers such as Jean Bodin, Francis Bacon, Hugo Grotius, Samuel von Pufendorf, John Selden, Gottfried Wilhelm Leibniz, Gottfried Achenwall, and notably Montesquieu to take an interest in comparing the laws of nations in a systematic way. I start by examining the epistemological and methodological innovation in the early-modern public law comparisons of Jean Bodin (16th century), John Selden (17th century), and Montesquieu (18th century), all of whom emerged in and responded to a monarchical setting troubled by political

instability and religious transformation. Bodin's *Six livres de la république* (*Six Books of the Commonwealth*, 1576), Selden's *De Iure Naturali et Gentium Juxta Disciplinam Ebraeorum* (*On Natural Law and Nations, according to the Teaching of the Jews*, 1640), and Montesquieu's *Lettres persanes* (*Persian Letters*, 1721) and *De l'esprit des lois* (*The Spirit of the Laws*, 1748) are all masterpieces (some acknowledged more than others) of early comparative public law scholarship. I then move on to the early 19th century, an age of nationalism and modern state formation. There emerged at this time much interest in constitutions as effective means of social and political design. Perhaps no one represents this era of constitutional thought better than Simón Bolívar, the great liberator of Spanish South America, an influential figure in the framing of a host of independence constitutions in Latin America, and one of the first political leaders of the new era to devote considerable thought to the reconciliation of local traditions with foreign constitutional models.

The chapter continues its intellectual journey into the 20th century—an era dominated by the global spread of constitutional courts, judicial review, and bills of rights as the centerpieces of the comparative constitutional universe. The voluminous scholarship on these matters is written predominantly from an American or European standpoint. However, it is the less-often studied Canadian constitutional landscape that provides a paradigmatic illustration of all the embodiments and preoccupations of comparative constitutionalism in the past century. Canada entered the 20th century as a living exemplar of deferential, British-style constitutional tradition; it emerged out of that century with a very different constitutional culture, featuring active judicial review, an acclaimed constitutional bill of rights (the Charter of Rights and Freedoms), a pervasive rights discourse, and one of the most frequently cited peak courts in the world. What is more, as part of its 1982 constitutional revolution, constitutional innovations such as a commitment to bilingualism, multiculturalism, indigenous peoples' rights, proportionality (via the Charter's section 1, the "limitation clause"), and majority rule (via section 33, the "override clause") were introduced, and later analyzed and emulated abroad. Canada's transformed constitutional terrain, and its reflection of changing Canadian politics and society, thus serves as the fifth focal point of my thumbnail history of modern constitutional comparisons. (The reader may think of this choice as akin to the award of the Nobel Peace Prize to an institution or organization—say *Médecins Sans Frontières*—rather

than to an individual). I close the chapter with an account of the current controversy in the United States concerning reference to constitutional jurisprudence of other countries. Three forces become significant here: the inevitability of encounters with foreign legal materials in an age of globalization; the tremendous brainpower of the American legal academia; and, above all, the deep political divide in contemporary United States. These three forces, I argue, have converged to generate a vehement debate about the status of comparative constitutional law in a polity that sees its own constitution as one of its most revered markers of collective identity. The contrast between the Canadian openness toward comparative constitutional endeavors and the contentious American approach to that same enterprise serves to illustrate that ultimately attitudes toward the “laws of others” reflect social processes, political ideologies, and national meta-narratives that are broader than the constitutional sphere itself.

These examples all illustrate that comparative constitutional inquiry is best understood as being driven by a combination of intellectual innovation and a compatible political agenda or ideological outlook—what I have earlier termed the trio of necessity, inquisitiveness, and politics. In some instances, intellectual pursuit led the way with an instrumentalist goal or ideological agenda providing added impetus. In other instances, comparative constitutional inquiry was more directly driven by political interests, ambitions, and aspirations, writ small or large.

The journey continues in Chapter 4, “From Comparative Constitutional Law to Comparative Constitutional Studies.” Here I argue for an interdisciplinary approach to comparative constitutional inquiry that is methodologically and substantively preferable to mere doctrinal accounts. In a nutshell, I suggest that for historical, analytical, and methodological reasons, maintaining the disciplinary divide between comparative constitutional law and other closely related disciplines that study various aspects of the same constitutional phenomena artificially and unnecessarily limits our horizons. It also restricts the kind of questions we ask as well as the range of answers we are able to provide. The traditional disciplinary boundaries, both substantive and methodological, between comparative (public) law and the social sciences continue to impede the development of comparative constitutional studies as an ambitious, coherent, and theoretically robust area of inquiry. To establish a stable, thriving research tradition in an interdisciplinary endeavor, we should strive to construct “shared, enduring,

foundational commitments to a set of beliefs about what sorts of entities and processes make up the domain of inquiry; and to a set of epistemic and methodological norms about how the domain is to be investigated, how theories are to be tested, how data are to be collected, and the like.”⁵

Heart health has more to it than mere anatomy, consisting as it does of far more than its sum of arteries, valves, and atriums. It involves interconnected physiological systems and complex biochemistry, genetics, preventive medicine, and healthy lifestyle. Car production is not merely assembling a collection of gears, engines, and chassis. It is also a matter of design and style, energy consumption, comfort, pricing, and marketing. Comparative constitutional law professors, to follow the metaphor, will continue to hold a 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. No one is better positioned than they are to trace the relationship between patterns of convergence and the persisting divergence in constitutional jurisprudence across polities, or to advance the research on how constitutional courts interact with the broader, transnational legal environment within which an increasing number of them operate. But theorizing about the constitutional domain as part of the outer world requires more than this. It requires the study of judicial behaviour (an overwhelming body of evidence suggests that extrajudicial factors play a key role in constitutional court decision-making); an understanding of the origins of constitutional change and stalemate (a variety of theories point to the significant role of ideational and strategic factors in both); the promises and pitfalls of various constitutional designs (the relevance of the social, political, and cultural context in settings where such designs are deployed is obvious); and the study of the actual capacity of constitutional jurisprudence to induce real, on-the-ground change, independently or in association with other factors (the social sciences are essential for studying the actual effects of constitutions beyond the courtroom). Above all, the field’s potential to produce generalizable conclusions, or other forms of nomothetic, presumably transportable

⁵ Larry Laudan, *Beyond Positivism and Relativism: Theory, Method, and Evidence* (Westview, 1996), 83; cited in Rudra Sil and Peter J. Katzenstein, “Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions,” *Perspectives on Politics* 8 (2010): 411–31, 413.

knowledge requires familiarity with basic concepts of social science research design and case-selection principles.

Many of the tools needed to engage in the systematic study of constitutionalism across polities can be found in the social sciences. Despite (or perhaps because of) bitter debates about approaches and methods, the social sciences have developed a rich and sophisticated framework for guiding serious comparative work. A close look at the philosophical foundations of comparative social research and the gamut of pertinent social science methods and approaches could suggest a toolkit of methodological considerations essential to comparative constitutional inquiry. It would effectively support a spectrum of comparative constitutional studies, qualitative and quantitative, inference-oriented or hermeneutic.

In fact, I would argue that for both analytical and methodological reasons there cannot be a coherent positivist (as in “is,” not “ought”) study of comparative constitutional law without the social sciences in general, and political science in particular. I suggest that the time has come to go beyond analyses of court rulings (or comparative constitutional *law*) toward a more holistic approach to the study of constitutions across polities (comparative constitutional *studies*). The intellectual foundations of such an approach are already in place; indeed, a close look at the “cosmology” of comparative constitutional studies as reflected in the seminal works of many of its grandmasters indicates that comparative constitutionalism as an area of inquiry is at its best when it crosses disciplinary boundaries in both substance and method.

Chapter 5, “How Universal is Comparative Constitutional Law?” addresses two issues at the heart of comparative constitutional law’s epistemological and methodological domain. First, I consider the very possibility of transhistorical and transgeographical comparisons of constitutional law and institutions. In particular, I am thinking here of the debate between “universalists,” who emphasize the common elements of legal (and constitutional) systems across time and place, and “particularists” who emphasize the unique and idiosyncratic nature of any given legal (and constitutional) system. Second, I consider the “global south” critique in comparative constitutional law. Or, put differently, how truly “comparative,” universal, or generalizable are the lessons of a body of knowledge that draws almost exclusively on a small—and not necessarily representative—set of frequently studied jurisdictions and court rulings to advance what is portrayed as general knowledge.

The debate between “universalists” (who emphasize the common and the similar among legal systems) and “particularists” (who pay heed to the unique and different in each system) has long plagued the field of comparative law; it has been debated using hyperbolic terms, often ad nauseam, and at times at the expense of generating actual comparative law scholarship *per se*. In comparative constitutional law, things have developed in a more productive direction. From the cultural defense in criminal law to dilemmas of religious accommodation, tensions between general norms and local traditions have been centrally featured in jurisprudence, constitutional or otherwise. Supranational tribunals and quasi-constitutional entities such as the European Court of Human Rights and the Court of Justice of the European Union make a living out of adjudicating particularism-versus-universalism conundrums. Meanwhile, within the world of new constitutionalism, we see a substantial convergence and consequent increase in similarity of constitutional ideas, structures, and practices; at the same time we observe patterns of persisting divergence among constitutional systems. This has created ideal, living laboratory-like conditions for comparative constitutional scholarship. There is now sufficient unity within the constitutional universe to allow for credible comparisons, combined with a healthy measure of plurality that makes comparisons meaningful and worthwhile.

As any North American sports fan knows, the finals of Major League Baseball is called rather boldly “The World Series.” In the second part of this chapter, I address what may be termed the “World Series” syndrome in comparative constitutional law: the presumption that insights based on the constitutional experience of a small set of “usual suspect” settings—all prosperous, stable constitutional democracies of the “global north”—are truly representative of the wide variety of constitutional experiences worldwide, and constitute a “gold standard” for its understanding and assessment. In this section, I unpack and evaluate the various claims raised by proponents of such a “global south” critique of comparative constitutional law, and assess the relevance of each of these claims to the epistemological and methodological challenges of comparative constitutional inquiry.

From this, other questions follow. Might it be that the focus on the constitutional “north” betrays not only certain epistemological and methodological choices but also a normative preference for some concrete set of values the northern setting is perceived to uphold? I suggest that it does, absolutely. The near-exclusive focus on a

dozen liberal democracies in comparative constitutional law reflects the field's deep 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. Does the selective "northern" (or "western") emphasis in comparative constitutional law limit the applicability or value of canonical scholarship in the field? I argue that the answer hinges on the specific question that is being posed. A given constitutional setting may belong to the "global south" in one context or comparative dimension, but not in another.

Chapter 6, "Case Selection and Research Design in Comparative Constitutional Studies," continues the critical examination of the field's epistemology and methodologies by addressing three additional aspects. I identify the various meanings, purposes, and modes of comparative inquiry in contemporary comparative constitutional studies. Importantly, I argue that while each of the purposes and modes of this inquiry is useful and advances knowledge in an important way, shifting from engagement with a given purpose of comparative work to engaging with another requires thoughtful adjustment of case-selection principles. I go on to suggest that while the study of comparative constitutional law has generated sophisticated taxonomies, concept formations that lead to theory building, and valuable normative accounts of comparative constitutionalism, it has for the most part fallen short of advancing knowledge through inference-oriented, controlled comparison that permits both in-depth understanding of the studied phenomena and the development of general explanatory principles.

I further discuss a few basic principles of case selection that may be employed in inference-oriented small-N studies in the field of comparative constitutional studies: (i) the "most similar cases" principle; (ii) the "most different cases" principle; (iii) the "prototypical cases" principle; (iv) the "most difficult case" principle; and (v) the "outlier cases" principle. While commonly deployed in comparative politics, these case-selection principles are often overlooked in comparative studies of constitutional law. I subsequently illustrate the successful application of these principles by examining a few recently published and genuinely comparative works dealing with the foundations, practice, and consequences of constitutionalization worldwide. Comparative constitutional scholarship that strives to advance causal arguments, I argue, should look more like these works.

Finally, I explore the emerging world of multivariate, large-N studies of comparative constitutionalism. The trend of works that attempt to capture the commonalities of the constitutional universe by drawing on statistical analyses of large data sets, Bayesian probability, and correlation is still in its early days. It may be argued that these studies suffer from most of the shortcomings of a-contextual social science, and may be seen by those who favor historical or cultural explanations as being overly shallow. But for the intellectually curious observer, large-N studies appear to introduce a novel, refreshing dimension to comparative constitutional studies. One reason for this is that these studies often make a conscious effort to avoid conflating positive (“factual”) and normative claims. They also pay close attention to research design, formulation of hypotheses, and data analysis. Perhaps most importantly, by treating constitutional law as a universal phenomenon with multiple manifestations worldwide, these studies signal a departure from the field’s traditional overreliance on a handful of frequently discussed examples. The result is that this mode of comparative constitutional inquiry empirically tests some of the core insights of post-WWII constitutional theory.

No research method enjoys an *a priori* advantage over any other without taking into account the scope and nature of the studied phenomenon or the question the research purports to address. For this reason, I argue that attempts to outline an “official” comparative method, or calls for the adoption of a stringent, “correct” approach to research methods, are not only unrealistic but also unwise. I argue that, by way of an alternative, comparative constitutionalists should settle on a set of four more sensible guiding principles: scholars should: (i) define clearly the study’s aim—descriptive, taxonomical, explanatory, and/or normative; (ii) articulate clearly the study’s intended level of generalization and applicability, which may range from the most context-specific to the most universal and abstract; (iii) encourage methodological pluralism and analytical eclecticism when appropriate; and (iv) ensure that the research design and methods of comparison reflect the analytical aims or intellectual goals of specific studies, so that a rational, analytically adaptive connection exists between the research questions and the comparative methods used. The Epilogue, “Comparative Constitutional Studies: Quo Vadis?,” brings together the main elements of the book—past and present, near and far—in order to assess the challenges that must be overcome for the 21st century to live up to its billing as the “era of comparative law,” and in particular as the era of comparative public law.

These are far from purely academic matters. Today, comparative study has emerged as the new frontier of constitutional law scholarship as well as being an important aspect of constitutional adjudication. Increasingly, jurists, scholars, legislators, and constitution drafters worldwide are accepting that “we are all comparativists now.” Precisely because the concern with the a-systematic “cherry-picking” of “friendly” examples (often raised by opponents of comparative inquiry) may not be easily dismissed, those who wish to engage in valuable comparative work ought to pay closer attention to research methods, and the philosophy of comparative inquiry more broadly. The response to the “cherry-picking” concern is not to abandon comparative work; rather, it is to engage in comparative work while being mindful of key historical foundations, epistemological directions, and methodological considerations.

This book, then, aims to fill a critical gap by charting the intellectual history and philosophical underpinnings of comparative constitutional inquiry, and by probing the different types, purposes, meanings, and methodologies of engagement with the constitutive laws of others through the ages. It explores how and why comparative constitutional inquiry has been, and ought to be, pursued by academics and jurists worldwide. I then consider a few key junctures in the intellectual history of comparative public law in the early-modern and modern eras, highlighting how the interplay between intellectual inquisitiveness and instrumentalism has influenced many of the field’s epistemological leaps, from its early attempts to delineate a universal public law and study comparative government in a methodical fashion to the current renaissance of comparative constitutional inquiry. It is my keen hope that what follows will make a contribution to the comparative study of constitutional law and courts, as well as to our understanding of the historical development and political parameters of one of the most intellectually vibrant subjects in contemporary public law.

'A book of dazzling scope and depth. At once a methodological manifesto and a sweeping intellectual history, Hirschl reminds us that our contemporary debates about universality and particularity in law are simply new variations on a very old theme. This is an instant classic, from which no one will fail to learn something new.'

Tom Ginsburg, Leo Spitz Professor of International Law, University of Chicago Law School

'*Comparative Matters* is a sharp reminder that law is too important a matter to leave in the hands and minds of lawyers. It is also a sharp reminder that comparative law, properly understood, is, can be and should be more than, yes, comparative law. It is a window to, and a tool for, an understanding of the political, the social, indeed, the human condition itself. Finally it is a gentle reminder that comparative "law" would be a very different field absent the voice of Ran Hirschl.'

J.H.H. Weiler, President of the European University Institute

'Ran Hirschl solidifies his position at the apex of students of comparative constitutional law. Both his range and depth of interests are remarkable. Every page has insights; it would be a pleasure to assign in courses and seminars, not only for the discussions it will surely provoke, but also for the plethora of papers, dissertations, and books it will surely inspire.'

Sanford Levinson, author of *Framed: America's 51 Constitutions and the Crisis of Governance*

'*Comparative Matters* truly matters, for if indeed we are now entering the "era of comparative law," we will need instruction and guidance in both the sources for, and possible futures of, this exciting renewal of intellectual exploration. In this wonderful book Ran Hirschl demonstrates that he is uniquely qualified to fill this role. By tracing contemporary debates and challenges in comparative constitutionalism to classical antecedents, he clears the path for a "renaissance" of methodologically and analytically diverse scholarly inquiry into the multifarious ways in which societies might choose to organize themselves constitutionally. In so doing he exemplifies the very transcendence towards which the book is devoted; thus the reach of his learning and the catholicity of his inter-disciplinary applications are precisely what are required for the successful evolution from comparative constitutional law to comparative constitutional studies.'

Gary J. Jacobsohn, H. Malcolm Macdonald Professor of Constitutional and Comparative Law, Department of Government, University of Texas at Austin

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