**THE QUESTION OF CASE SELECTION IN
COMPARATIVE CONSTITUTIONAL LAW**

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“To understand is to know what cause provokes what effect, by what means, and at what rate.”¹

Although intellectual interest in the international migration of constitutional ideas has been growing steadily over the last decade, the field of comparative constitutional law remains under-theorized and lacks a coherent methodology. In fact, fundamental questions concerning the very purpose and rationale of comparative inquiry and how that enterprise is to be undertaken remain largely outside the purview of canonical constitutional law scholarship.² Genuinely comparative, problem driven, and *inference oriented* scholarship is still difficult to come by. Most leading works in the field continue to lag behind the social sciences in their ability to trace causal links among pertinent variables, let alone to substantiate or refute testable hypotheses. More specifically, comparative constitutional law scholarship produced by legal academics often overlooks (or is unaware of) basic methodological principles of controlled comparison, research design, and case selection. The paper addresses this lacuna by contrasting the approaches of legal academics and political scientists to the same sets of comparative constitutional phenomena.

The paper is divided into three main sections. I begin by identifying four main types of scholarship labeled as comparative in the field

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1. EDWARD TUFTE, *VISUAL EXPLANATIONS: IMAGES AND QUANTITIES, EVIDENCE AND NARRATIVE* 9 (1997).

2. *See, e.g.*, *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (Vicki Jackson & Mark Tushnet eds., 2002). While illuminating in many respects, none of the essays in this collection, its bold title notwithstanding, address the issue of methodology in the study of comparative constitutional law.

of constitutional law and politics: (1) freestanding, single-country studies mistakenly characterized as comparative only by virtue of dealing with any country other than the author's own; (2) comparative reference aimed at self-reflection through analogy, distinction, and contrast; (3) comparative research aimed at generating "thick" concepts and thinking tools through multi-faceted descriptions; and (4) studies that draw upon controlled comparison and inference-oriented case selection principles in order to assess change, explain dynamics, and make inferences about cause and effect through systematic case selection and analysis of data. While the study of comparative constitutional law by legal academics has contributed significantly to concept formation and the accumulation of knowledge drawing upon the former three categories of comparative analysis, it has, for the most part, fallen short of advancing knowledge through inference-oriented, controlled comparison.

In the second part of the paper, I discuss a few basic principles of case selection employed by inference-oriented studies in the field of comparative constitutional law and politics: (A) the "most similar cases" logic; (B) the "most different cases" logic; (C) the "prototypical cases" principle; (D) the "most difficult cases" principle; and (E) the "outlier cases" principle. 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. Problem driven and inference-oriented comparative public law scholarship, I argue, should look more like these works.

I conclude by suggesting that while there are many valuable approaches and methods to study comparative public law, the aspiration to make valid causal claims based on comparative research warrants adherence to inference-oriented principles of research design and case selection. Attention to, and reliance on, such inference-oriented principles of case selection may help scholars studying the migration of constitutional ideas to make valuable causal claims as to why, when, and how such migration is likely to occur. It would also allow the field as a whole to move beyond the multiple-description method commonly deployed in comparative legal analyses toward the next level of comparative inquiry: causal inference through controlled comparison.

I. FOUR TYPES OF COMPARATIVE INQUIRY

In the field of comparative constitutional law, the term "comparative" is often used indiscriminately to describe what, in fact, are four different types of scholarship. The first and most basic of these four types is freestanding single country studies that are mistakenly characterized as comparative mainly because they concern a country

other than the author's own. Still common in doctrinal comparative law circles, this genre of scholarship often takes the form of interesting yet quite idiosyncratic aspects of constitutional law such as freedom of religion in Guatemala, the right to die in Bulgaria, or standing rights in Kazakhstan, with little or no reference to comparable constitutional practices in other countries. In its more taxonomical guise, this thread of scholarship assesses the genealogy of a given country's constitutional system, and its compatibility with somewhat anachronistic classifications of "legal traditions," "family trees for legal systems," and the like.³ Basic methodological considerations pertaining to case selection are often overlooked; the sole justification for most of these single country studies is more often than not the author's acquaintance with the constitutional system about which he or she is writing. A few of these studies have an eye to existing case studies that others have already researched. Others provide thorough, encyclopedic-like knowledge of certain aspects of constitutional law in the examined polity.⁴ At its best, this type of scholarship serves as a reliable reference for students of constitutional law in given polities. It may also contribute to the mapping and taxonomy of the still under-charted terrain of constitutional law worldwide.

A second, and increasingly fashionable enterprise within the field of comparative constitutional law, is geared toward self-reflection or betterment through analogy, distinction, and contrast. This type of comparative reference is often derivative of jurists' near permanent quest for what they deem the *right* or *just* solution for a given constitutional challenge their polity has been struggling with. It echoes, in some cases more than in others, comparative law's traditional quest for finding "the best" or most suitable rule across cultures.⁵ The underlying assumption here is that whereas most relatively open, rule-of-law polities face essentially the same set of constitutional challenges, they may adopt quite different means or approaches for dealing with these challenges. By referring to constitutional jurisprudence and practices of other presumably similarly situated polities, we might be able to gain better understanding of our own set of constitutional values and structures and enrich, and ultimately advance, a more cosmopolitan or universalist view of our constitutional discourse. At a more concrete level, constitutional practice in a given

3. The "legal families" approach serves as the organizing principle of most leading textbooks in comparative law. See, e.g., KONRAD ZWIEGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (3rd ed. 1998). For further discussion see, e.g., Esin Örüçü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, in EPIS-TEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW (Mark Van Hoecke ed., 2004).

4. See, e.g., DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1997); LASZLO SOLYOM & GEORG BRUNNER, CONSTITUTIONAL COURT IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT (2000).

5. For a recent illustration of this way of thinking about comparative law see, e.g. BERNHARD GROSSFELD, CORE QUESTIONS OF COMPARATIVE LAW (2004).

polity might be improved by emulating pertinent constitutional mechanisms developed elsewhere.⁶ Likewise, comparative constitutional law has been offered as a guide to constructing new constitutional provisions and institutions, primarily in the context of "constitutional engineering" in the post-authoritarian world or in ethnically-divided polities.⁷

In practice, this type of comparative work usually takes the form of reference by judges and legal academics to constitutional jurisprudence or practices of other countries. More often than not, these studies refer to established constitutional democracies such as the United States, Germany, Canada, etc. Within legal academia, this type of comparative reference often takes the form of critical commentaries on contentious supreme court rulings, drawing upon, *inter alia*, the alternative dealing of apex courts of other jurisdictions with roughly equivalent problems. However, the most obvious manifestation of the comparative reference genre is what scholars have identified as the ever-accelerating trend towards inter-court borrowing and the establishment of a globalized judicial discourse.⁸ Constitutional courts worldwide increasingly rely on comparative constitutional jurisprudence to frame and articulate their own position on a given constitutional question. This phenomenon is particularly evident with respect to constitutional rights jurisprudence. In its first landmark rights decision (*Makwanyane* 1995 – determining the unconstitutionality of the death penalty), the South African Constitutional Court examined in detail landmark rulings from Botswana, Canada, the European Court of Human Rights, Germany, Hong Kong, Hungary, India, Jamaica, Tanzania, the United Nations Committee on Human Rights, the United States (as a negative example), and Zimbabwe. As Sujit Choudhry noted, "constitution interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication."⁹

While increasingly fashionable and certainly more "comparative" than freestanding, single-country studies, the comparative reference approach is still lacking in methodological coherence. All too often, it is pursued (primarily by judges, I should note) through an eclectic, at times even scant and superficial, reference to foreign constitutional jurisprudence – typically rights jurisprudence. Case selection is sel-

6. See, e.g., Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

7. The literature here is too vast to cite. A representative work of this genre is THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY (Andrew Reynolds ed., 2002).

8. See Anne-Marie Slaughter, *A Typology of Transjudicial Communities*, 29 U. RICH. L. REV. 99 (1994); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

9. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. REV. 820, 820 (1999).

dom systematic, and it rarely pays due attention to the context and nuances that have given rise to similar or alternative interpretation or practice of constitutional norms. In short, from a methodological standpoint, we have yet to encounter a coherent theory of inter-court constitutional borrowing.

Comparative scholarship has more to offer than self-reflection or normatively driven advancement of cosmopolitan values through comparative reference. Comparison is a fundamental tool of scholarly analysis. It sharpens our power of description and plays a central role in concept formation by bringing into focus potential similarities and differences among cases.¹⁰ This end is precisely the rationale of a third (and arguably more sophisticated) type of comparative inquiry that is meant to generate rich concepts and analytical frameworks for thinking critically about constitutional norms and practices. This is done mainly through a quest for detailed understanding of how people living in different cultural, social, and political contexts deal with constitutional dilemmas that are assumed to be common to most modern political systems.

More often than not, the third type of comparative scholarship takes a universalist tone, emphasizing the broad similarity of constitutional challenges and functions across relatively open, rule-of-law polities. By studying various manifestations of and solutions to roughly analogous constitutional challenges, our understanding of key concepts in constitutional law such as separation of powers, statutory interpretation, or equality rights, to pick a few common examples, becomes more sophisticated and analytically sharper. *Concept formation through multiple description* is the methodological approach this guise of comparative study often adheres to.

This approach serves as the organizing principle of most leading textbooks in comparative constitutional law.¹¹ Each chapter in Vicki Jackson and Mark Tushnet's *Comparative Constitutional Law*, for example, is devoted to an exploration of a major aspect or concept of modern constitutional law as it manifests itself in a few pertinent polities. A similar organizing principle is applied in David Beatty's *The Ultimate Rule of Law*, where the author devotes chapters to comparative judicial interpretation of concepts such as liberty, equality, and proportionality.¹² The same methodological rationale underlies recent collections of "country essays" on themes such as judicial inde-

10. David Collier, *The Comparative Method: Two Decades of Change*, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 105 (Dankwart A. Rustow & Kenneth Paul Erickson eds., 1991).

11. See, e.g., VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999); NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM* (2003); DONALD KOMMERS ET AL., *AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES* (2004).

12. DAVID BEATTY, *THE ULTIMATE RULE OF LAW* (2004).

pendence;¹³ gender equality;¹⁴ constitutionalism in the Islamic world;¹⁵ or transition from authoritarian to constitutional democratic regimes in Eastern Europe or Latin America.¹⁶

Recent works dealing with innovative strategies for mitigating the tension between constitutionalism and democracy provide a good substantive illustration of the concept formation through multiple description approach. From the Canadian Charter's "limitation" and "override" clauses to the New Zealand Bill of Rights Act's "preferential" model of judicial review to the British Human Rights Act's "declaration of incompatibility," the new constitutionalism world has become a living laboratory of constitutional innovation. Drawing upon a comparative description of mechanisms adopted throughout the world of new constitutionalism, comparativists in Canada and Britain, for example, have been able to enrich the conversation concerning the questionable democratic credentials of constitutionalism and have succeeded at bringing new life to the somewhat exhausted debate in the United States concerning the counter-majoritarian difficulty.¹⁷

Drawing upon the same rationale for comparative work, recent studies have successfully generated a more nuanced concept of inter-court borrowing of constitutional ideas by introducing a distinction between positive and negative borrowing. The former type of borrowing pertains to judicial reliance on foreign constitutional concepts as a tool for improving the borrowing polity's own constitutional practices; the latter emphasizes explicit distinction and contrast from other polities' imperfect constitutional experiences as a means for justifying a given polity's advanced constitutional practices.¹⁸

Another example of "concept thickening through multiple description" work is provided by recent comparative analyses of constitutional provisions and jurisprudence concerning "positive" social and economic rights (e.g. the right to basic housing, education, and

13. See, e.g., JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Peter Russell & David O'Brien eds., 2001).

14. See, e.g., THE GENDER OF CONSTITUTIONAL JURISPRUDENCE (Beverly Baines & Ruth Rubio Marin eds., 2005).

15. See, e.g., NATHAN BROWN, CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT (2002).

16. Two good examples of this genre are: WILLIAM PRILLAMAN, THE JUDICIARY AND DEMOCRACY IN LATIN AMERICA (2000); HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2000).

17. See, e.g., Janet Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?* 82 TEX. L. REV. 1963 (2004).

18. Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 I-CON: INT'L. J. CONST. L. 1 (2004); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 I-CON: INT'L. J. CONST. L. 296 (2003).

health care).¹⁹ By expanding our knowledge of the various possibilities to advance progressive notions of distributive justice through constitutional and interpretive innovation in Belgium, India, Hungary, or South Africa, such comparative studies not only elevate the level of sophistication in discussing the concept of positive constitutional entitlements, but also inject new life to the near-moribund issue of welfare rights in North American constitutional law.

In short, the vast majority of high quality comparative constitutional law scholarship produced by legal academics over the past decade has contributed tremendously not only to the mapping and taxonomy of the new constitutionalism world, but also to the creation of pertinent conceptual frameworks for studying comparative constitutionalism. Indeed, one should never underestimate the significance of the "concept formation through multiple description" level of comparative inquiry. We acquire a far more complex, nuanced, and sophisticated understanding of what, say, "solids" or "mammals" mean by studying the variance and commonality among exemplars within their respective categories. As is well known, Charles Darwin's expeditions to the Galapagos on the *Beagle* (1832-1836) were initially driven by a modest attempt to collect and identify new species of plants and animals unknown to scholars in 19th century Europe. Darwin's various findings served as the basis for his *Origin of Species* and the development of one of the most influential theories of the modern era. However, while the systematic accumulation of facts, multifaceted descriptions of specific phenomena, and the development of thick concepts and thinking frameworks are all indispensable to the advancement of knowledge, the key distinguishing mark of what King, Keohane, and Verba called a unified logic of scientific inquiry is *making inferences about cause and effect* that go beyond the particular observations collected.²⁰

The fourth type of comparative studies attempts to move beyond the level of thick description and concept formation toward the ultimate goal of social inquiry: *theory building through causal inference*.²¹ It is based on the notion that a good theory requires clarifying concepts *as well as* offering causal explanations for observed phenomena. Since their birth as autonomous academic disciplines, the social sciences have always been influenced by diverse approaches to social inquiry. Granted, the joint inference-oriented goal of quantitative and qualitative methods in the social sciences is not uncontested. However, the aspiration to *explain*, rather than merely describe, social (including legal) phenomena through the validation or refutation

19. See, e.g., Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004).

20. GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994).

21. *Id.*, at 8.

of propositions about the world is common to all core quantitative and qualitative, "large-N" and "small-N",²² behavioralist and historical-interpretive approaches to social inquiry used in disciplines such as sociology and political science, let alone in generally more positivist disciplines such as social psychology and economics.²³

Such inference-oriented (quantitative and/or qualitative) research in the social sciences requires: (1) formulation of testable hypotheses, models, or arguments concerning possible causal links among well defined variables; (2) confirmation or disconfirmation of these hypotheses, models, or arguments through pertinent research design, data collection and analysis; and (3) generation of conclusions that are likely to be true, based largely on inductive inference. Controlled comparison and methodologically astute case selection and research design is a critical tool in accomplishing these goals.

It is precisely due to its traditional lack of attention to principles of controlled comparison and case selection that comparative constitutional law scholarship produced by legal academics, its tremendous development in recent years notwithstanding, often falls short of advancing knowledge in the manner sought after by most social scientists.²⁴ Whereas the third category of comparative scholarship does a good job of assessing the scope, extent, and nature of certain pertinent phenomena, it provides merely limited "methodology proof" insight as to the origins and causes of such phenomena. To the extent that case selection principles receive any attention, the focus is often on cases that involve current policy concerns in the author's own polity.

II. PRINCIPLES OF CASE-SELECTION IN INFERENCE-ORIENTED COMPARATIVE STUDIES

Experimental research, statistical analysis ("large-N"), and systematic examination of a small number of cases ("small-N") are the three major ways of causal inference and theory testing within the

22. The term "large-N" research is commonly used in the social sciences to describe studies that draw upon multi-variate statistical analyses of large number of observations, measurements, data sets, etc. in order to determine correlations and causal links among pertinent variables (more often than not of an a-priori quantifiable nature). The term "small-N" research refers to detailed, often more nuanced and contextual studies of a small number of cases, sometimes even of a single case study or event. It is frequently drawn upon in classical comparative politics scholarship as well as in disciplines such as history or social and cultural anthropology.

23. See, e.g., RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS (Henry Brady & David Collier eds., 2004); David Laitin, *The Perestroika Challenge to Social Science*, 31 POLITICS & SOCIETY 163 (2003); Sidney Tarrow, *Bridging the Quantitative-Qualitative Divide in Political Science*, 89 AM. POL. SCI. REV. 471 (1995).

24. A notable exception to this observation is the genuinely theory-oriented, economic analysis of constitutionalism. See, e.g., ROBERT COOTER, *THE STRATEGIC CONSTITUTION* (2000); Symposium, *Economic Analysis of Constitutional Law*, 3 THEORETICAL INQUIRIES L. (2002).

scientific approach to the study of politics and society.²⁵ The third category – small-N studies – is by far the most prevalent type of inquiry employed by scholars of comparative constitutional law and politics.²⁶ In the following pages, I explain the logic of the basic principles of research design and case selection foundational to the small-N method of theory testing through comparative inquiry. These principles are: (A) the “most similar cases” principle; (B) the “most different cases” principle; (C) the “prototypical cases” principle; (D) the “most difficult cases” principle; and (E) the “outlier cases” principle.²⁷ While prominent legal scholars do occasionally follow one or more of these five principles, the vast majority of legal scholarship in the field of comparative constitutional law, and comparative law in general, either is unaware of these principles, or simply overlooks them. I illustrate the logic of these causal inference-oriented case selection principles through a discussion of a few recent comparative studies of the origins and consequences of judicial empowerment. My aim is to demonstrate how adherence to these simple principles of case selection may elevate the field of comparative constitutional law beyond the third type of comparative examination – concept formation through multiple description – to the next level of comparative inquiry: causal inference through controlled comparison.

A. *The “Most Similar Cases” Logic*

Initially put forth by John Stuart Mill in *A System of Logic* (1843), and later refined and applied to the social sciences by a number of authors in the 1960s and 1970s, the “most similar cases” research design (Mill’s “method of difference”) and “most different cases” research design (Mill’s “method of agreement”) serve as two standard case selection principles in inference-oriented, controlled comparison in qualitative, “small-N” studies.²⁸ According to the

25. For further discussion see, KING ET AL., *supra* note 20; BRADY & COLLIER, *supra* note 23; PROBLEMS AND METHODS IN THE STUDY OF POLITICS (Ian Shapiro et al. eds., 2004).

26. See *supra* note 22.

27. Another type of inference-oriented small-N studies focuses on cases of embedded insulation and isolation, whether geographical, social, or political. Think of studies of endemic flora and fauna specimens in Madagascar or the Galapagos; studies of remote hunting and gathering societies; or situations of social isolation such as those witnessed by descendants of the Bounty mutineers on Pitcairn Island, or by Rudyard Kipling’s Mowgli – an Indian child who gets lost in the jungle and is brought up by a family of wolves. Such cases constitute a natural “control group”; by comparing pertinent findings gathered in such enclaves of isolation against the benchmark of common knowledge or practices elsewhere, we are able to assess the net effect of domestic or “innate” characteristics versus the effect of external or acquired processes, ideas, and practices. This particular type of case studies, however, is not easily transferable to the comparative constitutional law realm.

28. See, ADAM PRZEWORSKI & HENRI TEUNE, *THE LOGIC OF COMPARATIVE SOCIAL INQUIRY* (1982); Alexander George & Timothy McKeown, *Case Studies and Theories of Organizational Decision Making*, 2 ADVANCES INFO. PROCESSING ORG. 21 (1985);

“most similar cases” approach to selecting comparable cases, researchers should compare cases that have similar characteristics, or cases that are matched on all variables or potential explanations that are not central to the study, but vary in the values on the key independent and dependent variables. By controlling for variables or potential explanations that are not central to the study, the most similar cases principle helps “isolate” the great significance of the variance on the key independent variable in determining the variance on the dependent variable, thereby allowing for partial substitute for statistical or experimental control. What is more, because the most similar cases principle suggests that comparable cases should be selected so as to hold constant non-key variables while isolating the explanatory power of the key independent variable, this approach is the most adequate for a diachronic, cross-time comparison within the same polity (e.g. a study of the impact of a certain change through a pre change/post change comparison).

TABLE 1: THE “MOST SIMILAR CASES” LOGIC

	Possible Explanation I	Possible Explanation II	Possible Explanation III	Possible Explanation IV	Dependent Variable
Case A	X1	X2	X3	X4	Y
Case B	X1	X2	X3	Not X4	Not Y

Consider the hypothetical example outlined in Table 1 above. For the sake of simplicity, let us assume that all the pertinent variables are dichotomous (i.e. “Yes/No” or “X/Not X”), indicating the presence or absence of the possible explanation under consideration.²⁹ Case A and Case B are selected to test the hypothesis that explanation IV (X4) – and not explanations I, II or III – causes Y. If any of X1, X2 or X3 were the cause of Y, then the result for Case B with respect to the dependent variable would also have to be Y. Since the result in Case B is “not Y,” X1, X2, and X3 can be eliminated as causes of Y. However, in the column under “possible explanation IV,” X4 is present for Case A but not for Case B. When X4 is present, the result is Y. When “X4” is not present, the result is “not Y.” It appears that the presence

CHARLES RAGIN, THE COMPARATIVE METHOD: MOVING BEYOND QUALITATIVE AND QUANTITATIVE STRATEGIES (1989); Arend Lijphart, *Comparative Politics and Comparative Method*, 65 AM. POL. SCI. REV. 682 (1971); Sidney Verba, *Some Dilemmas of Political Research*, 20 WORLD POL. 111 (1967).

29. See Stanley Liberson, *Small N's and Big Conclusions: An Examination of the Reasoning in Comparative Studies Based on a Small Number of Cases*, 70 Soc. FORCES 307 (1991).

of X4 (possibly in conjunction with other factors) is necessary to generate the result Y, while the absence of X4 means that Y cannot result. This supports the hypothesis that, of possible explanations X1, X2, X3, and X4, the most likely cause of Y is X4.

Put differently, because the first three possible explanations for the studied phenomenon are held constant across the two cases, possible explanation IV appears to be the most plausible explanation for the variance across cases with respect to the dependent variable. Since the results "Y" and "Not Y" cannot be directly attributed to any of the first three possible explanations, explanation IV is the most likely to be the cause of the different outcomes in Case A and Case B with respect to the dependant variable. Conversely, the same configuration of readings of the four possible explanations leading to similarity across the two cases with respect to the dependent variable (meaning the readings on the dependent variable were both "Y" or both "Not Y") would mean the elimination of explanation IV as a significant determinant of the outcome or dependent variable.

Consider the following simple illustrations of the most similar cases logic. Selecting the United States and China as the two main cases in a study of the impact of judicial review on the status of civil rights and liberties in a given polity does not make much sense. These two countries feature so many pertinent differences in their political institutions, cultural propensities, and constitutional legacies, that isolating the independent impact of judicial review on the status of civil liberties in these two countries becomes virtually impossible. However, selecting the United States and Britain as the two main cases for the purposes of such investigation would be a far more plausible choice. Likewise, studying the status of civil liberties in the Netherlands – one of the few European countries that until very recently had stringently opposed the idea and practice of judicial review – would be a logical choice if a researcher wishes to establish the claim that the independent impact of judicial review on the status of civil rights and liberties in a given polity has not been as significant as is often claimed.

Similarly, comparing the Dominican Republic (that makes up the eastern two-thirds of the island of Hispaniola in the Caribbean Sea), and Haiti (that covers the island's western end), would be a *prima facie* plausible selection if one wishes to challenge Montesquieu's argument concerning the impact of environmental and material factors on a given polity's laws. However, selecting the same pair of countries would not be ideal if one is interested in testing hypotheses concerning the impact of a given polity's religious creed, colonial heritage, economic development, and/or political stability on its constitutional practices. Because the two countries vary significantly with respect to each of these parameters, it would be virtually impossible to iso-

late the impact of any of these specific factors on constitutional practice in these countries.

An effective "real life" application of the most similar cases logic to the study of comparative constitutional law and politics is provided by Tom Ginsburg's *Judicial Review in New Democracies*.³⁰ The book examines the evolution of independent constitutional courts during early stages of democratic liberalization in post-authoritarian polities. In a nutshell, Ginsburg argues that the establishment of constitutional review in new democracies is largely a function of politics and interests, not a reflection of macro-cultural or societal factors. Specifically, judicial review may provide "insurance" for self-interested, risk-averse politicians, who are negotiating the terms of new constitutional arrangements under conditions of political deadlock or systemic uncertainty. At times of political transition, greater degrees of political deadlock and/or more diffused or decentralized political power increase the probability that uncertainty will be embedded in its constitution-making process and subsequent electoral market. This in turn leads to a greater likelihood that a relatively powerful and independent constitutional court will emerge as insurance adopted by risk-averse participants in the constitutional negotiation game. In short, judicial review is a solution to the problem of uncertainty in constitutional design.

To substantiate these theoretical arguments, Ginsburg turns to an exploration of the rarely discussed establishment of constitutional courts, and the corresponding judicialization of politics, in three new Asian democracies: Taiwan, Mongolia, and Korea. All three countries share a roughly similar cultural context. Each country underwent a transition to democracy in the late 1980s and early 1990s. Newly established constitutional courts in all three countries have struggled to maintain and enhance their stature within political environments that lack an established tradition of judicial independence and constitutional supremacy. Despite these commonalities, there has been a significant variance in judicial independence among the three countries.

In Taiwan the democratization process was governed by a single dominant party (KMT) with an overwhelmingly powerful leader (Chi-ang Kai-shek). The result has been a very gradual constitutional reform ("Confucian constitutionalism," as Ginsburg calls it) and the evolution of a relatively weak and politically dependent court (the Council of Grand Justices). In Mongolia, the former Communist Party was in a strong position during the constitutional negotiation stage but was nonetheless unable to dictate outcomes unilaterally because of a newly emergent set of opposition parties. This has resulted

30. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003).

in the 1992 creation of a "middle of the road," quasi-independent court (the Constitutional Tsets). On the other hand, in Korea, constitutional transformation took place amidst embedded uncertainty stemming from political deadlock among three parties of roughly equal strength. As a result, in 1988, a strong and relatively independent constitutional court emerged as political insurance against electoral uncertainty.

Drawing on the same case selection logic, Pedro Magalhaes points out in his recently-completed Ph.D. dissertation that transition to democracy in Spain and Portugal in the mid 1970s was characterized by lack of a single core of post-authoritarian political power, thereby leading to the rapid adoption of strong constitutional review mechanisms.³¹ In Greece, by contrast, the post-authoritarian process was dominated by a single party (Constantine Karamanlis' New Democracy), which enjoyed over 70% of assembly seats, and did not have to worry about elections following the approval of the new constitution. The result, argues Magalhaes, was that Greece, with similar authoritarian and civil law legacies as Spain and Portugal, and involved in an almost simultaneous democratic transition, remained the only Southern European democracy without constitutional judicial review of legislation.³²

As indicated earlier, the requirement that comparable cases be selected so as to hold non-key variables constant while isolating the explanatory power of the key independent variable makes the most similar cases approach adequate for a diachronic, cross-time comparison within the same polity (e.g. a study of the impact of a certain change through a pre change/post change comparison). Because the comparison is done between two consecutive periods within the same polity (i.e. the general pertinent context is held constant), the researcher is able to control for possible intervening variables and explanations other than those he or she wishes to emphasize.

The significant methodological advantage of the most similar cases principle is illustrated by recent works that advance the strategic approach to the study of judicial behavior. According to this approach, judges are not only precedent followers, framers of legal policies, or ideology-driven decision-makers, but also sophisticated strategic decision-makers who realize that their range of decision-making choices is constrained by the preferences and anticipated re-

31. Pedro Magalhaes, *The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies* (2003)(unpublished Ph.D. dissertation, Ohio State University).

32. Other effective illustrations of the "most similar cases" logic in action are CARLO GUARNIERI ET AL., *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* (2002) – a study of constitutional politics in Spain, France, and Italy; and to a somewhat lesser degree, ALEC STONE-SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000) – a study of constitutional politics in Spain, France, Italy, Germany, and the EU.

action of the surrounding political sphere.³³ Accordingly, constitutional court rulings may not only be analyzed as mere acts of professional, apolitical jurisprudence (as doctrinal legalistic explanations of court rulings often suggest) or reflections of judicial ideology (as "attitudinal" models of judicial behavior might suggest), but also a reflection of judges' own strategic choices. Judges may vote strategically to minimize the chances that their decisions will be overridden; if the interpretation that the justices most prefer is likely to elicit reversal by other branches, they will compromise by adopting the interpretation closest to their preferences that could be predicted to withstand reversal.³⁴ Likewise, judges in certain legal systems may vote strategically, especially in politically charged cases, in order not to diminish their chances for promotion.³⁵ Supreme Court judges may also be viewed as strategic actors to the extent that they seek to maintain or enhance the court's independence and institutional position vis-à-vis other major national decision-making bodies.³⁶ In other words, strategic judges may recognize when the changing fates or preferences of influential political actors, or gaps in the institutional context within which they operate, might allow them to strengthen their own position by extending the ambit of their jurisprudence and fortifying their status as crucial national policy-makers.

In a recent study, Gretchen Helmke draws upon a diachronic, cross-time study of judicial behavior in Argentina to demonstrate this argument. While Argentine Supreme Court judges showed little will to resist the state's governing military junta at its zenith (1976-1981), a significant increase in antigovernment decisions occurred between 1982-1983 when it became clear that the days of the military regime were numbered. Likewise, the judges' willingness to issue antigovernment decisions was relatively high during the years of weak democracy in Argentina (1983-1989) primarily because the judges did not face a credible threat. However, as Carlos Menem became in-

33. William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Howard Gillman & Cornel Clayton eds., 1999); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Lee Epstein & Jack Knight, *Towards a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625 (2000).

34. LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 119 (1997).

35. Mark Ramseyer & Eric Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331 (2001).

36. The establishment of an international rule of law in the EU, for example, was driven in no small part by national judges' attempts to enhance their independence, influence and authority vis-à-vis other courts and political actors. For an elaboration of this point see KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001).

creasingly popular and as it became more likely that he would get reelected, the percentage of antigovernment decisions declined.³⁷

As is well known, in 1993 Russian President Boris Yeltsin reacted to an over-active involvement of the Constitutional Court in Russia's political sphere by signing a decree suspending the Constitutional Court until the adoption of a new constitution – an act that marked the demise of the first Constitutional Court and its controversial Chair, Valerii Zorkin, and brought about the establishment of the second Constitutional Court. Drawing upon a controlled comparison of the dockets of the first and second Constitutional Courts, Lee Epstein et al. show that in a marked departure from the first Court era where the docket was dominated by politically charged federalism and separation of powers cases, in the years following the constitutional overhaul, the second Russian Constitutional Court resorted to the “safe area” of individual rights jurisprudence and tended to avoid federalism issues or separation of powers disputes.³⁸ Through a classic application of the “most similar cases” principle to two consecutive periods of time within the same polity, the researchers effectively illustrate another aspect of the strategic approach to judicial decision-making: harsh political responses to unwelcome activism or interventions on the part of the courts have a chilling effect on judicial decision-making patterns.

B. *The “Most Different Cases” Logic*

According to the “most different cases” approach to selecting comparable cases, researchers should compare cases that are different on all variables that are not central to the study but match in terms that are, thereby emphasizing the significance of consistency on the key independent variable in explaining the similar readings on the dependent variable. Consider the hypothetical example outlined in Table 2 below. Case A and Case B are selected to test the hypothesis that explanation IV (X4) – and not explanations I, II or III – causes Y. If the presence of any of the possible explanations I (X1), II (X2) or III (X3) was necessary to cause result Y, then the result for Case B with respect to the dependent variable could not be “Y” and would instead have to be “Not Y.” Since the result in both Case A and Case B is similar (“Y”), possible explanations I, II, and III can be

37. Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002). See also, GRETCHEN HELMKE, *COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA* (2005). For other variations on the same theme see, Taavi Annus and Margit Tavits, *Judicial Behavior After a Change of Regime: The Effects of Judge and Defendant Characteristics*, 38 L. & SOC. REV. 711 (2004); GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005).

38. Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC. REV. 117 (2001).

eliminated as direct causes of Y. In contrast, the real explanation IV is similar in both cases, as is the reading with respect to the dependent variable. It appears that of X4 is necessary and sufficient to generate the results the hypothesis that of possible explanations X1 and the most likely cause of Y is X4.

TABLE 2: "THE "MOST DIFFERENT CASES" LOGIC

	Possible Explanation I	Possible Explanation II	Possible Explanation III	Possible Explanation IV
Case A	X1	X2	X3	X4
Case B	Not X1	Not X2	Not X3	X4

As we have seen, selecting comparable cases as most similar cases principle effectively emphasizes power of an independent variable or variables that compared cases. In contrast, selecting comparable cases the most different cases principle effectively emphasizes the power of key independent variables with *similar* the compared cases. Differently put, because independent, II, & III vary significantly across the two cases while explanation IV are similar, the most plausible explanation in the dependent variable in the two cases IV – the only constant across the two instances. The same configuration of readings in the "possible explanations leads to a different result in Case A and Case B the dependent variable, then explanation IV would be seen as a possible cause.

Suppose a researcher is interested in studying which a polity's history of authoritarianism influences a court's interpretative approach toward the "doctrine. Selecting Chile and Argentina as the two best a study would not be the most effective choice. Because countries share many pertinent factors other than cultural propensities, or constitutional legacies) it would determine whether any similarities in high court activist) attitudes toward the executive branch are due to countries' similar histories of powerful military regimes transitions to democracy. Comparing instead, say, China would make more sense, precisely because these countries

each other in almost all pertinent respects but share a roughly similar history of military authoritarianism and transition to democracy. Similarly, if a researcher is interested in drawing upon comparative study to assess the significance of colonial legal legacy in shaping post-colonial constitutional arrangements, it would not be most effective to compare Mali and Niger – two countries that share many pertinent factors other than their joint French colonial heritage. It would be more plausible to compare, say, Indonesia and Suriname – two formerly Dutch colonies that have few pertinent factors in common beyond their colonial past.

Consider the following application of this case selection principle. In a recent article, I explored the crucial secularizing role of constitutional jurisprudence in three countries facing a deep secular/religious divide – Egypt, Israel, and Turkey.³⁹ These three countries have witnessed a considerable increase in the popular support for, and influence of, theocratic political movements. At the same time, these three countries differ in their formal recognition of, and commitment to, religious values. For example, Article 2 of the Egyptian Constitution, as amended in 1980, states that principles of Muslim jurisprudence (the *Shari'a*) are the primary source of legislation in Egypt, while Israel defines itself as a “Jewish and Democratic” state; conversely, modern Turkey characterizes itself as secular, adhering to the Western model of strict separation of state and religion. Accordingly, there are considerable differences in the interpretive approaches and practical solutions adopted by the three countries’ respective high courts in dealing with core religion and state questions. Egypt’s Supreme Constitutional Court has developed its own moderate “interpretation from within” of religious rules and norms. The Israeli Supreme Court has tackled the tension between these conflicting values by curtailing the jurisprudential autonomy of religious courts and tribunals, and by subjecting their jurisprudence to general principles of administrative and constitutional law. The Turkish Supreme Court, on the other hand, has opted for the outright exclusion of religious values and policy preferences from legitimate political discourse. Despite these dissimilarities, there are striking parallels in the way constitutional courts in these and other similarly situated countries have positioned themselves as important secularizing forces within their respective societies.

While *different* in many pertinent respects, the increased popular support for principles of theocratic governance in all three countries, along with the threat these principles pose to the cultural propensities and policy preferences of local secular elites, resulted in a *similar* transfer of fundamental “religion and state” questions from

39. Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819 (2004).

the political sphere to the constitutional courts. Drawing upon their disproportionate access to, and influence over, the legal arena, political power-holders representing secular voices in these and other polities facing deep divisions along secular/religious lines aim to ensure that their secular liberal views and policy preferences are less effectively contested. The result has been an unprecedented judicialization of foundational collective identity (particularly "religion and state" questions) and the consequent emergence of constitutional courts as important guardians of secular interests in these countries.⁴⁰

C. "Prototypical Cases"

The logic of the "prototypical cases" principle is fairly intuitive. If a researcher wishes to draw upon a limited number of observations or case studies to test the validity of a theory or an argument, these should feature as many key characteristics as possible that are akin to those found in as many cases as possible. Unlike the a-systematic case selection in most freestanding, insular, single-country studies of constitutional law, a prototypical case serves as a representative exemplar of other cases exhibiting similar pertinent characteristics. Theories that pass the tests posed by prototypical cases are therefore likely to "travel" well, applying widely to other, presumably analogous cases.⁴¹ The key aspect that makes studies of prototypical cases methodologically superior to what political scientists call "country/area studies" is the applicability of the findings derived from prototypical cases to other, similarly situated cases. In that respect, the underlying logic of the prototypical cases principle is that of "reasoning by analogy." That is, "if two units are the same in all relevant respects, similar values on the relevant explanatory variables will result in similar values on the dependent variable."⁴²

Comparative observations of prototypical cases served as the methodological basis to the seminal work of pioneering legal sociologists such as Henry Sumner Maine, Emile Durkheim, and Max Weber.⁴³ In its more contextualist guise, analysis of prototypical cases resembles what Clifford Geertz termed "thick description" – a thorough, nuanced analysis of a single case that exhibits as many

40. Interesting variations on the "most similar" and "most different" case selection principles are offered in GARY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE PERSPECTIVE* (2003), and in LESLIE GOLDSTEIN, *CONSTITUTING FEDERAL SOVEREIGNTY* (2001).

41. STEPHEN VAN EVERA, *GUIDE TO METHODS FOR STUDENTS OF POLITICAL SCIENCE* 84 (1997).

42. KING ET AL., *supra* note 20, at 209, 212.

43. See, e.g., HENRY MAINE, *ANCIENT LAW* (2000) [1861]; EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1964) [1893]; MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (1978) [1925].

archetypal characteristics as possible.⁴⁴ In this way, such studies may yield illuminating “ethnography-like” accounts of constitutional transformation in given polities.⁴⁵

An effective illustration of the application of the prototypical cases principle is provided by Martin Shapiro’s *Courts: A Comparative and Political Analysis* – the first thorough application of Robert Dahl’s theory of courts as political institutions to the study of comparative public law.⁴⁶ Shapiro argues that courts worldwide should be thought of as political agencies of government and judges should be perceived as political actors functioning largely in support of political regimes. “Most fundamentally,” argues Shapiro, “the role of courts and judicial processes is to maintain the legitimacy of the regime, and most elements of the court system serve to advance this function.”⁴⁷ Common characteristics and images of court systems worldwide (for example, judicial independence, judicial selection processes, perceptions of impartiality and procedural fairness, appellate processes, etc.) are politically constructed to support political hierarchy, stability, and legitimacy.

In order to illustrate the applicability of his “courts as political institutions” argument in diverse legal contexts, Shapiro analyzes the main institutional, jurisprudential, and socio-legal characteristics of four prototypical cases, each representing a major and distinct legal tradition. He takes the case of the English legal system as the prototype of a common law system, characterized by a political construction of judicial independence and the image of judicial impartiality. France and Italy serve as prototypical illustrations of how judges in civil law systems (who are commonly perceived as bound by pre-existing codes) adjust their jurisprudence to accord with regime interests. Imperial China is a prototype of a very different kind of regime: the political construction of Confucian ethics and non-litigious mediation in Asian law. Finally, the Ottoman Empire is an example of a

44. See, CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* (1973).

45. See, Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 L. & SOC. REV. 389 (2004). Three effective illustrations of this genre of scholarship in action are: HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* (2000) – a detailed account of the South African constitutional revolution of the mid-1990s as illustrating the impact of international political economy pressures on domestic constitution drafting; Kim Lane Scheppele’s work on constitutional politics in Hungary and Russia as illustrative cases of the struggle to establish norms of liberal constitutionalism in post-communist Europe; as well as Joseph Weiler’s seminal work on the origins and nature of the emerging EU constitutional order as illustrating the central role of courts in creating supra-national constitutionalism, e.g., J. H. H. WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999).

46. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

47. Herbert Kritzer, *Martin Shapiro: Anticipating the New Institutionalism*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 397 (Nancy Maveety ed., 2003).

decentralized political system resulting in a mosaic of secular and religious jurisprudence; in addition, appellate-less “kadi justice” in Islamic jurisprudence reflects the absence of central political authority. Shapiro’s conclusion is blunt: despite the variance in the legal cultures and traditions within which they operate, judicial tribunals in each of these prototypical cases – and by extension in many other cases – reflect and promote broad socio-political interests.

Another illustration of the “prototypical cases” principle is provided by Mitchel Lasser’s *Judicial Deliberations* – a study of inter-country differences in judicial discourse and argumentation styles.⁴⁸ In Lasser’s view, these differences reflect divergent ideological frameworks and national meta-narratives, not merely well-rehearsed doctrinal distinctions among broad categories of legal traditions. His three case studies – the French Cour de cassation, the U.S. Supreme Court, and the European Court of Justice – are prototypical of civil law, common law, and supra-national law systems, respectively.⁴⁹ The Cour de cassation, Lasser argues, adheres to a formalistic or “grammatical” style of argumentation, whereby little or no reference is made to extra-judicial interpretive means, extra-textual arguments, etc. This is reflective, *inter alia*, of France’s unified institutional and ideological framework founded on both explicitly republican notions of meritocracy and managerial expertise, and the French legal system’s long-term emphasis on control and hierarchy, as well as professionalism. The American judicial system, by contrast, derives its legitimacy from a more argumentative and engaging “hermeneutic” style of judicial discourse that frequently resorts to extra-textual discursive contexts and interpretive means. This is reflective of the decentralized, multi-focal nature of the American judicial system and the more deliberative or democratic political ethos within which it operates. Finally, Lasser argues that the ECJ’s judicial discourse – a prototypical case of supra-national constitutionalism – features elements of both the French “grammatical” approach and the American “hermeneutic” approach. This he sees as a result of the ECJ’s hierarchical, French discursive-like structure on which the court was originally patterned, as well as its inherently fractured, transnational political and legal context.

D. “Most Difficult Cases”

Single observation research is not necessarily detrimental to causal inference. Indeed, it may even support it. Consider the contri-

48. MITCHEL DE S.-O.-L’E LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2004).

49. On this and other methodologically-astute observations concerning his own work and the field of comparative law more generally, see Mitchel De S.-O.-L’E. Lasser, *The Question of Understanding*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 197-232 (Pierre Legrand & Roderick Munday eds., 2003).

bution of the “most difficult case” principle to the substantiation of arguments made in a small-N or a single-country study. The “most difficult case” principle is based on an idea known in formal logic as *ad absurdum*. According to this principle, our confidence in the validity of a given claim, or in the explanatory power of a given hypothesis, is enhanced once it has proven to hold true in a case that is, *prima facie*, the most challenging or least favorable to it. In a more moderate fashion, “if the investigator chooses a case study that seems on a-priori grounds unlikely to accord with theoretical predictions – a least likely observation – but the theory turns out to be correct regardless, the theory will have passed a difficult test, and we will have reason to support it with greater confidence.”⁵⁰ Conversely, if a claim or a hypothesis does not survive a “most likely” or a “most favorable” case, its plausibility is severely undermined. In short, a single crucial case may either positively validate a claim or, conversely “score a clean knockout over a theory.”⁵¹

An effective application of the “most difficult case” principle helped make Gerald Rosenberg’s *The Hollow Hope* one of the most influential works on the question of the impact of landmark court rulings.⁵² As Rosenberg suggests in his polemic against the prevalent “dynamic court” approach, the U.S. Supreme Court’s role in producing social reforms (at least in the domains of racial desegregation and abortion) has been far less significant than conventional wisdom would suggest. In fact, hostile opposition forces were able to neutralize the Court’s seemingly ground breaking, and widely celebrated ruling in *Brown v. Board of Education*, at least in the decade following the decision. The limited progress eventually made after the ruling was, argues Rosenberg, due to a shift in political forces that had everything to do with the changing economic role of African-Americans and their own extra-legal activism – changes that had little to do with the Supreme Court’s ruling. Moreover, courts lack independent enforcement and implementation powers and are therefore institutionally constrained in their efforts to bring about social change; their decisions can be fairly easily stymied if met by strong political opposition. Therefore, courts may effectively produce significant social reform only when extra-judicial political factors are conducive to change, or when market forces offer positive incentives to induce compliance. By drawing upon the surprisingly limited direct effects of the most widely celebrated ruling in the history of the United States Supreme Court, Rosenberg was able to utilize the “most difficult cases” strategy to lend credence to his counter-intuitive arguments.

50. KING ET AL., *supra* note 20, at 209.

51. Harry Eckstein, *Case Study and Theory in Political Science*, in HANDBOOK OF POLITICAL SCIENCE 127 (Fred Greenstein & Nelson Polsby eds., 1975).

52. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

Charles Epp's influential work on rights revolutions provides another illustration of an effective use of the "most difficult cases" logic.⁵³ Epp suggests that the impact of constitutional catalogues of rights may be limited by individuals' inability to invoke them through strategic litigation. Hence bills of rights matter to the extent that a support structure for legal mobilization – a nexus of rights-advocacy organizations, rights-supportive lawyers and law schools, governmental rights-enforcement agencies and legal aid schemes – is well developed. In other words, while the existence of written constitutional provisions is a necessary condition to effective protection of rights and liberties, it is certainly not a sufficient condition. The effectiveness of rights provisions in planting the seeds of social change in a given polity depends largely upon the existence of a support structure for legal mobilization, and, more generally, hospitable socio-cultural conditions.

In order to establish this broad claim, Epp engages in a comparative study of rights revolutions in several countries, most notably the United States, India, and Canada. The rights revolution in the United States occurred through a series of landmark Supreme Court rulings between 1961 and 1975, and was largely contingent upon concerted pressure from well-organized rights advocates. In India, by contrast, "the interest group system is fragmented, the legal profession consists primarily of lawyers working individually, not collectively, and the availability of resources for noneconomic appellate litigation is limited."⁵⁴ Canada presents a "most difficult case" for Epp's thesis as it offers, *prima facie*, a simple, straightforward explanation for the origin of the Canadian rights revolution – the 1982 adoption of the Charter of Rights and Freedoms. However, Epp's analysis suggests that Canada's rights advocacy and rights litigation rates, as well its "support structure for legal mobilization" started to gain momentum in the early 1970s – a decade prior to the adoption of the Charter.⁵⁵ Here too, a rights revolution was largely contingent on the growth of a support structure for legal mobilization, not merely on the formal protection of rights through constitutional provisions.

E. "Outlier Cases"

Outlier cases occur where the outcome is poorly explained by existing theories but may be explained by a newly identified explanation. In such cases, the values on the dependent variable are high (i.e. the result occurs frequently or in a significant fashion) while the

53. See Charles Epp, *Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms*, 90 AM. POL. SCI. REV. 765 (1996); and CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

54. EPP, *THE RIGHTS REVOLUTION*, *supra* note 53, at 95.

55. Epp, *Do Bills of Rights Matter?*, *supra* note 53.

known causes or existing explanations are absent (i.e. there ought to be another explanation).⁵⁶ This case selection principle is designed to lend credence to a novel explanation for a given phenomenon through the initial negation of alternative explanations for that phenomenon. It draws upon a basic principle of formal logic according to which, as long as an explanation or cause for a given outcome is not proven irrelevant, it remains a possible explanation for that outcome. Conversely, negating the viability of a possible cause for a given outcome increases our confidence in other possible explanations for that phenomenon. Using the outlier cases principle, our confidence in a given explanation increases by selecting a case or cases that do not feature any alternative explanation for the studied phenomenon other than the new explanation we wish to establish. In short, selecting a number of outlier cases that cannot be explained by existing theories helps substantiate the new cause, explanation or argument through the a-priori elimination of alternative explanations.

Consider the following example of the "outlier cases" logic in action. The constitutionalization of rights and the corresponding establishment of judicial review are widely perceived as power-diffusing measures often associated with liberal or egalitarian values. As a result, constitutionalization is portrayed by conventional theories of constitutional transformation as reflecting a polity's "pre-commitment" against its members' own imperfections or harmful future desires,⁵⁷ and/or a polity's convergence to an all-encompassing, post-World War II thick notion of democracy and universal prioritization of human rights and judicial review.⁵⁸ From a more functionalist standpoint, constitutionalization is often portrayed as reflecting a general waning of confidence in technocratic government and a consequent desire to restrict discretionary powers of the state. According to this thesis, constitutional courts tend to be more powerful in polities requiring them to police federalism or separation of powers boundaries.⁵⁹ Constitutionalization may also reflect an attempt to mitigate tensions in ethnically divided polities through the adoption of federalism and other power-sharing principles.⁶⁰ According to institutional economics and public choice theories of constitutional

56. VAN EVERA, *supra* note 41, at 86-7.

57. See, e.g., JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1988); and STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995).

58. The most prominent proponent of this view is Ronald Dworkin. See, e.g., RONALD DWORKIN, *A BILL OF RIGHTS FOR BRITAIN* (1990); and RONALD DWORKIN, *FREEDOM'S LAW* (1996).

59. See, Martin Shapiro, *The Success of Judicial Review and Democracy*, in MARTIN SHAPIRO & ALEC STONE-SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* (2002).

60. The works that propose various versions of this "consociational" approach are too numerous to cite. Some of the most prominent exponents of this line of thought are Donald Horowitz, Arend Lijphart, and Yash Ghai.

transformation, the constitutionalization of rights and the establishment of judicial review increase economic predictability and efficiently mitigate systemic collective-action problems such as coordination, commitment, and enforcement.⁶¹

Unfortunately, however, none of these prevalent theories of constitutional transformation is based on a genuinely comparative systematic or a detailed analysis of the political vectors behind any of the actual constitutional revolutions of the past two decades. What is more, none of these theories account for the great variance in the timing, scope and nature of constitutional reform. The applicability of some of these theories (e.g. the federalism/consociationalism theory of constitutionalization) is limited to a small number of countries in the first place. More importantly, if we apply any of these constitutional transformation theories to any given "new constitutionalism" polity, it is hard to see why members of that polity chose to embark upon the post-World War II constitutional supremacy model in the year they did, and not earlier. Likewise, if a given polity indeed requires efficient mitigation of systemic collective-action problems, how can we explain the fact that earlier attempts to resolve these problems through constitutionalization in that polity have failed? Furthermore, conventional theories of constitutional transformation tend to focus exclusively on explaining constitutional change, while overlooking constitutional stalemate. These theories ignore human agency, and the fact that legal innovations require legal innovators – people who make choices as to the timing, scope, and extent of legal reforms.

To address this lacuna, I devote a substantial portion of a recently published book to a comparative study of the political origins of constitutionalization in established democracies.⁶² My underlying assumptions in addressing the origins of judicial empowerment through constitutionalization are: (1) the expansion of judicial power is an integral part and an important manifestation of the concrete social, political, and economic struggles that shape a given political system; it could not have developed and cannot be understood in isolation from them; (2) the political origins of constitutional reform cannot be studied in isolation from the political origins of constitutional stalemate and stagnation; (3) other variables being equal, prominent political, economic, and judicial actors are more likely to favor the establishment of institutional structures that will benefit them the most; and (4) constitutions and judicial review hold no purse-strings,

61. See, e.g., Douglas North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. ECO. HIS. 803 (1989); Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 286 (1993).

62. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

have no independent enforcement power, but nonetheless limit the institutional flexibility of political decision-makers. Therefore, the voluntary self-limitation through the transfer of policy-making authority from majoritarian decision-making arenas to courts seems to run counter to the interests of power-holders in legislatures and executives. Unless proven otherwise, the most plausible explanation for voluntary, self-imposed judicial empowerment is therefore that political, economic, and legal power-holders who either initiate or refrain from blocking such reforms estimate that it best serves their interests to abide by the limits imposed by increased judicial intervention in the political sphere. Put more succinctly, those who are eager to pay the price of judicial empowerment must assume that their position (absolute or relative) would be improved under a "juristocracy."

Specifically, I suggest in *Towards Juristocracy*, that judicial empowerment through constitutionalization in many "new constitutionalism" countries resulted from self-interested actions taken by hegemonic, yet threatened, sociopolitical groups fearful of losing their grip on political power. Constitutionalization may provide an effective solution for influential groups who possess better access to, and influence upon, the legal arena, and who, given serious erosion in their popular support, may seek to entrench their policy preferences against the growing influence of "peripheral" groups and interests. Such a strategic, counter-intuitive self-limitation may be beneficial to threatened political elites and power-holders when the limits imposed on rival elements within the body politic outweigh the limits imposed on themselves. Strategic, self-interested legal innovators – threatened political elites in association with economic and judicial elites who have compatible interests – determine the timing, extent, and nature of constitutional reforms. Judicial empowerment through the constitutionalization of rights is often not a reflection of a genuinely progressive revolution in a polity; rather it is evidence that the rhetoric of rights and judicial review has been appropriated by certain groups to bolster their own position in the polity.

Understanding judicial empowerment as a form of hegemonic preservation by threatened elites may shed light on the political vectors behind the constitutional revolutions in formerly Westminster-style polities such as Canada, South Africa, and Israel. Canada's 1982 adoption of the Charter of Rights and Freedoms was part of a broader strategic response by the federalist, anglophone, business-oriented elites to the growing threat of Quebec separatism and the rapidly changing demographics of Canadian society. Similarly, the near-miraculous conversion to constitutionalism and judicial review among South Africa's white political and business elites during the late 1980s and early 1990s occurred when it became clear that the days of apartheid were numbered and an ANC-controlled govern-

ment became inevitable. Israel's 1992 adoption of two new Basic Laws protecting core rights and liberties, coupled with the corresponding establishment of constitutional review in 1995 and the Israeli Supreme Court's continuous anti-religious jurisprudence over the past fifteen years, were part of a strategic response by Israel's secular bourgeoisie who had been rapidly losing its historical political dominance.

Likewise, the 1994 judicial empowerment through constitutional reform in Mexico was a calculated attempt by the then-ruling party (Partido Revolucionario Institucional) to lock in its historic influence over the judicial branch before the PRI's increasingly popular political opponents (and eventual winners of the 2000 presidential election) gained control.⁶³ The same logic may also explain the scope and timing of the June 1991 constitutionalization of rights in British-ruled Hong Kong, which occurred less than two years after the British Parliament ratified the Joint Declaration on the Question of Hong Kong, thereby restoring the province to China on July 1997, or Britain's enthusiastic support for the codification of property rights in the "independence constitutions" of newly self-governing African states (e.g. Ghana in 1957, Nigeria in 1959, and Kenya in 1960), which occurred despite Britain's unwillingness at the time to incorporate the provisions of the European Convention on Human Rights into its own legal system (let alone to enact a constitutional bill of rights of its own). Strong constitutional courts were established in predominantly Islamic polities such as Egypt and Turkey as part of a broad strategy by secularist, relatively cosmopolitan elites in these countries to tame the increased popularity of anti-secularist political forces.⁶⁴ This type of strategic constitutionalization may also explain the timing of the recent attempt to adopt an EU Constitution as a measure allowing powerful stakeholders within the EU to enjoy the geopolitical and macroeconomic benefits of enlargement without risking the embedded uncertainty, potential divergence, and other accompanying perils posed by the EU's spread to central and eastern Europe.⁶⁵ It suggests that the contemporaneous emergence of the enlargement and the constitutionalization processes is anything but coincidental.

Without debating the substantive merits of the "hegemonic preservation" thesis, case selection was a crucial aspect of my project's design.⁶⁶ At a first glance, the possibilities for case selection seem

63. See Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 47 LAT. AM. POL. & SOC. 87 (2005).

64. See Hirschl, *supra* note 39.

65. See Ran Hirschl, *Preserving Hegemony? Assessing the Political Origins of the EU Constitution*, 3 I-CON: INT'L. J. CONST. L. 269 (2005).

66. For a discussion of the merits of this thesis see, e.g., Leslie Goldstein, *From Democracy to Juristocracy*, 38 L. & SOC. REV. 611 (2004); Mark Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005). For additional discussion see, 16 EUR. J. INT'L. L. 160 (2005); 14 L. & POL. BOOK REV. 552 (2004).

endless. Around the globe, in more than eighty countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries. The countries that have hosted this expansion of judicial power stretch from the Eastern Bloc to Canada, from Latin America to South Africa, and from Britain to Israel. This spate of constitutional reform reflects a number of common constitutionalization scenarios.

From an empirical perspective, the majority of constitutional revolutions over the past few decades represent five common scenarios. First, constitutionalization may stem from political reconstruction in the wake of an existential political crisis (e.g. the adoption of new, post-World War II constitutions in Japan in 1946, in Italy in 1948, in Germany in 1949, and in France in 1958). Likewise, constitutionalization may stem from de-colonization processes (e.g. India in 1948-1950), or may be derivative of a transition from authoritarian to democratic regimes (e.g. the constitutional revolutions in newer democracies in Southern Europe in the 1970s, and in Latin America in the late 1980s and early 1990s). Additionally, constitutionalization may reflect a "dual transition" scenario, in which constitutionalization is part of a transition to both a Western model of democracy and a market economy (as with the numerous constitutional revolutions of the post-communist and post-Soviet countries). Finally, the incorporation of international and trans- or supranational legal standards into domestic law is another possible explanation for constitutionalization (e.g. the recent passage of the Human Rights Act 1998 in Britain, which effectively incorporated the provisions of the ECHR into British constitutional law).

Each of these types of constitutional reform poses its own puzzles for scholars of public law and judicial politics. It is the "no apparent transition" scenario of constitutional revolutions, however, that I find the most intriguing from a methodological standpoint. In this "none of the above" category, constitutional reforms have neither been accompanied by, nor resulted from, any apparent fundamental changes in political or economic regimes.⁶⁷ The constitutional revolutions in Canada (1982) and Israel (1992-1995), for example, provide nearly ideal testing-grounds for identifying the political origins and consequences of the constitutionalization of rights and the fortification of judicial review. The two countries have undergone a major constitutional reform over the past two decades. However, unlike many former Eastern Bloc countries, for example, these dramatic constitutional changes have neither been accompanied by, nor re-

67. Some examples would be the constitutional revolution and the corresponding establishment of active judicial review in Sweden (1979), Egypt (1980), Canada (1982), New Zealand (1990), Israel (1992), Mexico (1994), and Thailand (1997).

sulted from, major shifts in political regime. As such, by selecting these "no apparent transition" cases it is possible to disentangle the political origins of constitutionalization from other possible explanations (reconstruction, independence, democratization, incorporation).

Moreover, these cases provide an effective response to efficiency-driven explanations for constitutionalization as mitigating problems of information, credible commitment and effective enforcement; it is unclear why any of these polities chose to adopt such efficient mechanisms precisely at the time they did, and not earlier. Likewise, these cases offer a cogent response to the broad "democratic proliferation," "constitutionalization in the wake of World War II," and "constitutionalization as pre-commitment" theses. In both cases, it is unclear why members of the Canadian or Israeli public decided to pre-commit themselves against their own imperfections or harmful future desires precisely in 1982 (Canada) or in 1992 (Israel), and not a decade earlier or later. In short, none of the broad explanations account for the precise timing of the recent constitutional revolutions in Canada and Israel.

But there is even more to selecting these cases. When studying the political origins of constitutionalization (as well as the political origins of other institutional reforms), it is important to take into account events that did *not* occur and the motivation of political power-holders for not behaving in certain ways. In other words, the political origins of constitutional reform cannot be studied in isolation from the political origins of constitutional stalemate and stagnation. By studying the origins of constitutional stagnation in the pre-constitutionalization era in Canada and Israel, we are able to compare a series of "no cause/no effect" observations (at least with respect to the new explanation and independent variable) with a series of combined "cause and effect" observations. The very selection of these outlier cases, therefore, helps substantiate the hegemonic preservation thesis both by a-priori elimination of other possible explanations and by establishing controlled comparison of "cause and effect" cases versus "no cause/no effect" cases.

III. CONCLUSION

Topical subjects such as comparative constitutionalism have fascinated legal academics worldwide. But the decision to study a particularly broad or pressing topic does not necessarily translate into a methodologically astute research design.⁶⁸ The central argument of this paper is that the time is ripe for scholars of comparative constitutional law and, more generally, comparative public law, to further

68. BARBARA GEDDES, *PARADIGMS AND SAND CASTLES: THEORY BUILDING AND RESEARCH DESIGN IN COMPARATIVE POLITICS* (2003).

release themselves from traditional doctrinal constraints, and contribute more significantly to the accumulation of theoretical knowledge through the deployment of more methodologically rigorous methods of research design and case selection.

This argument is twofold. First, while the field has made a remarkable leap forward over the past few years – primarily through comparative research aimed at generating thick, multi-faceted descriptions, concepts, and thinking tools – most leading works in the field still lag behind the social sciences in their ability to use controlled comparison to trace causal links among pertinent variables. Despite the tremendous progress in the field over the last decade, *causal inference* – arguably, the ultimate goal of scientific inquiry, quantitative or qualitative, positivist or hermeneutical – remains largely beyond the purview of comparative constitutional law scholarship.

This may be explained, in part, by traditional doctrinal boundaries, trajectories of academic training, and the different epistemologies of social and legal inquiry. In part, it reflects the genuine concern of some legal historians and anthropologists with context, meaning, and contingencies. Most of the gap, I suspect, is reflective of the generally blurred, not to say underdeveloped, methodological matrix of comparative constitutional law. Either way, too many constitutional comparativists still adhere to a convenient “cherry picking” approach to case selection while overlooking (or being unaware of) basic methodological principles of controlled comparison and research design frequently drawn upon in the social sciences. Continuous reliance on such an a-systematic and methodology-light practice of research design and case selection does not serve the cause of serious theory building well.

To be sure, reliance on comparative research in the quest for *explaining* variance in legal phenomena across polities is not foreign to the legal discipline. Explanation, not merely description or taxonomy, has long been a main objective of evolutionist and functionalist approaches to legal transformation, and to comparative law more generally.⁶⁹ It has also characterized the law and economics movement, as well as the emerging trend toward empirical legal scholarship. There is no apparent *a-priori* or systemic reason why the study of comparative constitutional law could not engage in a more explanation-oriented mode of scholarship.

Granted, detailed taxonomy, let alone the formation of sophisticated concepts, is a fundamental element of any academic inquiry. It

69. For a general survey of the evolutionist tradition in comparative law see, e.g., PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* (1980). For a general survey of the functionalist tradition in comparative law see, e.g., Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES*, *supra* note 49.

is of great significance to the study of the yet under-charted terrain of comparative constitutional law. What is more, adherence to quasi-scientific, inference-oriented principles of research design is certainly not the only valuable mode of social, let alone legal inquiry. Any type of academic inquiry that advances our knowledge and understanding of the enterprise of public law in a meaningful way – be it qualitative or quantitative, normative or positivist, descriptive or analytical – is potentially of great value. In fact, my own vision of social science methodology is similar to Henry Brady's "workshop of tools" analogy, whereby all methods are "constantly being used and redesigned to fashion an understanding of reality," and where "there is no master tool, but there is constant attention to improving the relationship between the tools and the projects at hand."⁷⁰ Accordingly, adherence to inference-oriented principles of research design and case selection is not required as long as one does not profess to determine causality or to develop explanatory knowledge. However, intellectual integrity warrants that one follows inference-oriented research design and case selection principles when aspiring to establish meaningful causal claims or explanatory theories through comparative inquiry. Neither advanced knowledge of the epistemological foundations of social inquiry nor mastery of complex research methods is required. As we have seen, adherence to a few basic inference-oriented case selection principles such as the "most similar" and "most different cases," the "prototypical cases," the "most difficult cases," and the "outlier cases" logic fills this gap. Abiding by these principles lends credence to causal claims based on them.

Second, closer attention to, and more frequent deployment of, such inference-oriented case selection principles would be of particular value in the study of the transnational migration of constitutional ideas. After all, despite the general agreement that a large-scale migration of constitutional ideas has been taking place, we still know precious little about the actual extent of this phenomenon, let alone why, when, and how such migration has been occurring or is likely to occur. Which polities and courts are more receptive to transnational migration of constitutional ideas than others, and why? Which types of constitutional controversies are more conducive to inter-court borrowing? What is the impact of the migration of constitutional ideas on methods of constitutional interpretation and reasoning? What interlinks can be identified between the triumph of democracy, the emergence of an economic and cultural "global village," and the transnational migration of constitutional ideas? What accounts for the variance in scope, nature, and timing of various countries' convergence to the constitutional supremacy model? Why is the migration of con-

70. Henry Brady, *Symposium, Two Paths to a Science of Politics*, 2 PERSP. ON POL. 297 (2004).

stitutional ideas happening, and who are its main agents and advocates? These and other pertinent questions seek to explain and to determine causality, not merely to map or to describe certain phenomena. Thus, comparative studies that address such questions must pay close attention to methodological concerns and follow inference-oriented research design and case selection principles.