CHAPTER 2

COMPARATIVE CONSTITUTIONAL LAW: METHODOLOGIES

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METHODOLOGIES of constitutional comparison vary at least as much as, if not more than, do methodologies more generally in comparative law. Methods vary in what they aim to do and in who is engaged in comparisons, particularly if the comparative enterprise is defined broadly to include doctrine produced by courts, features of government (such as parliamentary vs presidential systems, more typically studied by comparative government than by constitutional law scholars), and the processes of constitution-making and adoption. The methodological categories have considerable overlap and a single work may include examples of multiple methodologies, for example classificatory work and functional analysis.

The primary practitioners of comparative constitutional law are scholars—not only legal scholars, but also social scientists or historians who bring distinct disciplinary perspectives to the analysis of law, legal institutions, and legal change. In addition to scholars, adjudicators—including judges of national supreme or constitutional courts—sometimes consult, and perhaps less frequently refer to, comparative constitutional law and government experience in other countries. Finally, 'constitutional legislators'—those charged with drafting of new constitutions or constitutional amendments—quite commonly engage in comparative constitutional examination. Although constitutional adjudicators and constitutional legislators often draw from the work of constitutional scholars, their context and goals at times frame distinc-

tive methodological orientations. This chapter will briefly discuss the different communities of comparative constitutional analysis and will close by noting some methodological challenges of comparative constitutional analysis.

I. Comparative Constitutional Scholarship

The world of comparative constitutional scholars includes several broad classes of methodological approach, which this chapter describes as (1) classificatory, (2) historical, (3) normative, (4) functional, and (5) contextual. Each of these categories may overlap with others in scholarly practice. Moreover, within these categories, different techniques may be used, as diverse as detailed analysis of one or more foreign constitutions' development, or constitutional courts' doctrine, on a matter of domestic interest, to case studies of one or two countries across historical and/or doctrinal development, to explorations of judicial self-understanding of role, to overtly comparative case studies by country of particular issues, to large-N statistical analyses of particular phenomena. Some of these techniques may be associated with particular kinds of inquiries; for example, large-N works tend to ask causal, functional questions;[1] detailed case studies tend to have historic and/or contextual focuses; normative work may be pursued through a number of different techniques. I illustrate these points below.

1. Classificatory Work: 'Families', Regional, Emerging

Much work in comparative law generally has been concerned with the classification of different legal systems into what has sometimes been described as 'families' of law. In comparative constitutional law, a number of contemporary works have explored the significance of the different 'families' of constitutional law, notably the divide between civil and common law legal systems, and between 'centralized' or 'decentralized' constitutional review.[2] Allan-Randolph Brewer-Caraís, for example, has analyzed the logical, as well as empirical, differences and similarities between constitutional review in civil and common law countries and its 'hybrid' forms in South America, challenging conventional assumptions that common law and civil law countries will consistently differ along the same axis in how they structure judicial review.[3]

[1] The term 'large-N' is used to here to refer to studies with a large enough set of comparators and factors to be subject to quantitative, statistical analysis designed to test and explore correlations and associations. Widely described as a valuable tool to test hypotheses generated by qualitative research, such studies, it is claimed, can also reveal magnitudes of effects and interactions not revealed by other methods. See eg Michael Coppedge, 'Theory Building and Hypothesis Testing: Large- vs Small-N Research on Democratization', Paper prepared for presentation at the Annual Meeting of the Midwest Political Science Association, Chicago, Illinois, April 25–27, 2002, available at <http://www.nd.edu/~mcoppedg/crd/mpsacoppo2.pdf>. See also Joachim Blatter, 'Case Studies' in Lisa M. Given (ed), *The Sage Encyclopedia of Qualitative Research Methods* (2008), vol 1, 68–9 (suggesting, inter alia, that case studies are more likely to produce 'theoretical innovation', while large-N studies help 'control the empirical scope of new theoretical concepts'; that large-N studies tend to focus on causal claims, while case studies tend to be more descriptive or interpretive; and that large-N statistical studies are associated with establishing external validity, while case studies are more associated with constructing internal validity).

[2] Louis Favoreu, 'Constitutional Review in Europe' in Louis Henkin and Albert J. Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (1990), 38–62; Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (1989).

[3] Allan-Randolph Brewer-Caraís, *Judicial Review in Comparative Law* (1989) and *Reflexiones Sobre el Constitutionalismo en América* (2001); see also Louis Favoreu, *Constitutional Courts* (2001).

More recent scholarship has examined convergences as well as differences between centralized constitutional review in specialized constitutional courts and judicial review in more general supreme courts.[4] There is considerable scholarly work classifying domestic constitutional regimes as 'monist' or 'dualist' for purposes of international law; increasingly, these categories are being recognized as inadequate descriptors of the far more complex array of relationships national constitutions take towards the role of international sources of law in the domestic order.[5]

'Area' studies also contribute to efforts at classification, or better understanding of possible classification, of constitutional systems.[6] A key question is whether there are distinctive features of constitutional development in a region, either because of conquest or colonial influences, common religious or cultural heritage, or other aspects of the geopolitical legal environment. Although area studies depend on the distinctiveness and cohesiveness of geographic association, some 'area' work might be thought of as deconstructing its own analytic foundation, for example by denying claims of certain distinctively Asian forms of constitutionalism, while remaining conscious of the question of the effect of the regional characteristics.[7] Some work focuses on other regional constitutional characteristics, as in studies of presidentialism in Latin America[8] or Africa,[9] or of the relationships between state, rulers, people, and religion in Arab or Muslim countries.[10]

A wide literature exists on whether Europe has a constitution, and what this means.[11] This literature, often abstract and conceptual, at times seems to lack a self-consciousness of the possibility of understanding the query as one of 'area studies'. The literature is not concerned so much with exploring what is distinctive about the European setting but rather with characterizing what that setting is; indeed, some of this literature suggests that the legal conceptual-

[4] Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (2010) and 'The European Model of Constitutional Review of Legislation: Toward Decentralization?' (2004) 2 *International Journal of Constitutional Law* 461.

[5] Melissa A. Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628; Tom Ginsburg, 'Locking in Democracy: Constitutions, Commitment, and International Law' (2006) 38 *New York University Journal of International Law and Policy* 707.

[6] On Asia, see Andrew Harding, 'Comparative Public Law: Some Lessons from South East Asia' in Andrew Harding and Esin Oriicu (eds), *Comparative Law in the 21st Century* (2002); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003); Tania Groppi (ed), *Asian Constitutionalism in Transition: A Comparative Perspective* (2008).

[7] Jiung-Ronn Yeh and Wen-Chen Chang, 'The Emergence of East Asia Constitutionalism: Features in Comparison', Asian Law Institute Working Paper Series No 006, 2009, available at <http://law.nus.edu.sg/asli/pdf/WPS006.pdf>.

[8] Juan J. Linz, 'The Perils of Presidentialism' (1990) 1 *Journal of Democracy* 51; Carlos Santiago Nino, 'Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America' in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993).

[9] H.W.O. Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Greenberg (n 8). For a regionally focused study of approaches to religious freedom, see Makau wa Mutua, 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context' (1999) 5 *Buffalo Human Rights Law Review* 75.

[10] Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (2002); Abdullahi Ahmed An-Naim, *African Constitutionalism and the Role of Islam* (2006).

[11] J.H.H. Weiler, *The Constitution of Europe* (1999); Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999); Kalypso Nicolaïdis and Stephen Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (2003).

izations called forth in Europe may be of use more generally to the rest of the world.[12] Nonetheless, there is a sense in which much of the literature concerned with the question of whether and what kind of 'constitution' Europe has, or may have, could be seen as a classificatory form of area studies.

Other forms of classificatory studies, conducted largely by political scientists, focus on particular attributes of constitutional systems, for example the classification of presidential and parliamentary systems, or of electoral systems, or of federal or more consociational forms of organization.[13] Some classificatory studies identify new and emerging categories of constitutional systems or phenomena. The literature on European constitutionalism has some of these characteristics,[14] as does work identifying and analyzing such new developments as 'weak form' judicial review, or 'commonwealth constitutionalism'.[15] So, too, does the work, often done by those with training in political science, analyzing emerging typologies of organizing executive and legislative power,[16] or identifying other constitutional phenomena previously overlooked.[17]

In addition to comparative work focused on large structural issues, there is a considerable amount of comparative scholarship that explores emerging trends in doctrine and interpretive methodology. Consider here the work being done examining doctrine in different countries around the methodological approach of proportionality or balancing as compared with formalism, or originalism, as efforts to understand 'families' of interpretive approaches, rather than 'families' of overall systems.[18]

Finally, there are revisionist or cautionary forms of classificatory or emergent phenomena, comparative constitutional scholarship, such as on the entrenchment of investment regimes that limit the regulatory and fiscal capacities of domestic governments.[19] We might likewise

[12] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World?: International Law, Global Governance, Constitutionalism* (2009).

[13] Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1994); Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 *Journal of Democracy* 96; Donald L. Horowitz, *Ethnic Groups in Conflict* (2000) and 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States' (2008) 49 *William and Mary Law Review* 1213; John McGarry and Brendan O'Leary, 'Iraq's Constitution of 2005: Liberal Consociation as Political Prescription' (2007) 5 *International Journal of Constitutional Law* 679.

[14] Pavlos Eleftheriadis, 'The Idea of a European Constitution' (2007) 27 *Oxford Journal of Legal Studies* 1; Neil Walker, 'Reframing EU Constitutionalism' in Dunoff and Trachtman (n 12).

[15] Mark V. Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781 and *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009); Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707. See also Stephen Holmes and Cass Sunstein, 'The Politics of Constitutional Amendment in Eastern Europe' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995), 286.

[16] Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the Fifth French Republic* (2005); Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633.

[17] David Fontana, 'Government in Opposition' (2009) 119 *Yale Law Journal* 548.

[18] David Beatty, *The Ultimate Rule of Law* (2004); David S. Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652; Vicki C. Jackson and Jamal Greene, 'Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?' in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook in Comparative Constitutional Law* (2011). On the theory of proportionality, see generally Robert Alexy, *A Theory of Constitutional Rights* (2009); see also Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2009) 47 *Columbia Journal of Transnational Law* 72.

[19] David Schneiderman, 'Comparative Constitutional Law in an Age of Economic Globalization' in Vicki C. Jackson and Mark Tushnet (eds), *Defining the Field of Comparative Constitutional Law* (2002).

include work on increased executive, vis-à-vis legislative, power resulting from national and international responses to terrorism and other global problems, as a challenge across many countries for constitutionalism, with a wide range of potential normative ramifications.[20]

So classificatory scholarship can be backward-looking in historical or intellectual ways; it can be concerned with defining a relatively stable framework for classification and analysis. In its more historical forms focused on colonial relationships, it can also be concerned with identifying a normatively doubtful legal basis for constitutional phenomena, in order to explain existing circumstances or lay a foundation for change.[21] Yet classificatory scholarship can also be forward-looking, concerned with identifying and analyzing new phenomena. Stable and emergent classification can coexist in the same work. And for some scholars, classificatory work is a predicate for their functional conclusions.

2. Historical Work and the Migration of Constitutional Ideas

Classificatory work is closely related to historical work. Historical work is concerned with understanding the development of constitutional law or constitutional systems over time. There may be both 'genetic' forms of connections between systems, based on the influence one has on the development of another,[22] and 'genealogical' forms of connection, where one (or more) constitutional system(s) grew out of another, typically in countries emerging out of colonial relationships.[23] Scholarly work may proceed by examining how two systems that originate in a common legal system, or one system that originates in another, develop over time in similar or different ways.[24] It may also examine how a legal concept that exists in one system influences or migrates to another, focusing not only on the path of ideas but also on how those ideas are transmitted, for example as through graduate study abroad.[25] Historical work concerned with the influence and movement of constitutional ideas across national boundaries often exhibits a degree of skepticism about strong claims of 'transplants' found in the more general comparative literature.[26] Another form in which this work on migration of ideas occurs is one that identifies the historical role of transnational legal influences on a single constitutional system.[27]

[20] Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 1001 and 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006); Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241.

[21] Okoth-Ogendo (n 9), 65–84; Nino (n 8).

[22] See Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994); Henkin and Rosenthal (n 2); Jonathan M. Miller, 'The Authority of a Foreign Talisman: A Study of US Constitutional Practice As Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith' (1997) 46 *American University Law Review* 1483.

[23] Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819.

[24] See eg Martha A. Field, 'The Differing Federalisms of Canada and the United States' (1992) 55 *Law and Contemporary Problems* 107.

[25] David S. Law and Wen-Chen Chang, 'The Limits of Transnational Judicial Dialogue' (2011) 86 *Washington Law Review* 523.

[26] Symposium, 'Constitutional Borrowing' (2003) 1(2) *International Journal of Constitutional Law*; Choudhry (n 20); cf Eivind Smith, 'Give and Take: Cross-Fertilisation of Concepts in Constitutional Law' in Jack Beatson and Takis Tridimas (eds), *New Directions in European Public Law* (1998).

[27] See eg Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (2010), 103–16.

An important development in this field is Choudhry's concept of 'migration' of constitutional ideas—an idea that represents a broader range of influences on a broader range of actors than much of the pre-existing literature reflected. Yet 'the migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice',[28] with far more complex cross currents than reflected in early work on the influence of the US Constitution.[29] More recent literature, for example, tracks the German constitutional influence on India's 'basic structure' doctrine,[30] the relative influence of German and US constitutional ideas in newer constitutional systems,[31] or the changing relationships between international law, foreign constitutional law, and domestic constitutional development.[32]

A cautionary note is sounded by Mark Tushnet's argument that comparative study of constitutions reveals a degree of 'bricolage', that is, of more or less random adaptation of what is 'at hand' in ways that contribute to a certain eclecticism within individual constitutions that poses challenges to interpretive theories founded on the coherence of legal instruments.[33] Migration may appear random and adventitious, as is generally appreciated in the comparative law literature,[34] and may also reflect competitive efforts among the universities of the world for foreign students.

Historical or positive analysis of the development or operation of a particular constitutional system, or set of systems related by region or history, may be explored through a framework that seeks both to understand it internally and to make it accessible to readers from other legal systems.[35] Such works are either explicitly or implicitly comparative, engaged both in analytical description and translation of national contexts for readers from other systems; at the same time, these works usually rest on implicit, or draw explicit, normative and/or functional conclusions.

Although scholarship in this vein is not typically quantitative, the field of 'citation studies' does employ empirical methods to attempt to analyze the role or influence of foreign or international law in domestic constitutional decisions. Thus, quantitative studies have sought to focus on the behavior of particular national constitutional courts in referring to transnational sources of law, how often the court refers to foreign law as compared to international law, or on the influence of particular courts in the jurisprudence of other coun-

[28] Choudhry (n 20), 13.

[29] See Henkin and Rosenthal (n 2).

[30] Sudhir Krishnaswamy, *Democracy and Constitutionalism In India: A Study of the Basic Structure Doctrine* (2009), xxvi–xxvii.

[31] Law and Chang (n 25).

[32] Jackson (n 27), 255–79.

[33] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225.

[34] Alan Watson, 'Aspects of Reception of Law' (1996) 44 *American Journal of Comparative Law* 335, 339–41 (noting the 'chance' that students from several African countries studied in Scotland, leading to reliance on Scots law by jurists in those countries).

[35] See eg Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of German* (2nd edn, 1997); John Bell, *French Constitutional Law* (1992); Alec Stone, *The Birth of Judicial Politics in France* (1992); Mary Volcansek, *Constitutional Politics in Italy: The Constitutional Court* (2000); Kim Lane Scheppele, 'Guardian of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154 *University of Pennsylvania Law Review* 1757; Heinz Klug, 'Constitution-Making, Democracy and the "Civilizing" of Unreconcilable Conflict: What Might we Learn from the South African Miracle?' (2007) 25 *Wisconsin International Law Journal* 269; Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (2000).

tries.[36] As its most sophisticated practitioners recognize, such studies provide only a partial and potentially misleading guide to influence; courts may be influenced by ideas from foreign or international legal systems without acknowledging the debt by citation. Both 'silent dialogues'[37] and 'prudential silences'[38] may result in noncitation of foreign material of which judges were aware and which influenced decision. At the same time, citations to foreign or international law may be more 'decorative' or supplementary in character, not analytically significant in the underlying decision. Citation studies thus provide only a partial picture, as they suggest trends in the courts' willingness to manifest an awareness of comparative or international law.

3. Universalist Search for Just or Good Principles

An important, yet at the same time controversial, form of comparative analysis is the effort, in Donald Kommers' words, to discover through comparative study, 'principles of justice and political obligation that transcend the culture bound opinions and conventions of a particular political community'.[39] For a similar normative aspiration expressed by another constitutional scholar, consider A.E. Dick Howard's view that 'comparative studies can . . . nourish our search for principles of ordered liberty and for theories of a just society'.[40] This approach has been termed a 'universalist' approach to comparative constitutional study.[41]

Much comparative work—even work that is 'classificatory', 'historical', or 'functionalist'—is motivated by a search, implicit or explicit, for transcendent principles—of the good, or the just—in constitutional theory, institutions, and doctrine. There is a literature—in comparative government, in philosophy, and in political science—about theories of the good society, work that may be informed by knowledge of constitutional practices in various countries. Yet foreign legal sources in such work may be examined, not with a view to understanding their comparative setting, but rather with a view towards constructing a general theory, using various legal sources as examples to help to refine, and to clarify, the analytics of a general problem in democratic or political theory, for example the relationship of equality to legitimacy,[42] or of judicial review and democracy.[43]

[36] See C.L. Ostberg et al, 'Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada' (2001) 34 *Canadian Journal of Political Science* 377; Bijon Roy, 'An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation' (2004) 62 *University of Toronto Faculty Law Review* 99; Devika Hovel and George Williams, 'A Tale of Two Systems: Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 95; Peter McCormick, 'The Supreme Court of Canada and American Citations, 1945–94: A Statistical Overview' (1997) 8 *Supreme Court Law Review (2d)* 527; Shannon Ishiyama Smithey, 'A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa' (2001) 34 *Comparative Political Studies* 1192.

[37] Judith Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry' (2005) 115 *Yale Law Journal* 1564.

[38] Jackson (n 27), 192.

[39] Donald P. Kommers, 'The Value of Comparative Constitutional Law' (1976) 9 *John Marshall Journal of Practice and Procedure* 685.

[40] A.E. Dick Howard, 'A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism' (2009) 50 *Virginia Journal of International Law* 3, 41.

[41] Choudhry (n 23).

[42] See eg Wojciech Sadurski, *Equality and Legitimacy* (2008), 93–146.

[43] See eg Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

In other work on constitutional theory by those who identify themselves as constitutional scholars, there is more attention to comparative analysis as a central means of trying to answer important jurisprudential or philosophical questions. Recent examples would include Michel Rosenfeld's scholarship exploring 'essential jurisprudential characteristics of the respective conceptions of the rule of law in three different legal traditions[:]... the German conception of the Rechtsstaat;... the French notion of the Etat de droit; and... the Anglo-American common law based elaboration of the idea of "the rule of law"' to analyze the rule of law's role in legitimating constitutionalism in democracies,[44] or work by social scientists theorizing the relationship between constitutionalism and democratic politics based on selected comparative case studies.[45] Moreover, ideas drawn from comparative constitutional study about the nature of constitutionalism itself have begun to influence scholarly discourses in international law, international organization, and global legal studies, with volumes devoted to the possibilities for 'world constitutionalism'.[46]

In addition to large-scale theories about justice and the nature of constitutions and constitutionalism, there is a middle level of theorizing towards good or just principles that is an important strand in this literature, focused more on specific doctrine and specific institutions. Comparative analysis is deployed to criticize the implications of domestic constitutional doctrine for presumptively shared or universal norms of equality, or democracy, or human dignity. Such discussions are found on a wide range of issues, including the legitimate scope of punishment, defenses to defamation, criminal sedition, whether hateful speech can be prohibited or must be protected, the permissible scope of campaign finance laws,[47] or the constitutionality of actions that have the effect, but not the purpose, of harming disadvantaged groups.[48] An interesting body of literature explores comparative approaches to social rights, or horizontal effects of constitutional rights.[49] This work is typically characterized by doctrinal analyses. Scholars' exploration of the varying assumptions, and interpretive approaches, of comparator countries may serve self-reflective normative purpose—at once trying to understand other systems and identify improvements of one's own.

Comparative work in this vein can focus not only on reform in the sense of identifying normatively more attractive and justice-seeking approaches but also on what Kim Scheppele has aptly described as 'aversive precedent',[50] exploring in normative terms the role of comparative examples as the antithesis of what countries properly committed to shared or universal values (of democracy, limited government, or the like) should aspire to. This method may be

[44] Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *Southern California Law Review* 1307, 1309.

[45] Andrew Arato, *Civil Society, Constitution, and Legitimacy* (2000); Ulrich K. Preuss, *Constitutional Revolution: The Link Between Constitutionalism and Progress* (1995).

[46] Ronald MacDonald and Douglas Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005); see also Dunoff and Trachtman (n 12).

[47] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009), 6–8.

[48] See eg Vicki C. Jackson, 'Review of Laws Having a Disparate Impact Based on Gender' in Mark V. Tushnet and Vikram David Amar (eds), *Global Perspectives on Constitutional Law* (2009), 130–45.

[49] See eg Helen Hershkoff, 'Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings' in Varun Gauri and Daniel M. Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008), 290; Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory And Practice* (2007).

[50] See Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296.

contrasted, for example, with that of Choudhry's analysis of the negative impact of *Lochner* on Canadian constitution-making and constitutional law;[51] that approach is more positive and historical, than normative or reformist, even though some of the techniques of investigation—including close analysis of doctrinal development—may be similar.

As has been observed, universalist justice-seeking approaches to comparative constitutional law most typically, though not inevitably, entail comparative work on rights, often linked with literature on human rights.[52] By contrast, functionalist approaches, discussed below, are often deployed in analyzing structural issues, for instance different forms of federalism, or presidentialism, or voting structures. For this reason, universalist scholarship about rights has tended to bring together work on comparative constitutional law with work on international law and especially international human rights and humanitarian law. Yet the search for 'just principles' of human rights law may be no more theoretical or universalist than the search for 'good' principles of government design, even though the reasoning used in connection with the latter search usually, though not always, sounds more in methods of functional consequentialism.[53]

4. Functionalism and Consequentialism; Positive and Normative

Perhaps the dominant method of comparative analysis, in constitutional law, as in other fields of law, is functionalist.[54] The scholar may identify an institution that exists in multiple constitutional systems and explore its function(s); or the scholar may identify one or more functions performed by constitutions or constitutional institutions or doctrines in some societies,[55] and analyze whether in fact the constitutional institution or doctrine believed to perform a valid function does so, or may analyze whether and how that function is performed elsewhere. Sometimes the work is positive, concerned not with questions of normative superiority but, for example, with how different institutions may perform roughly equivalent roles, or how differences in institutional design may correspond with broader differences in political society or behavior. Sometimes the approach is more normative, as where the scholar seeks to identify what constitutional designs or doctrines are better suited to producing consequences that are normatively valuable.[56] Sometimes the scholar may consider whether consequences asserted to flow from some institution or doctrine, questioned in normative grounds, in fact lead to or avoid the consequences its defenders identify. The goals of functional comparison may be as

[51] See Sujit Choudhry, 'The Lochner Era and Comparative Constitutionalism' (2004) 2 *International Journal of Constitutional Law* 5.

[52] Tushnet (n 47); see also Ronald J. Krotoszynski, *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (2006), 6; Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' in Rosalind Dixon and Tom Ginsburg (eds), *Research Handbook in Comparative Constitutional Law* (2011).

[53] For a more deontological argument about institutional design, see Waldron (n 43), 1374–5.

[54] Tushnet (n 33); cf. Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2006), 339–82; David S. Law, 'Constitutions' in P. Cane and H.M. Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (2010).

[55] See eg Beau Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (2009); Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (2007).

[56] See eg Cass Sunstein, *Designing Democracy: What Constitutions Do* (2001). Normative value here might be defined by nonmaterial conceptions of justice and morality, or by a normative commitment to utilitarianism in its various forms.

normative and universalistically theory-seeking as others described earlier, but the techniques used focus more on specific functional comparisons and questions of causation, rather than on the moral, principled appeal of comparative approaches.

Functional comparisons can be advanced through several techniques, including conceptual functionalism, detailed case studies, and large-N studies. *Conceptual functionalism* is a form of analysis that overlaps with the classificatory category: scholars hypothesize about why and how constitutional institutions or doctrines function as they do, and what categories or criteria capture and explain these functions, drawing examples from some discrete number of systems to conceptualize in ways that generate comparative insights or working hypotheses that can be tested through other methods. Thus, for example, Bruce Ackerman explained:

> My aim is to identify (a) one or another common problem confronting different 'constitutional courts,' and then follow up by specifying (b) different coping strategies these courts have adopted as they have tried to solve the problems. Once we have gained some clarity on these two issues, we may hope for a deeper insight into the comparative value of competing coping strategies.[57]

In this same article, Ackerman asked whether there 'are... patterns that repeat themselves in the successful establishment of written constitutions'.[58] This is a positive historical question, but with a functional orientation (and normative underpinning). Ackerman's technique is not quantitative, but a method of drawing insights about functional questions from comparative case studies, a form of 'concept thickening'.[59]

Some of the best work in comparative constitutional law is done in this vein. Consider Mark Tushnet's work, in which a constitutional institution—judicial review—is subjected to critical comparative analysis, both as to its value (in producing the positive consequences its proponents assert) and in terms of how it may in fact work differently depending on its legal status and other mechanisms available in different systems. Or consider Martin Shapiro's analysis, based in part on US experience, of the possible need to 'serv[e] the haves before beginning to serve the have nots' and of focusing on administrative law before constitutional law in countries with weak rule of law commitments as possible 'conditions for the success of constitutional courts' (as measured by courts' willingness to rule against governments),[60] or Ackerman's conceptual work on parliamentary and presidential forms of government.[61] Likewise Victor Ferres Comella compares centralized and decentralized constitutional review in functional terms and then, in a normative turn, makes recommendations for change in the

[57] Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771, 794. See also ibid:

> Much of the best comparative scholarship follows a similar method, first defining a common problem—for example, the protection of freedom of speech—and then considering different doctrinal solutions proposed by different courts, before passing a considered judgment on the best approaches.

[58] Ibid 775.

[59] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125, 129–31.

[60] Martin Shapiro, 'Some Conditions for the Success of Constitutional Courts: Lessons from the US Experience' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (2002), 46–50.

[61] Ackerman (n 16).

way in which centralized review is conducted;[62] Gerald Neuman considers the functions of overlapping systems of constitutional and international human rights protections.[63]

Conceptual functionalism might also include economic or behavioral models of constitutional design, models that may be entirely theoretical, or derived from a single country, but that could, in theory, be tested against different comparative examples. This work may be concerned not only with the relationship between different constitutional designs and various forms of economic success, but also with the relationship between constitutional design and other goods more conventionally thought of as legal, such as protection of minority rights.[64]

Secondly, functional analyses may be reflected in *more detailed case studies* of how a constitutional institution or doctrine actually functions in two or more societies. They may differ only in degree from the more conceptual functionalism, which draws on case studies but of a more limited level of density. Scholars may be attempting to analyze the functional consequences, for good or bad, of a particular institution, as in studies of the effects of constitutional federalism in different countries in affecting social movements for equality of opportunities for women and minorities,[65] in managing ethnic conflict,[66] or to test more rigorously the positive association between an institution or doctrine and its purported positive, or negative, effects. Comparative functional inquiries may also examine the causal relationships between the operation or development of a legal institution, such as judicial review, and other conditions in the political system.[67]

The choice of comparators is relevant to the utility of the effort: comparator countries to be studied may be limited by the languages the scholar is familiar with, or the accessibility of the legal information. As Hirschl has suggested, comparator countries for case studies may be chosen using different techniques, for example those that are 'most similar' (except for the particular doctrine or institution at issue) or those that are 'most different' but seem to have a similar institution or doctrine. And, as Cheryl Saunders has suggested, even within the constraints of language and availability, there are standards of selection that ought to be applied with consistency.[68]

A benefit of the case study method in the comparative setting is the ability to explore how different features of the system may interact with and affect the operation of seemingly similar institutions or doctrines, that is, to see particular institutions or doctrines 'in action' in their own legal contexts. Kent Greenawalt proceeds on the assumption that US and Canadian free speech law is functionally comparable, and then analyzes the differences and relates them to differences in constitutional text and to differences in history.[69] Studies of US and European

[62] Ferreres Comella (n 4).

[63] Gerald L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863.

[64] For a recent review of developments in 'positive constitutional economics', see Stefan Voigt, 'Positive Constitutional Economics II: A Survey of Recent Developments' (2011) 146 *Public Choice* 205.

[65] Lee Ann Banaszak, *Why Movements Succeed or Fail* (1996); Vicki C. Jackson, 'Citizenships, Federalisms, and Gender' in Seyla Benhabib and Judith Resnik (eds), *Migrations and Mobilities* (2009), 439–86.

[66] See eg Horowitz (n 13); Donald L. Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States' (2008) 49 *William and Mary Law Review* 1213; Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 *Journal of Democracy* 96.

[67] See eg Tom Ginsburg, *Judicial Review in New Democracies* (2003); Ran Hirschl, *Juristocracy* (2004); Ran Hirschl, *Constitutional Theocracy* (2010).

[68] Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37.

[69] Kent Greenawalt, 'Free Speech in the United States and Canada' (1992) 55 *Law and Contemporary Problems* 5.

constitutionalism,[70] or in specific areas (such as free speech[71] or property law[72]) have drawn on comparative perspectives for purposes of both understanding US doctrine and sometimes arguing for its improvement. Even single-country case studies may contribute to functional understandings of constitutional law or institutions. While detailed case studies are able to explore a broader range of variables in a particular setting, the greater the detail, the smaller the number of comparable entities to validate results in the form of more general statements.[73]

Increasingly, scholarship has turned to the creation of what one might call structured comparative case studies, where scholars are asked to explain and analyze, on a country basis, a selected set of issues, so that the resulting volume provides a set of comparative perspectives on how seemingly similar issues are (or are not) addressed in different constitutional systems. Goldsworthy's volume on constitutional interpretation focuses on interpretive questions and the role of constitutional courts in six countries.[74] Useful two-country comparisons exist as well.[75] Baines and Rubio Marin's collection focuses on gender equality and related issues;[76] others focus on social welfare rights[77] or on doctrines addressing the horizontal implications of constitutional norms for private actors and private law.[78]

Thirdly, functional analysis is increasingly associated with *large-N studies* designed to reveal correlative or causal associations between some constitutional feature (institution or doctrine) and some other phenomena, desirable or undesirable. The literature on the effects of presidentialism vs parliamentary democracy is an example, albeit situated in the less 'law'- and more 'institution'-focused world of comparative government.[79] Elkins, Ginsburg, and Melton's work on constitutional longevity is exemplary of a more 'legally' oriented form of empirical, functional scholarship.[80] The authors compiled a database of constitutions around the world, developed criteria for defining longevity (eg what kinds of changes would be treated as a new constitution rather than as an amendment), and then analyzed, in some detail, what features of constitutions were associated with longevity. The authors were careful to note that longevity may or may not have normative value; but their work, as a positive matter, suggested that the longevity of constitutions was associated with the right degree of flexibility, the right degree of specificity, and the availability of judicial enforcement mechanisms; their study packs considerable normative work—assuming political stability of constitutions is a desideratum—into the framing of positive categories, and in the classification of the events studied. Similarly, Jennifer

[70] George Nolte (ed), *European and US Constitutionalism* (2005).

[71] Krotoszynski (n 52).

[72] Gregory S. Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (2006).

[73] See Mark Tushnet, '"Country Studies" in Comparative Constitutional Law', Paper presented at the World Congress of Constitutional Law, International Association of Constitutional Law, Mexico City, Workshop No 17, 'How Comparative is Comparative Constitutional Law (9 December 2010).

[74] Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006). Cf eg Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (2007).

[75] Sarah K. Harding, 'Comparative Reasoning and Judicial Review' (2003) 28 *Yale International Law Journal* 409; Jamal Greene, 'On the Origins of Originalism' (2009) 88 *Texas Law Review* 1.

[76] Beverly Baines and Ruth Rubio-Marin (eds), *The Gender of Constitutional Jurisprudence* (2004).

[77] Gauri and Brinks (n 49); Daphne Barak-Erez and Aeyal M. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (2007).

[78] Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Analysis* (2007).

[79] See eg Linz (n 8).

[80] Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (2009).

Widner's database of constitution-making processes, analyzed to explore relationships between process and outcomes, is another example of a relatively new form of quantitative scholarly work focused on comparative constitutionalism, that also contributes to understandings of the very different measures by which 'success' in constitution-making can be measured.[81]

Large-N studies of causal connections between constitutions and constitutional law and effects in society have rarely focused on doctrine and reasoning, perhaps in part because of the difficulty of reliable coding, in part because of the disciplinary assumptions (focused on results as outputs, fairly narrowly understood) of the political scientists who typically conduct large-N studies. Consider the various studies of the relationship, *vel non*, between various 'rights' protecting provisions in constitutions and respect for those rights 'on the ground'.[82] Large-N studies, however, may also be used not for functional purposes but for classificatory or historical ones, as in the spate of studies analyzing 'citations' to foreign or international law.[83] Also of note are efforts by economists to explore relationships between different forms of constitutional government and economic well-being.[84]

Although functionalism (both positive and normative) represents a dominant approach in comparative constitutional study, it has been subject to serious critique. A number of scholars have cautioned against the misleadingly homogenizing and obscuring perils of functionalism. It is all too easy, scholars such as Günter Frankenberg suggest, for a comparativist unconsciously to assume the categories of legal thought with which she is familiar, and thus to see foreign law only as either similar or different, without being able to grasp the conceptual or sociological foundations of other legal orders.[85] Professor Bomhoff, in a similar vein, has shown how doctrines with a similar name and seemingly similar function actually mean quite different things in a practice that is shaped by more particular contexts.[86]

5. Contextualism, Expressivism, and Self-Reflection

These critical cautions might be understood to argue for a form of contextualism in scholarly work. Public law, it has been argued, is particularly path dependent on initial institutional choices, and thus requires attention to particular systems operating in their own context.[87]

[81] Jennifer Widner, 'Constitution Writing in Post-Conflict Societies: An Overview' (2008) 49 *William and Mary Law Review* 1513.

[82] See generally Benedikt Goderis and Mila Versteeg, 'Human Rights Violations After 9/11 and the Role of Constitutional Constraints', Economics of Security Working Paper 11 (2009); Linda Camp Keith, C. Neal Tate, and Stephen C. Poe, 'Is the Law a Mere Parchment Barrier to Human Rights Abuse' (2009) 71 *Journal of Politics* 644; Steven C. Poe, C. Neal Tate, and Linda Camp Keith, 'Repression of the Human Right to Personal Integrity Revisited: A Global Crossnational Study Covering the Years 1976–1993' (1999) 43 *International Studies Quarterly* 291; Gerald Blasi and David Cingranelli, 'Do Constitutions and Institutions Help Protect Human Rights?' in David Cingranelli (ed), *Human Rights and Developing Countries* (1996), vol 4, 223; Christian A. Davenport, '"Constitutional Promises" and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties are Suppressed' (1996) 58 *Journal of Politics* 627.

[83] See n 36.

[84] See Voigt (n 64).

[85] Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411.

[86] See Jacco Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 *Hastings International and Comparative Law Review* 555, 562; cf Pierre LeGrand, 'Issues in the Translatability of Law' in Sandra Bermann and Michael Wood (eds), *Nation, Language, and the Ethics of Translation* (2005), 30.

[87] John Bell, 'Comparing Public Law' in Andrew Hardy and Esin Orücü (eds), *Comparative Law in the 21st Century* (2002).

And much scholarly work can be understood as an effort to learn, from outsider perspectives, more about the particular context of one's own system, whether its functional 'packages' of features, or its particular socio-legal self-understandings or self-expressions.

Many studies of comparative constitutional law are concerned with questions of context and particularity. Without embracing the idea, advanced by some comparativists, about the necessary particularity of each legal system,[88] scholarship in this vein does emphasize either the ways in which particular institutional contexts may limit the ability to draw conclusions from the practices of other systems, or the expressive functions of constitutions or constitutional law within particular national contexts. Contextual approaches problematize the sense of 'false necessity' that may emerge from functional or universalist approaches. So, for example, Tushnet has suggested that even in the realm of understandings of rights, the particular national and institutional context matters to an understanding of constitutional doctrine. Thus, with regard to hate speech and libel, he suggests that institutional factors, including the decentralization of enforcement, may affect analysis of the desirable scope for constitutional protection even of hateful speech.[89] Such functional contextualism must be distinguished from more normative arguments about national identity, even though the latter may also assume empirical benefits, or harms, from particular national constitutional features.

Some contextually oriented scholarship seeks to elicit more intense understanding of how particular paradigmatic social or political concerns shape or are reflected in constitutional law. Gary Jacobsohn's work on constitutional identity perhaps epitomizes this school, which is necessarily associated with close analysis of particular countries, and particular institutions and doctrines.[90] Yet, as work on the role of politics in reshaping constitutional law suggests,[91] the content of a country's expressive identity may be complex and multi-stranded, and may shift over time;[92] Rosalind Dixon's work, among others, might be understood to raise cautions about the tendency of expressivist approaches to assume a fixed national identity.[93] Considering the plurality of understandings and interpretive possibilities within a single national constitutional culture may yield important degrees of nuance, complicating and perhaps defeating efforts to generalize from particular cases.

II. Courts

Courts' approaches to comparative methodology overlap considerably, though not entirely, with those of scholars. Some jurists argue for comparative constitutional consideration as a form of consequences-focused 'functionalism'.[94] For still others, consulting foreign law is an ordinary part of what it means to be a thoughtful jurist, especially in interpreting constitutional

[88] Cf. Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

[89] Tushnet (n 47).

[90] Gary Jeffrey Jacobsohn, *Constitutional Identity* (2010), *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (2005) and *Apple of Gold: Constitutionalism in Israel and the United States* (1994).

[91] See eg Reva Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA' (2006) 94 *California Law Review* 1323.

[92] See Resnik (n 37).

[93] See Rosalind Dixon, 'A Democratic Theory of Constitutional Comparison' (2008) 56 *American Journal of Comparative Law* 947.

[94] See eg *Printz v United States* 521 US 898, 976–8 (1997) (Breyer J dissenting).

provisions with a common genetic or genealogical root, but more generally, insofar as greater knowledge of other legal systems helps judges to strengthen their own.[95] Some constitutions themselves require interpretation in light of international law, which may invite comparative analysis of how other domestic courts have interpreted the same international provision.

1. Doctrinal Demands, Self-Reflection, and Expressive Comparisons

When facing an open issue, judges may benefit from knowledge that expands the range of interpretive options considered in implementing their own constitution. But there are also doctrinal demands that may require resort to foreign constitutional law, as when limitations clauses (such as Canada's) refer to government practices that can be justified in 'a free and democratic society' and thus contemplate resort to foreign practice. Judges' consideration of foreign or international sources can serve as a self-reflective check on constitutional judgment, as the national constitutional ethos is defined by comparison, positive and negative, with others.[96]

2. Scholars and Courts

In scholarly work, contextualism and expressivism may function as a prism for analyzing how a particular constitutional context or identity is developed in a particular country. Expressivism in judicial decisions may be somewhat different: scholars work to contribute to knowledge or understanding; judges give judgments, creating winners and losers. Part of the task of courts is to issue decisions that are likely to be complied with. For this and other reasons, courts may consider or be influenced by comparative constitutional law even when they do not openly refer to it.[97]

At least three factors are relevant to judicial decisions whether to engage in comparative analysis. The first is *the nature of the domestic issue*. Some constitutional issues arise within well-settled fields of domestic discourse, or may concern a distinctive and unusual constitutional text, such as the US Second Amendment. Secondly, the *nature of the transnational source* will affect its relevance. International law might have a particular salience in some cases, but sometimes comparative constitutional law might have more persuasive value than international law.[98] Thirdly, judges need to consider the *comparability of contexts*. On these issues, the courts are generally going to be dependent on the infrastructure of knowledge that scholars develop.

III. Constitutional Legislators

Constitutional legislators are, most fundamentally, persons having authority to propose a new constitution, which can then be ratified.[99] Considering comparative constitutional approaches is quite a common aspect of such constitution-making enterprises, as one sees in the drafting of both national and subnational constitutions. James Madison, an influential framer of the

[95] See Konrad Schiemann, 'A Response to The Judge as Comparatist' (2005) 80 *Tulane Law Review* 281, 297.

[96] See eg *Griswold v Connecticut* 381 US 479 (1965) (negative contrast with totalitarian governments); *Lawrence v Texas* 539 US 558 (2003) (positive comparison with Europe).

[97] See Olivier Duhamel de Lamothe, Member, Conseil Constitutionnel (Fr), 'Constitutional Court Judges' Roundtable' (2005) 3 *International Journal of Constitutional Law* 550.

[98] Jackson (n 27), 168–78.

[99] One may also conceive of those who may initiate or enact amendments to a constitution as constitutional legislators.

US Constitution, made himself conversant with foreign constitutions, both ancient and contemporary. Modern constitution-making often takes place under more or less explicit forms of international monitoring or supervision, with widespread consultation of experts.[100]

Although scholarly work in recent years has begun to focus more attention on legislators both as constitution-makers and as constitutional interpreters,[101] empirical work has not kept pace with theoretical developments. There are few studies of a comparative nature that explore how actual legislators, or members of constituent assemblies, behave and view their work. One leading scholar has suggested that foreign models or advice have little to contribute, given the dominance of local contexts in influencing conditions for successful constitution-making;[102] others offer cautious praise for foreign technical assistance and expertise, as compared to more active forms of intervention.[103] In some instances, it appears that foreign experts, bringing knowledge of their own constitutional systems, have been given key roles in the drafting process, in an effort both to harness expertise and to provide a form of legitimacy that only outsiders (of a particular sort) could do.[104]

A major scholarly effort is now focused on questions of institutional design in divided societies,[105] as the benefits of federalism, consociationalism, or other forms of recognition, accommodation, or power sharing are analyzed and modeled. Some of this scholarly work is intended to influence constitutional design decisions on the ground, though rarely do actual constitutional processes follow singular templates and models, instead displaying a 'mix and match' approach in which small differences in institutional design may yield large differences in outcomes. Scholarly work on normatively or functionally desirable constitutions sometimes gives insufficient attention to a consideration of actual "upstream" or "downstream" constraints on decision-makers.[106] For such knowledge to be usable by constitutional legislators, more study of the processes and political economy of constitutional change would be helpful to future decision-makers in being able better to link normative and functional goals with understandings of the political economy of constitutional change.

IV. Methodological Challenges

In concluding, this chapter addresses some of the special methodological challenges of comparative constitutional law, an issue that can only be addressed by understanding the goals of comparison.[107] A first goal is simply to develop a better intellectual understanding of one or

[100] See Laurel E. Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010).

[101] See eg Richard W. Bauman and Tsvi Kahana (eds), *The Least Examined Branch The Role of Legislatures in the Constitutional State* (2006); Jon Elster, 'Legislatures as Constiuent Assemblies' in Bauman and Kahana; Ruth Gavison, 'Legislatures and the Phases and Components of Constitutionalism' in Bauman and Kahana; Mark Tushnet, 'Interpretation in Legislatures and Courts: Incentives and Institutional Design' in Bauman and Kahana.

[102] Mark Tushnet, 'Some Skepticism About Normative Constitutional Advice' (2008) 49 *William and Mary Law Review* 1473.

[103] Miller (n 100).

[104] Ibid 616 (discussing Namibia).

[105] See Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (2008).

[106] For discussion of these constraints, see Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 373–5.

[107] This section of the chapter, and one earlier paragraph, draw from my previously published article, Vicki C. Jackson, 'Methodological Challenges in Comparative Constitutional Law' (2010) 28 *Penn State International Law Review* 319.

more other systems. For this purpose, the challenges include time, the need to develop expertise, language barriers, and the need to understand the broader context—both legal and social—in which law operates. All these challenges are about the risks of error or oversimplification. However difficult it is to become *bilingual*, *bilegalism* is even harder to achieve. Not only is it necessary to understand foreign languages, or find reliable translations of foreign legal materials, but in order to understand one doctrine or institution of another legal system it is necessary to have at least some understanding of the broader canvas on which it exists.

Each of these risks raises another kind of challenge for scholars and that is the 'opportunity costs' of maintaining expertise in more than one system. What will scholars give up in order to develop this expertise? For judges, the opportunity costs might be framed differently: is there a risk of losing what Karl Llewellyn might have called a 'situation sense' about their own constitutional system if they spend considerable time developing expertise on others?[108]

A second goal for comparative constitutional study is to enhance capacity for self-reflection, to develop a better understanding of one's own system. In this regard, there are all of the challenges set out above, plus the following. While 'the unnoticed in our practices may become visible in the contrast with other cultural practices of law', which 'can help us to understand who we are', comparison alone 'cannot... tell us whether we should remain what we have been'.[109] Distinguishing 'true' from 'false' necessities is a distinct challenge.

A third purpose of comparative constitutional study goes beyond simple self-reflection and aims to develop an understanding of normatively preferable 'best practices'—whether from a 'universalist' perspective about rights or a more functional perspective about general political truths about well-designed constitutions.[110] There are at least three additional challenges in pursuing this goal. First, implicit is the need to identify a notion of the normative good, or of just results. Second, not only does this inquiry require a normative baseline of the good or just, it also depends on implicit notions of causality, that is, of the relationship between law and/or legal structures and good and/or just results in society; yet being able to make general statements of causal relations confronts the general problem of identifying relevant variables.[111] A related challenge is how to select cases for purposes of causal analysis in comparative constitutional law.[112]

A fourth goal may be to answer questions, asked by domestic constitutional doctrine or text, that are comparative in nature. For example, in Europe, the case law of the European Court of Justice resorts to the common constitutional traditions of the member states to help to protect fundamental rights.[113] One might think that the question of 'commonality' is a relatively simple empirical question. But determining what is common has a normative element as well. More relaxed standards for what counts as a common tradition may reduce the space for diversity and for localized democratic decision-making; more rigorous criteria for identifying the 'common tradition' will allow more space for diverse practices. So whether to adopt

[108] See Karl N. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed' (1950) 3 *Vanderbilt Law Review* 395, 397–401.

[109] Paul W. Kahn, 'Comparative Constitutionalism in a New Key', (2003) 101 *Michigan Law Review* 2677, 2679.

[110] Kommers (n 39), 691–6.

[111] On the problems of 'omitted variables' in comparative constitutional analysis, see Tushnet (n 33).

[112] See Hirschl (n 59).

[113] Michel Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the US Supreme Court' (2006) 4 *International Journal of Constitutional Law* 618.

a narrow or broad definition of commonality of constitutional tradition has important normative impacts in this context. Similarly, in applying the comparative inquiry about the practices of 'free and democratic' societies, translating from what is demonstrably justified in one free and democratic society to another may not be so easy a matter.[114]

Is there anything distinctive about the methodological challenges of constitutional comparisons as opposed to other kinds of legal comparisons? Limitations of time and resources, limitations of language and contextual understanding, are challenges that apply to any kind of comparative legal study; they can arise whether one is looking at contract law, tort law, or constitutional law in a comparative setting. Three other, possibly distinctive methodological challenges in comparative constitutional law are discussed below: the challenges posed by the complexity and path dependence of the historical context and the interdependence of constitutional provisions one on the other; the tendency in constitutional law and theory to conflate the normative and positive; and the expressivist aspects of constitutional law.

First, constitutions are made and then interpreted in complex and distinctive historical contexts; constitutional provisions are often interdependent, designed to create an overall system or balance, as in most federal systems. Comparisons on federalism issues are especially challenging because federal bargains are always historically contingent and arise out of particular deals struck by particular holders of power in society at one time.[115] But the degree to which these characteristics are distinctive to constitutional law is unclear. Substantive contract law's practical meaning, for example, may depend on the broader legal context, including the procedural rules for litigation, such as who pays attorney's fees, or the practical availability of lawyers or of other means of dispute avoidance or resolution. Nonetheless, the degree to which historic evolutions of particular public institutions influence public law,[116] of which constitutional law is a part, may differ (at least in degree) from analogous influences on other fields, such as contracts.

A second feature that might be considered distinctive is the tendency to conflate normative with positive claims about what is and is not constitutional. In constitutional systems such as the United States, where the Constitution is deeply entrenched and the system thus depends heavily on interpretation, there is a fairly strong tendency in both judicial opinions and scholarly literature to blend normative claims about what the Constitution should be understood to mean, and positive claims about what the courts are now doing or what the Constitution requires. This feature, while perhaps distinctive, may not be true for all constitutional systems, or even for all that depend strongly on interpretation; and there might be other areas of the law where this tendency to conflate also exists.

A third possibly distinctive feature that may affect comparative methodology is the expressivist role played by constitutions and constitutional law.[117] Constitutions serve as a form of public law that is particularly likely to be used to express, or help to constitute, or to influence, national identity. Constitutional preambles make this clear. Thus, Iraq's constitutional preamble asserts, 'We are the people of the land between two rivers, the homeland of the apostles and prophets,... pioneers of civilization... Upon our land the first law made by man was passed....'[118] This is a claim about who the people are. The preamble of the Constitution of

[114] That is to say, for example, that limitations on expression that may be 'demonstrably justified in a free and democratic society' with a history of Nazism may not be quite so readily 'demonstrably justified' in societies without that history.

[115] Jackson (n 27), 227–30.

[116] Bell (n 87).

[117] Tushnet (n 33).

[118] Permanent Constitution of the Republic of Iraq, Preamble, 2005.

China reads like a tract on national history and the accomplishments of a collective people.[119] The French Constitution announces its commitment to the declaration of rights of man and proclaims France an indivisible, secular, democratic, and social republic.[120] The German Basic Law asserts Germans' responsibilities before God and man.[121] The Irish Constitution invoked the 'Most Holy Trinity'.[122]

These are not claims about function and purpose; these are claims about identity and self-expression. The point here is the degree to which the expressive components of constitutions may complicate efforts to do comparative analysis, especially at the functional level. Whether a country sees religion as helping to constitute the state, or whether it sees government as instrumental to a specific social and economic vision, may be understood to influence both constitutional meaning and national identity. Correct, incorrect, better, best, functional, or not, is beside the point; the point from this perspective is that these are situated and embedded in layers of meaning of which the constitution is representative of deeper social and self understandings.

But should functionalism be seen as in some ways an opposite to expressivism? Good comparative analysis tries to reconcile rather than choose between them, though a *contextualized functionalism*. Contextualized functionalism requires a willingness to question whether functions, concepts, or doctrines that appear similar may in fact be quite different in different societies; an attention to how seemingly separate institutions or legal practices are connected to, and influenced by, others; and a commitment to be open to noticing how legal rules or doctrines may be affected by the identitarian or expressivist aspects of the constitution. It is in this vein that more important scholarly work in the future remains to be done, drawing on both qualitative and quantitative methods of analysis.

Bibliography

Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771

John Bell, 'Comparing Public Law' in Andrew Hardy and Esin Orücü (eds), *Comparative Law in the 21st Century* (2002)

Jacco Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 *Hastings International and Comparative Law Review* 555

Allan-Randolph Brewer-Caraís, *Judicial Review in Comparative Law* (1989)

Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819

Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006)

Rosalind Dixon, 'A Democratic Theory of Constitutional Comparison' (2008) 56 *American Journal of Comparative Law* 947

Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (2009)

Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364

[119] See Xian Fa Preamble (1982) (People's Republic of China).

[120] 1958 Constitution, Art 1.

[121] Grundgesetz für die Bundesrepublik Deutschland (federal constitution), Preamble, May 23, 1949 (Federal Republic of Germany).

[122] Irish Constution, 1937.

Louis Favoreu, 'Constitutional Review in Europe' in Louis Henkin and Albert J. Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (1990)

Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (2009)

Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707

Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003)

Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006)

Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125

Stephen Holmes and Cass Sunstein, 'The Politics of Constitutional Amendment in Eastern Europe' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995)

Donald L. Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States' (2008) 49 *William and Mary Law Review* 1213

Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (2010)

Vicki C. Jackson and Jamal Greene, 'Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?' in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook in Comparative Constitutional Law* (2011)

Gary Jeffrey Jacobsohn, *Constitutional Identity* (2010)

Donald P. Kommers, 'The Value of Comparative Constitutional Law' (1976) 9 *John Marshall Journal of Practice and Procedure* 685

Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World?: International Law, Global Governance, Constitutionalism* (2009)

David S. Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652

Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 *Journal of Democracy* 96

Juan J. Linz, 'The Perils of Presidentialsim' (1990) 1 *Journal of Democracy* 51

Gerald L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863

H.W.O. Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993)

Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (1994)

Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37

Kim Lane Scheppele, 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006)

Alec Stone, *The Birth of Judicial Politics in France* (1992)

Cass Sunstein, *Designing Democracy: What Constitutions Do* (2001)

Mark V. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009)

Mark V. Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225

Stefan Voigt, 'Positive Constitutional Economics II: A Survey of Recent Developments' (2011) 146 *Public Choice* 205

Neil Walker, 'Reframing EU Constitutionalism' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World?: International Law, Global Governance, Constitutionalism* (2009)

Jiung-Ronn Yeh and Wen-chen Chang, 'The Emergence of East Asia Constitutionalism: Features in Comparison', Asian Law Institute Working Paper Series No 006, 2009, available at <http://law.nus.edu.sg/asli/pdf/WPS006.pdf>