

THE RISE OF COMPARATIVE CONSTITUTIONAL LAW: THOUGHTS ON SUBSTANCE AND METHOD

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The past decade has witnessed a sharp comparative turn in legal practice and scholarship. Centripetal processes of global convergence, transnational governance, and complex economic inter-dependence aided by the development of new communication and information technologies have all contributed towards making the legal profession more international in scope than it has ever been before. The ever-expanding interest among practitioners, scholars and policy-makers in the laws and legal institutions of other countries is remarkable. “We are all comparativists now” has increasingly become the motto of many jurists worldwide. This new interest is particularly striking in comparative constitutional law and the transnational migration of constitutional ideas. From a relatively obscure and exotic subject studied by the devoted few, comparative constitutionalism has emerged as one of the more fashionable subjects in contemporary legal scholarship. In this essay, I chart the contours of the recent revival in comparative constitutional law. The discussion proceeds in two steps. First, I provide a brief survey of the main themes and issues that currently occupy the field. In the second part, I address several lingering epistemological and methodological challenges embedded in the study of comparative (constitutional) law.

I. The Rise of Comparative Constitutional Law

There is no doubt that comparative constitutional law—the systematic study of constitutional law, jurisprudence and institutions across polities—has enjoyed a certain renaissance since the mid-1980s. Constitutional courts worldwide increasingly rely on comparative constitutional law to frame and articulate their own position on a given constitutional question. This trend has been described as “a brisk international traffic in ideas about rights,” carried on through advanced information technologies by high court judges from different countries.¹ Indeed, “constitution interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional

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1. Mary Ann Glendon, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991), at 158.

adjudication.”² In short, “Courts are talking to one another all over the world.” This phenomenon is particularly evident with respect to constitutional rights jurisprudence. In its landmark ruling determining the unconstitutionality of the death penalty, the South African Constitutional Court examined in detail pertinent jurisprudence from Botswana, Canada, Germany, Hong Kong, Hungary, India, Jamaica, Tanzania, the United States, Zimbabwe, the European Court of Human Rights and the United Nations Committee on Human Rights.³ Even the US Supreme Court—perhaps the last bastion of parochialism among the world’s leading constitutional courts - has hesitantly joined the comparative reference trend. In two recent cases - *Lawrence v. Texas* and *Roper v. Simmons* - the Court’s majority opinion cited foreign judgments in support of its decision.⁴

Another manifestation of the global convergence of constitutional law and jurisprudence is the emergence of what may be termed as “generic constitutional law” – a supposedly universal, Esperanto-like discourse of constitutional adjudication and reasoning, primarily in the context of core civil rights and liberties.⁵ This has been accompanied by the rise of “proportionality” as the prevalent interpretive method in comparative constitutional adjudication.⁶ This interpretive method – commonly drawn upon throughout the world of new constitutionalism – is based on judicious, pragmatic balancing of competing claims, rights and policy considerations, as opposed to various more principled approaches to constitutional interpretation commonly used in the United States.

Comparative constitutional law is often used for purposes of self-reflection through analogy, distinction, and contrast. The underlying assumption here is that whereas most relatively open, rule-of-law polities essentially face the same set of constitutional challenges, they may adopt quite different means or approaches for dealing with these challenges. By referring to the constitutional jurisprudence and practices of other presumably similarly situated polities, scholars and jurists might be able to gain a better understanding of the set of constitutional values and structures in their own sets of constitutional values. These references also enrich, and ultimately advance, a more cosmopolitan or universalist

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2. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 INDIANA L. REV. 820 (1999).
 3. *S v. Makwanyane*, 1995 [3] SA 391 [CC].
 4. *Lawrence v. Texas*, 539 US 558 (2003); *Roper v. Simmons*, 543 US 551 (2005).
 5. David Law, *Generic Constitutional Law*, 89 MINNESOTA L. REV. 652 (2005).
 6. David Beatty, *THE ULTIMATE RULE OF LAW* (2004).

view of constitutional discourse. At a more concrete level, constitutional practices in a given polity might be improved by emulating certain constitutional mechanisms developed elsewhere. 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

The international migration of constitutional ideas has not gone unnoticed in the legal academia. Scholarly books and monographs dealing with comparative constitutional law are no longer considered a rarity.⁸ Entire textbooks are now devoted exclusively to comparative constitutional law, or draw upon selected comparative constitutional jurisprudence to highlight distinct characteristics of American constitutional law.⁹ More edited collections than ever before deal with various aspects of constitutionalism beyond the United States.¹⁰ New periodicals (e.g., *International Journal of Constitutional Law*) and symposia are devoted to the study of comparative constitutional law.¹¹ Top-ranked law schools in the United States and elsewhere now regard courses on comparative constitutional law as essential additions to the curriculum. A notable example is Harvard Law School, one of the world’s foremost schools of law, which in 2007 embarked on a major curriculum overhaul—the most significant revision to the formative first-year course of study in over one hundred years—with the aim of introducing its students to a distinctly more cosmopolitan, comparatively informed, view of constitutional law and legal institutions. While certain foundational, ontological, epistemological and methodological questions concerning the field’s purpose, scope and nature remain largely unanswered, there is no doubt that this is the heyday for comparative constitutional law scholars.¹²

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7. See, e.g. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999); Mark Tushnet, *Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, (M. Reimann and R. Zimmerman, eds.; 2006).
 8. See, e.g. Gary J. Jacobsohn, THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT (2003); Ran Hirschl, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Mark Tushnet, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2007).
 9. Vicki Jackson and Mark V. Tushnet, COMPARATIVE CONSTITUTIONAL LAW (2nd edition, 2006).
 10. THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry, ed.; 2006); INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy, ed.; 2006).
 11. Christopher L. Eisgruber and Ran Hirschl, eds., *Symposium: North American Constitutionalism*, 4 INT’L J. CONST. L. 203–437 (2006).
 12. Ran Hirschl, *On the Blurred Methodological Matrix of Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 10.

One of the main reasons for the revival is the global convergence to constitutional supremacy—a concept that has long been a major pillar of American political order, and that is now shared, in one form or another, by over one hundred countries across the globe. Numerous post-authoritarian regimes in the former Eastern Bloc, Latin America, Asia and parts of Africa have been quick to endorse principles of modern constitutionalism upon their transition to democracy. From Germany and Spain to Russia and Turkey, constitutional courts throughout Europe have become important translators of constitutional provisions into practical guidelines for use in public life. The 1996 South African Constitution and the South African Constitutional Court have become symbols of post-apartheid renewal in that country. Even countries such as Britain, Canada, Israel and New Zealand—not long ago described as the last bastions of Westminster-style parliamentary sovereignty—have rapidly embarked on the global trend toward constitutionalization. Most of these countries also have a recently adopted constitution, or have undergone a constitutional revision in order to incorporate a bill of rights and introduce some form of active judicial review. This trend has not passed over supra-national entities. Constitutionalization processes have taken place in the 27-state strong European Union as well as in other supra-national settings. Meanwhile, the European Court of Justice (the apex court of the EU), and the European Court of Human Rights (the top judicial organ of the 47-member Council of Europe), have emerged as widely-cited sources of jurisprudence.

To provide a crude taxonomy, 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 passage of the Human Rights Act, 1998 in Britain, which effectively incorporated the provisions of the European Convention of Human Rights into British constitutional law, or the incorporation of a bundle of international human rights treaties into domestic constitutional law in Colombia (1991), Argentina (1994) or Brazil (2004)). However, one can also identify a “no apparent transition” category, whereby constitutional reforms have neither been accompanied by, nor resulted from, any apparent fundamental changes in political or economic regimes. The major constitutional revisions in Canada (1982), Mexico (1994), or Israel (1992-1995) are good illustration of that type of constitutionalization and the accompanying fortification of judicial review.

Most written constitutions adopted after World War II (1939–1945) feature five main elements: (1) provisions that establish the principal institutions of government, define their prerogatives and the relationship among them, and establish rules and procedures for their renewal; (2) provisions that establish the distribution of governmental powers over the polity’s territory (different in unitary versus federal or otherwise multilayer polities); (3) a catalogue of protected rights and liberties of the polity’s citizens and residents; (4) an amendment formula that allows for the possibility of amending the constitution, and states the conditions such amendments must meet; and finally (5) provisions that establish a relatively independent judiciary armed with the authority to review executive practices, administrative decrees, and laws enacted by legislatures, and to declare these unconstitutional on the grounds that they conflict with fundamental principles protected by the constitution. Certain written constitutions elaborate in great detail on each of these five elements. Other constitutions are relatively short, and feature generic statements or broad wording.

As in early-nineteenth century America, the legitimacy of judicial review in post-war Europe, for example, was often established through *Marbury v. Madison*-like manifestations of judicial activism. Four well-known examples of such foundational moments of judicial activism in Western Europe are the German Federal Constitutional Court ruling in the *Southwest* case (1951) – involving a groundbreaking constitutional challenge to the federal government’s attempt to redraw the boundaries of three of Germany’s *Länder* (constitutionally recognized states);¹³ the French *Conseil Constitutionnel*’s groundbreaking *Decision*

13. I BVerfGE 14 (1951).

on Association (1971) – involving a successful challenge by opposition parties to a bill proposed by the government that would have banned any associations appearing to have “an immoral or illicit purpose”;¹⁴ the Italian Constitutional Court’s inaugural ruling in the *Security Law* case (1956) – retroactively invalidating a public security law of fascist vintage (and in the process, indirectly invalidating an entire corpus of similar laws) on the grounds that it contravened the freedom of expression and press provisions of the Italian Constitution;¹⁵ and the European Court of Justice’s landmark *Van Gend and Loos*, and *Costa v. Enel* decisions (1963) – which declared that European law was supreme to national law, thereby creating an obligation for national courts to enforce EU law over conflicting national laws.¹⁶

The establishment of judicial review through foundational cases has certainly not been limited to leading European polities. A leading example here is the newly established South African Constitutional Court’s *Constitutional Certification* judgments of 1996. In its first ruling on the subject, the Court identified nine elements of the proposed South African constitution text that failed to comply with certain constitutional principles.¹⁷ The draft constitution was therefore sent back to the Constitutional Assembly so that certain provisions could be reworked. Following the refusal of the Court to certify the draft constitution, the Constitutional Assembly was recalled in an attempt to pass an amended text that would satisfy the constitutional principles. A few weeks after the first certification judgment was handed down, the South African Constitutional Assembly passed an amended text addressing all of the concerns raised by the Constitutional Court in the first certification hearing. In December 1996, the Court approved the amended text in the second certification hearing.¹⁸

The global convergence toward constitutional supremacy and the establishment of judicial review brought about an inevitable and often welcomed increase in the political salience of constitutional courts worldwide. Today, not a single week passes without a national high court somewhere in the world releasing a major judgment pertaining to the scope of constitutional rights or the limits on legislative or executive powers. Bold newspaper headlines reporting on landmark

14. CC decision 71-44 DC (July 16, 1971).

15. Judgment No. 1, May 5, 1956.

16. ECJ decision 26/62 (1963) ECR 1; ECJ decision 6/64 (1964) ECR 583.

17. *Certification of the Constitution of the Republic of S. Afr.*, 1996 (4) SA 744 (CC).

18. *Certification of the Amended Text of the Constitution of the Republic of S. Afr.*, 1997 (2) SA 97 (CC).

court rulings concerning hotly contested issues – same sex marriage, limits on campaign financing, and affirmative action, to give a few examples – have become a common phenomenon. The most common are cases dealing with procedural justice and criminal “due process” rights. Aggregate data suggest that approximately two-thirds of all constitutional rights cases in the world of new constitutionalism deal with that type of rights. Also common are rulings involving classic civil liberties, the right to privacy, and formal equality. This ever-expanding body of civil liberties jurisprudence has expanded and fortified the boundaries of the constitutionally protected private sphere (often perceived as threatened by the long arm of the state and its regulatory laws) and has transformed numerous policy areas involving individual freedoms.

While several scholars have identified a decline in the political salience of the United States Supreme Court,¹⁹ the global expansion of judicial power has marched on. In recent years we have seen the emergence of another level of judicialized politics: reliance on courts and judges for dealing with what we might call “mega-politics” – matters of outright and utmost political significance that often define and divide whole polities.²⁰ These range from electoral outcomes and corroboration of regime change to foundational collective identity questions, and nation-building processes pertaining to the very nature and definition of the body politic as such. These and other core political controversies have been framed as constitutional issues, with the concomitant assumption that courts – not politicians or the public – should resolve them.

Although many public policy matters still remain beyond the purview of the courts, there has been a growing legislative deference to the judiciary, an increasing and often welcomed intrusion of the judiciary into the prerogatives of legislatures and executives, and a corresponding acceleration of the judicialization of political agendas. Together, these developments have helped to bring about a growing reliance on adjudicative means for clarifying and settling highly contentious political questions, and have transformed national high courts worldwide into major political decision-making bodies. Aharon Barak, the former proactive president of the Supreme Court of Israel,

19. See, e.g. Frederick Schauer, *Foreword: The Court's Agenda – And the Nation's*, 120 HARV. L. REV. 4-64 (2006); Mark Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485-545 (2004).

20. Ran Hirschl, *The Judicialization of Politics*, in OXFORD HANDBOOK OF LAW AND POLITICS (K. Whittington et al., eds.; 2008), at 119-143.

once said that “nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable,” and it seems that this motto has become widely accepted by courts worldwide.

Despite the global spread of constitutional supremacy and judicial review, there remain some notable differences between American-style constitutional law and constitutional law in other countries. These differences reflect the wide variations in constitutional legacies and structures, historical inheritances, and formative experiences, as well as nontrivial differences in the value systems of America, Europe and other foreign jurisdictions. Some of these differences are obvious. Whereas the US-established legacy of constitutionalism and active judicial review has passed its bicentennial anniversary, most of the written constitutions of other countries were adopted (or rewritten) in the post-World War II era. As a result, the sheer size and scope of what may be defined as “American constitutional law” is notably larger than the perimeters of constitutional law in most other polities. While the constitution of the United States is written, entrenched, and contained in one document, the constitutions of other countries (e.g., Britain) still include significant unwritten components (e.g., constitutional conventions and common practices), or comprise a bundle of pertinent laws and documents (e.g., Canada or Israel). The constitutional law of yet other countries (e.g., Australia or New Zealand) includes significant written, albeit non-entrenched, components.

There are also pertinent differences in constitutional cultures across countries. The US Constitution (most notably the Bill of Rights) and the US Supreme Court have long enjoyed a near-sacred position in American political and civic culture. “For the past two centuries,” argues one astute observer,

“...the Constitution has been as central to American political culture as the New Testament was to medieval Europe. Just as Milton believed that ‘all wisdom is enfolded’ within the pages of the Bible, all good Americans, from the National Rifle Association to the ACLU, have believed no less of this singular document”.²¹

By contrast, in many young constitutional democracies, the constitutional courts still struggle to establish their status and authority in an often-volatile, wider political context, while the constitution itself is in many respects a “work-in-progress.”

21. Daniel Lazare, *America the Undemocratic*, 232 *NEW LEFT REV.* 3-31 (1998), at 21. See also, Sanford Levinson, *CONSTITUTIONAL FAITH* (1988).

Constitutional jurisprudence in the United States tends to be elaborate, and often involves sophisticated reasoning alongside detailed reference to pertinent precedents and constitutional history. Nuanced approaches to constitutional interpretation (e.g., textualism, consensualism, originalism, structuralism, doctrinalism, minimalism, or pragmatism) have been developed and debated. The judges' individual opinions (and ideological profiles more generally) are considered important and are studied carefully. Concurring and dissenting opinions, not merely majority opinions, often carry significant weight. In other countries, most notably in continental Europe and Latin America (mainly civil law systems), constitutional courts tend to speak with a single, unanimous voice. Little or no attention is paid to judges' individual preferences and attitudinal tilts. Constitutional jurisprudence in these countries is often more straightforward, technical, and formalist, with far less frequent manifestations of interpretive sophistication or other "philosopher-king-like" aspects of judging that have come to characterize American constitutional law.

Important distinctions also exist between the models of judicial review employed by leading constitutional democracies. These differences have significant implications for the scope and nature of judicial review in these countries. To begin with, there is the distinction between *a priori* and *a posteriori* review, and the distinction between *abstract* and *concrete* review. The former refers to whether the constitutionality of a law or administrative action is determined before or after it takes effect. The latter refers to whether a declaration of unconstitutionality can be made in the absence of an actual case or controversy, in other words, hypothetical "what if" scenarios (*abstract* review), or only in the context of a specific legal dispute (*concrete* review).

In the United States, only *a posteriori* judicial review is allowed. Judicial review of legislation—whether exercised by lower courts or by the Supreme Court—is a power that can only be exercised by the courts within the context of concrete adversary litigation; that is, when the constitutional issue becomes relevant and requires resolution in the decision of the case. By contrast, in France, judicial review is limited to an *a priori* or abstract judicial review. The Conseil Constitutionnel has only pre-enactment constitutional review powers. The principal duty of the council has been to control the constitutionality of legislative bills passed by Parliament but not yet promulgated by the President of the Republic. Unlike many of its counterpart institutions worldwide, the French *Conseil Constitutionnel* has no power to nullify a law after it has been enacted by the legislature.

A number of countries feature combined a priori/a posteriori, abstract *and* concrete review systems, which effectively blur the distinct public policy effects of each of these models. Judicial review in Canada, for example, is not limited to review within the context of concrete adversary litigation. The reference procedure allows both the federal and provincial governments in Canada to refer proposed statutes or even questions concerning hypothetical legal situations to the Supreme Court or the provincial courts of appeal for an advisory (abstract) opinion on their constitutionality. A system that permits a priori and abstract review would appear to have a greater potential for generating high levels of judicialized policymaking using the process of constitutional review. Apex courts in such countries could paralyze a statute, or a significant portion of it, before it was formally enacted on the basis of hypothetical constitutional arguments about its effect. Moreover, unlike in the United States, most a priori and abstract review models allow public officials, legislators, cabinet members, and heads of state to initiate judicial scrutiny of proposed laws and hypothetical constitutional scenarios, thereby providing a constitutional framework that is *prima facie* more hospitable to the judicialization of politics and public policymaking.

Another important distinction is between *decentralized* (all courts) and *centralized* (constitutional court) review. The United States employs a decentralized system of judicial review; almost all courts—state courts, federal courts, and, of course, the Supreme Court—have the power of judicial review of constitutionality, which in this system can be exercised over all acts of Congress, state constitutions and statutes, as well as acts of the executive and the judiciary itself. Even the constitutional validity of treaties and legislation based on treaties may be the subject of judicial inquiry. In short, according to the decentralized system, judicial review is an inherent competence of all courts in any type of case or controversy.

The centralized judicial review system (often referred to as *constitutional review*), in contrast, is characterized by having only a single state organ (a separate judicial body in the court system or an extrajudicial body) acting as a constitutional tribunal. This model of judicial review has been adopted by many European countries that follow one of the various branches of the civil law tradition (such as Germany, Austria, Italy, and Spain), as well as by almost all of the new democracies in post-communist Europe. In Germany, for example, a separate judicial body—the Federal Constitutional Court—fulfills the sole function of constitutional review. Its jurisdiction includes

interpreting the Basic Law in disputes between parties with rights vested under it, settling public law disputes between the federation and the states and between and within the states, and settling election disputes.

Some new constitutionalism countries employ a combined decentralized and centralized model of judicial/constitutional review. The decentralized elements of the Portuguese constitution, for example, require all the courts of the country to refrain from applying unconstitutional provisions or principles. Statutes, decrees, executive regulations and regional or any other state acts are thereby subject to review by the courts. Since this ability is given as a judicial duty, the courts have *ex officio* power to raise constitutional questions. Issues can also be raised by a party in a concrete case or by the public prosecutor. Parallel with the decentralized system of judicial review, the Portuguese constitution has also established a centralized system that can review both enacted and proposed legislation. The Portuguese Constitutional Court exercises a preventative control over constitutionality with regard to international treaties and agreements, and other laws when so requested by the President of the Republic. The constitutionality of an enacted legislation can also be the object of abstract scrutiny by the Constitutional Court.

Another important structural aspect of judicial review is the question of standing (*locus standi*) and access rights: who may initiate a legal challenge to the constitutionality of legislation or official action, and at what stage of the process a given polity's apex court may become involved. In the United States, "standing rights" have been traditionally limited to individuals who claim to have been affected by allegedly unconstitutional legislation or an official action. The US Supreme Court will not hear a challenge to the constitutionality of legislation unless all other possible legal paths and remedies have been exhausted. Moreover, the Court has full discretion over which cases it will hear. Its docket therefore consists of *discretionary leave* cases rather than appeals by right.

In contrast, countries that employ a priori and abstract judicial review allow for, and even encourage, public officials and political actors to challenge the constitutionality of proposed legislation. Several countries even authorize their constitutional court judges, in an *ex-officio* capacity, to initiate proceedings against an apparently unconstitutional law. Other countries (South Africa, for example) impose mandatory referrals of constitutional questions by lower courts to a constitutional tribunal. Yet other countries (Israel, India, Hungary,

and Germany, for example) allow private-person constitutional grievances to be submitted directly to their respective high courts, effectively recognizing the standing rights of public petitioners and lowering the barrier of non-justiciability.

One of the interesting features of the global convergence towards constitutional supremacy and active judicial review has been the emergence of innovative mechanisms designed to address and mitigate the tension between rigid constitutionalism and judicial activism on the one hand, and fundamental democratic governing principles on the other. This bundle of institutional means has been loosely termed “weak-form” judicial review. Whereas under “strong-form” judicial review (the approach established in the United States) judicial interpretations of the constitution are binding on all branches of government, “weak-form” review allows the legislature and executive to limit or override constitutional rulings by the judiciary – as long as they do so publicly.

Two familiar and oft-cited examples of such mechanisms are the Canadian Charter’s “limitation clause” (Section 1) and “override clause” (Section 33). Section 1 carries an inbuilt emphasis on judicial balancing between rights provisions and other equally important imperatives. Very few constitutional catalogues of rights reflect, in such a clear fashion, the notion that no constitutional right is “absolute.” Rights litigation and jurisprudence in the shadow of Section 1 are inherently attentive to macro public policy considerations that are “demonstrably justified in a free and democratic society” and that in most other constitutional democracies would fall beyond the purview of rights jurisprudence *per se*. The embedded subjection of Canadian rights jurisprudence to broad public policy considerations has led to sound, middle-of-the-road SCC judgments on a host of potentially divisive issues.

However, Canada is not alone in this trend towards weak-form, dialogical review. Persisting political traditions of parliamentary sovereignty had to be taken into account by the framers of the new constitutional arrangements in Canada, as well as in other Westminster-style political systems such as those of Britain, Israel, South Africa and New Zealand (to mention only a few examples). A noteworthy example of a weak-form review is provided by the British Human Rights Act, 1998 (entered into effect in October 2000), which effectively subjects British public bodies to the provisions of the European Convention on Human Rights. The Act requires the courts to interpret “as far as it is

possible to do so” (Section 3) existing and future legislation in accordance with the Convention. If the higher courts in Britain decide that an Act of Parliament prevents someone exercising their ECHR rights, judges make what is termed a “declaration of incompatibility”. Such a declaration puts Ministers under political pressure to change the law (or so it is hoped). Formally, the Convention does not override existing Acts of Parliament. However, Ministers must state whether each new piece of legislation that they introduce complies with the ECHR. What is more, the Act also provides for a fast-track procedure that allows Parliament to repeal or amend a legislation found incompatible with the ECHR.

To a large extent, variance in constitutional law across countries reflects differences in constitutional models and priorities. Constitutions vary considerably with respect to organic features of government and state institutions (e.g., unitary versus federal polities, presidentialism versus parliamentarism, unicameral versus bicameral legislature, proportional representation versus first-past-the-post electoral systems, and so on). The scope and nature of constitutional law defining legislative boundaries between state organs vary accordingly. And there are notable differences with respect to the (generally more uniform) rights aspect as well. Granted, due process rights, most classic civil liberties, and formal equality are protected by the vast majority of the world’s modern constitutions. But the picture is different when it comes to religion and state, to pick merely one notable example. Whereas several leading Western democracies (e.g., the United States or France) adhere to a strict separation of religion and state model, in other countries, a certain religion is designated as a *state church* (e.g., Evangelical Lutheranism in Norway, Denmark, and Finland). Countries such as India, Israel or Kenya grant recognized religious and customary communities the jurisdictional autonomy to pursue their own traditions in several areas of law, most notably in matters of personal status. In yet other countries (e.g., Egypt or Pakistan), the constitution enshrines a specific religion, and its texts, directives, and interpretations, as *a* or *the* main source of legislation and judicial interpretation of laws. In such cases, laws may not infringe upon injunctions of the state-endorsed religion. Accordingly, the constitutional law of state and religion in these countries differs greatly from that of the United States.

Whereas social welfare rights have never gained real political momentum in the United States, such rights are protected by the constitutions of countries such as India and Brazil. A new form of social welfare protection is advanced in the 1996 South African constitution.

Among its catalogue of rights, the constitution explicitly protects positive social and economic rights, such as the right to housing (Section 26), the right to health care, food, water, and social security (Section 27), and the right to education (Section 29). None of these positive rights provisions, however, imply a right to housing, health care, or education *per se*. Instead, they merely ensure that reasonable state measures are taken to make further housing, healthcare and education progressively available and accessible.

Whereas no group or collective rights are directly protected by the American Constitution, or have been unequivocally protected by the US Supreme Court, several categories of such rights—language rights, the rights of indigenous peoples, a constitutional shield for affirmative action programs, and environmental rights—are an integral part of constitutional law in several leading constitutional democracies (e.g., language rights in Belgium, Canada, and Spain; provisions protecting certain rights of indigenous populations in Canada, Mexico, and New Zealand, etc.). Likewise, there is considerable difference between constitutions in established democracies and in new democracies in the realm of transitional justice.

Some of the differences in constitutional law across countries stem from variance in judicial interpretation. Section 7 of the Canadian Charter of Rights and Freedoms reads: “Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Article 21 of the Constitution of India reads: “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Despite the near identical wording of these provisions, they have been interpreted in very different ways with respect to the constitutional protection of subsistence rights. Such rights are appreciated in Canadian public discourse, but have been consistently pushed beyond the purview of Section 7 by the Supreme Court of Canada. India, by contrast, features vast socioeconomic gaps. Yet its Supreme Court has consistently declared claims for subsistence social rights justiciable and enforceable through constitutional litigation that draws on Article 21.

Finally, a controversial constitutional issue in one polity (say, affirmative action in the United States or jurisdictional autonomy of religious minority groups in India) maybe a non-issue in another polity. And a certain issue may be framed differently in different polities. For example, reproductive freedom may be framed mainly as a clash of rights (e.g. in the US), as a reflection of the status of the historically

influential church (e.g. in Poland), or as a conflict between national preferences and supra-national norms (e.g. the compatibility of Irish abortion laws with provisions of the European Convention of Human Rights).

At any rate, the proliferation of constitutionalism and comparative constitutional law has gradually eroded the status of American constitutional law as the ultimate source for constitutional borrowing. The groundbreaking ideas of the American founding fathers are still studied widely worldwide. The limitation of government powers and protection of fundamental civil liberties by the American Constitution are still considered the quintessential example of modern constitutionalism. Famous figures of American constitutional theory—for example, Alexander Bickel, John Hart Ely and Ronald Dworkin—still comprise much of what is considered the global canon of constitutional theory and interpretation. The legacy of the Warren Court era remains widely admired worldwide; *Brown v. Board of Education*²², is still considered a constitutional event of near-mythical proportion.

However, the prime status of American constitutionalism has given way to a more balanced, multi-source enterprise of comparative constitutional law. The constitutional law and practice of countries such as Germany, Canada, or South Africa are increasingly used as a source of inspiration for jurists worldwide. What is more, less-than-dazzling chapters in American constitutional history, from the *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* rulings to the Clarence Thomas congressional hearings in 1991 and the *Bush v. Gore*²³ courtroom struggle over the American presidency are commonly referred—in the world of new constitutionalism—as examples of constitutional failure. More often than not, jurists draw explicit distinctions and seek to distinguish these and other less-than-glorious episodes in American constitutional history as a means for justifying or improving their own polity's constitutional practices. In short, American exceptionalism, all too common in other contexts, has gradually become the dominant approach in comparative constitutional law around the globe.

II. Comparative Constitutional Law between Substance and Method

As we have seen, intellectual interest in the international migration of constitutional ideas has been growing rapidly over the last decade. However, despite the many scholarly advancements, the

22. *Brown v. Board of Education*, 347 US 483 (1954).

23. *Bush v. Gore*, 531 US 98 (2000).

field of comparative constitutional law remains quite eclectic, and continues to lack coherent methodological and epistemological foundations. 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. 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. If we contrast the approaches of legal academics with the approaches of social scientists to the same sets of comparative constitutional phenomena, we find that the scholarship produced by legal academics often overlooks (or is unaware of) basic methodological principles of controlled comparison, research design, and case selection. And when we expand our lens beyond comparative constitutionalism to capture the entire comparative law enterprise, the methodological matrix gets notably even more blurred. Genuinely comparative, problem-driven, and inference-oriented scholarship is still relatively rare in the study of comparative law as it is currently carried out by legal academics.

A key issue seems to be the very definition of the term “comparative”. Indeed, in the field of comparative constitutional law (and comparative law, more generally) the term “comparative” is often used indiscriminately to describe what, in fact, are several different types of scholarship: (i) freestanding, single-country studies mistakenly characterized as comparative only by virtue of dealing with any country other than the author’s own; (ii) genealogies and taxonomical labeling of legal systems; (iii) surveys of foreign law aimed at finding the “best” or most suitable rule across cultures; (iv) comparative references aimed at engendering self-reflection through analogy, distinction, and contrast; (v) concept formation through multiple descriptions of the same constitutional phenomena across countries; (vi) careful comparative analysis of one or several case-studies (“small-N”) aimed at generating/supporting causal arguments that may travel beyond the cases studied; and possibly also (vii) “large-N” studies that draw upon multi-variate statistical analyses of large number of observations, measurements, and data sets etc. in order to determine correlations among pertinent variables (by definition of an a priori quantifiable nature). These two latter types of scholarship 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.

An often cited hurdle in advancing general theory in comparative constitutional law is the potential oversight of the specific institutional, political and doctrinal context within which laws evolve and function. Without attention to such contextual details, important nuances and idiosyncrasies are easily lost.²⁴ There is, no doubt, some truth in the contextualist concern. As we have seen, there are significant differences in the constitutional history, law and jurisprudence of countries worldwide. Having said that, the contextualist concern seems to provide an all too easy excuse for avoiding serious comparative work. Surely, details and context matter a great deal. However, even social anthropology – arguably the most “contextual” and “hermeneutic” discipline in the social sciences – attempts to produce generalizable insights regarding human development and behavior that are based on, but ultimately go beyond, detailed ethnographies.²⁵ Besides, there seems to be a notable difference between the significance of context when one studies the transition from childhood to adolescence in early 20th century New Guinea (Margaret Mead), patterns of reciprocity in remote Melanesian islands (Bronislaw Malinowski) or magic rituals among the Nuer of southern Sudan (E. E. Evans-Pritchard) – to name but three ethnographic classics – and the much more modest significance of context when one studies popular phenomena such as the mass media, air traffic, professional sports, scientific discoveries, or modern constitutionalism. In other words, the more universal and widespread certain norms and practices become – the astounding convergence worldwide toward constitutional supremacy and judicial review would be a good example here – the less effective or significant the contextualist concern becomes. So while each language or dialect is surely unique or idiosyncratic in many respects, it is the development

24. This is, in a nutshell, the argument advanced by Mark Tushnet in his *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONNECTICUT L. REV. 649 (2004).

25. One of my favorite examples here is Richard Lee’s meticulous ethnographic work on patterns of food gathering and consumption among the !Kung San in the Kalahari. His work led to the expansion of the “homo-economicus” thesis to the least likely of settings, and ultimately to a paradigm shift in our understanding of the economic and political organization of hunter-gatherer societies. See, e.g. Richard B. Lee, *THE !KUNG SAN: MEN, WOMEN, AND WORK IN A FORAGING SOCIETY* (1979).

and substantiation of a core common element or a general linguistic principle that can be applied to many or all of these languages (e.g. Chomsky's theory of 'generative grammar') that makes for a great scientific discovery.

A major impediment seems to be the field's reluctance to engage in theory building through causal inference. 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. They are characterized by the aspiration to *explain* – rather than merely describe – social (including legal) phenomena through the validation or refutation of propositions about the world. And this is common to all core social sciences: it is true of quantitative and qualitative, behaviorist and historical-interpretive approaches to social inquiry that are used in disciplines such as sociology and political science, not to mention in generally more positivist disciplines (such as social psychology and economics).²⁶ Even the large camp of social scientists who attempt to illuminate large, complicated, and untidy social phenomena that cannot be easily measured or that resist definitive explanations, agree that a good theory requires more than mere description or classification.

Granted, there is genuine skepticism with regards to much of what passes for comparative work in the social sciences: it is often empirically thin, relying too much on "theory", and reflecting too little knowledge of the cases under consideration. Other "comparative" disciplines – comparative literature, comparative religion, or film studies being three pertinent examples – have gravitated over the years towards a more hermeneutic mode of inquiry, emphasizing the unique, exceptional or idiosyncratic aspect of their research subject. But even the concern with context, meaning, and contingencies does not prevent the disciplines of history and social anthropology – two disciplines that often rely on thorough investigation of a single case study – from attempting to advance knowledge in a way that ultimately surpasses their specific case study.²⁷

26. See, e.g. *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* (Henry Brady and David Collier, eds.; 2004); Alexander L. George and Andrew Bennett, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* (2004).

27. On the possibility of a unified logic of causality in the shadow of this plurality, see Gary King et al., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994); John Gerring, *Causation: A Unified Framework for the Social Sciences*, 17 *J. THEORETICAL POL.* 163 (2005); Lee Epstein and Gary King, *The Rules of Inference*, 69 *CHI. L. REV.* 1 (2002); Judea Pearl, *CAUSALITY: MODELS, REASONING, AND INFERENCE* (2000).

There is no apparent, a priori analytical reason, endogenous or exogenous, that explains why the study of comparative law could not engage in a more explanation-oriented mode of scholarship. Reliance on comparative research in the quest for explaining variance in legal phenomena across polities was the main objective of legal sociology's founding fathers. Explanation, not just description or taxonomy, has long been a main objective of evolutionist and functionalist approaches to legal transformation. The quest for explanation derived from comparisons across jurisdictions, time, policies, or institutions has characterized sub-fields within law (such as law and development, much of the law and economics movement, as well as the emerging trend toward empirical legal scholarship). Moreover, one of the judge's main areas of expertise lies in assessing evidence, weighing probabilities for conviction or acquittal purposes, and ultimately determining responsibility for alleged wrongdoing. This is, in essence, a causality-oriented exercise.

The purpose and utility of the comparative inquiry is admittedly different for the lawyer, the judge, the law professor, and the legal academic. A lawyer who wishes to represent her client in the best possible way may be forgiven for selectively using comparative evidence in an attempt to enhance the client's case. A judge who tries to make a good policy call may be encouraged to look selectively at other jurisdictions that have been experimenting with the same public policy issues. A law professor who is trying to illustrate to her students the variance across countries with regard to, say, reproductive freedoms, would be well advised to survey the pertinent state of affairs with respect to reproductive freedoms in a few leading polities. But a more methodologically astute approach is warranted when an attempt to explain or establish causality are involved. A legal academic, who is set to advance a causal claim – whether small or large-scale – must follow basic case selection and data analysis procedures that are inference-oriented or are otherwise methodologically astute.

The different purpose and value of comparative inquiry for the jurist and the legal academic highlights the basic tension between the modern law school's vocational training *raison d'être* on the one hand, and its aspiration to become a research-intensive enterprise where explanatory theories are developed and advanced on the other. This kind of tension is not unique to law schools. However, other professional schools torn between their vocational commitments and scholarly aspirations (most notably medical schools and business schools) have found effective ways for combining method with substance, valuable

information and analytical tools with inference-oriented research. Interdisciplinary agendas, curricula and methods have been adopted to allow for the smoother accomplishment of these aims. However, despite the growing reliance of jurists and policy-makers on comparative jurisprudence and legal data, the field of comparative law has not kept pace with other areas of comparative inquiry within and beyond law.

A case in point is comparative constitutional law. There is little doubt that the vast majority of high-quality comparative public-law scholarship produced over the past decade has contributed tremendously not only to the mapping and classification of the world of new constitutionalism, but also to the creation of pertinent conceptual frameworks for studying comparative law more generally. Indeed, we must not underestimate the significance of the “concept formation through multiple description” aspect of comparative inquiry. We acquire a far more complex, nuanced, and sophisticated understanding of what, for example, solids or mammals are by studying the variance and commonality among exemplars within their respective categories. It is well known that 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 nineteenth-century Europe. Darwin’s various findings also served as the basis for his *Origin of Species* – and the development of one of the most influential theories of the modern era. 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 may be called a unified logic of scientific inquiry is *making inferences about cause and effect* that go beyond the particular observations collected. 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 by most social scientists. It is little wonder then why there has been more frequent reference to insights from the social sciences by legal scholars than vice versa. To the extent that an inter-disciplinary borrowing has occurred, it has been, by and large, a one way migration of ideas.

To further clarify this point: detailed taxonomy, let alone the formation of sophisticated concepts, is a fundamental element of any

academic inquiry. It is, for example, of great significance to the study of the largely under-charted terrain of comparative constitutional law. It is also worth noting that a devotion 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 other words, adhering to inference-oriented principles of research design and case selection is not necessarily required, so long as no claim of determining causality or developing explanatory knowledge is made. However, intellectual integrity warrants that a scholar who aspires to establish meaningful causal claims or explanatory theories through comparative inquiry should follow these methodological principles. And, in fact, neither advanced knowledge of the epistemological foundations of social inquiry nor the mastery of complex research methods is necessarily required. Simply following certain basic principles that are commonly used in “small-N” studies in the social sciences may fill this gap.

There are several other reasons for the limited focus on causality, inference, and explanation in comparative constitutional law. These include traditional doctrinal boundaries; trajectories of academic training; lack of established tradition of anonymous peer review in most law reviews; and the different epistemologies of social and legal inquiry. The traditional “case-law” method of instruction – commonly drawn upon in legal academia – is geared toward studying the legal forest through a detailed examination of its individual trees. Because this method is aimed to teach students to “think like lawyers,” it is quite effective in conveying the significance of subtle distinctions between the facts and language of cases and judicial opinions. Unfortunately, however, this approach does not lend itself easily to thinking about comparative inquiry in order to establish causality or to expose extra-judicial factors that may shape legal outcomes.

There is also persisting resistance within legal academia to the notion that law operates not only as a semi-autonomous professional universe with its own rules and rationales, but also as a site of social struggle and political strife. Unlike most social scientists, mainstream legal scholars continue to resist the notion that law is a species of politics and that courts are a part of the political system, not a thing apart. This doctrinal separation of law and politics has not passed over most scholars of constitutional law – perhaps the most observably political

branch of law. This law- or court-centric perception seldom foregrounds the reality that law and courts are a part of the political system, not a thing apart. Even those who are skeptical of the belief that constitutionalism is an undisputed “good thing” have given little consideration to the actual political conditions and incentives that are conducive to the expansion of judicial power. From Jeremy Waldron on the left to Robert Bork on the right, these critics are locked in a “court-centric” dogma that tends to blame “power hungry” judges and “imperialist” courts for “expropriating” the constitution, while ignoring the political conditions, settings, and interests that promote judicial activism and the ever-accelerating judicialization of politics.

The legacy of legal realists and critical legal scholars notwithstanding, there is still an embedded reluctance to treat law as a dependent variable that often reflects powerful ideologies, hegemonic interests, and strategic choices. With a few notable exceptions,²⁸ too many constitutional law professors continue to ignore pertinent political science literature that points to political, not juridical, sources of judicial entanglement with pure politics. While legal analyses of court rulings are countless, only a small handful of articles published in America’s leading law reviews every year pay attention to the critical institutional and political conditions within which constitutional courts operate and judicial review is exercised. Fundamental questions are rarely addressed. Where, for example, does judicial power originate? What accounts for the significant variance in the timing, scope, and nature of constitutional reform across the world of new constitutionalism? What are the political conditions that support the maintenance and expansion of judicial power? What are the determinants of judicial decision-making? Even more concrete questions such as the effect of institutional features of judicial review on judicial engagement with politics are addressed almost exclusively by political scientists or political economists, not by constitutional theorists.²⁹ In fact, power relations or strategic choices have always been at best a peripheral component of mainstream constitutional law,

28. See, e.g. Jack Balkin and Sanford Levinson, *Understanding Constitutional Revolution*, 87 VIRGINIA L. REV. 1045 (2001); Barry Friedman, *The Politics of Judicial Review*, 84 TEXAS L. REV. 257 (2005); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 35 (2005); Mark Tushnet, *Political Power and Judicial Power: Some Observations on Their Relation*, 75 FORDHAM L. REV. 755 (2006); Adrian Vermeule, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).

29. None of Ronald Dworkin’s seven books on constitutionalism, for example, refer to any of these fundamental questions, nor do they even cite any secondary sources dealing with positive questions or empirical findings concerning the origins and consequences of constitutionalization and judicial review. Dworkin – arguably the most prominent contemporary constitutional theorist – is certainly not alone in doing this.

comparative or not.

Consider, for example, the recent scholarship in political science that points to the extra-judicial determinants of judicial empowerment.³⁰ These works examine in a comparative context the reasons for political deference to the judiciary and the political construction of judicial review more generally. It suggests that the existence of an active, non-deferential constitutional court is a necessary, but *not a sufficient condition*, for persistent judicial activism and the judicialization of mega politics. Assertion of judicial supremacy cannot take place, let alone be sustained, without the support (tacit or explicit) of influential political stakeholders. A political sphere that is conducive to constitutionalization and the expansion of judicial power is at least as significant to the emergence and sustainability of judicial review as the contribution of law, courts and judges.

The strategic approach to the study of judicial behavior, to pick another example, casts doubt on the prevalent apolitical view of the judiciary. It suggests that judges are not only precedent followers, framers of legal policies, or even 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 reaction of the surrounding political sphere. 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. Because justices do not have the institutional capacities to enforce their rulings, they must take into account the extent to which popular decision makers will support their policy initiatives.³¹ Strategic justices must gauge the prevailing winds that drive election-minded politicians and make decisions accordingly. Judges may also 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. As recent studies show, credible threats on the court’s autonomy and harsh

30. See, e.g. Hirschl, *TOWARDS JURISTOCRACY*, *supra* note 8; Tom Ginsburg, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003); Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in The European Union*, 52 *INT’L. ORGAN.* 149 (1998).

31. Kevin McGuire and James Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 *J. POL.* 1018 (2004).

political responses to unwelcome activism or interventions on the part of the courts have chilling effects on judicial decision-making patterns.³² Likewise, judges in certain legal systems may vote strategically, especially in politically charged cases, in order not to diminish their chances for promotion.³³ 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-a-vis other major national decision-making bodies.³⁴ Finally, judges seem to care about their reputation within their close social milieu, court colleagues, and the legal profession more generally.³⁵ 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.

Or consider the issue of the possible extra-judicial (e.g. historical, cultural, economic, ideological or political) determinants of a given polity's commitment to a relatively generous welfare regime. Unfortunately, there has not been any serious dialogue between the discourse (normative or empirical) concerning the constitutional status of positive rights and the literature concerning the political economy of welfare regimes and the modern welfare state more generally. In particular, no major work that this author is aware of addresses in a comparative fashion the possible causal links between: 1) the political salience of socio-economic inequality, and/or labor unions and other leftists political forces in a given polity; 2) levels of commitment to, and existence of, a well developed welfare regime (Keynesian, Marxist-socialist, or otherwise) in that polity; and 3) constitutional protection (via law and/or jurisprudence) of social welfare rights in that polity. Leftist political forces have historically been influential in polities such

32. See, e.g. Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & Soc'y. Rev. 117 (2001); Lee Epstein et al., *Constitutional Interpretation from a Strategic Perspective*, in MAKING POLICY, MAKING LAW: AN INTER-BRANCH PERSPECTIVE (M. Miller and J. Barnes, eds.; 2004); Gretchen Helmke, *COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA* (2005); Georg Vanberg, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005).

33. J. Mark Ramseyer and Eric Rasmusen, *Why are Japanese Judges so Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331 (2001).

34. This is a common argument in explaining the expansion of judicial power in regional or supra-national settings. See, e.g. Joseph H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26 COMP. POL. STUD. 510 (1994); Karen Alter, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* (2001); Maria Oliveira, *Judicial Diplomacy: The Role of the Supreme Courts in Mercosur Legal Integration*, 48 HARV. INT'L. L.J.93 (2007).

35. Laurence Baum, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

as Brazil, India or Spain. All three countries feature strong constitutional support for social welfare rights. The United States' example may be compatible in that, much like Brazil or India, the US features one of the most unequal distributions of income among advanced industrial societies; it has vast social and economic disparity (the second largest among western societies), and is controlled to a large extent by the sheer power of corporate capital. Unlike Brazil or India, however, true socialist (let alone communist) political agenda has never garnered any meaningful popular support in 20th century United States. And then we have countries such as Sweden or Norway – two of the most developed and prosperous nations on earth – that have long adhered to a notion of generous welfare regime and a relatively egalitarian conception of distributive justice while being less than enthusiastic (to put it mildly) toward the notions of rights and judicial review. And there are of course numerous other variations among countries that may be derivative of differences in hegemonic cultural propensities or demographic trends, historical and institutional path dependence, domestic and international political economy factors, or strategic behavior by constitutional courts vis-à-vis other political actors and/or the public. In short, there seem to be multiple paths and trajectories to the realization (or neglect) of social welfare rights, of which formal constitutionalization or supportive jurisprudence are only two possibilities. More generally, this suggests that the traditional focus on legal provisions and court rulings – the common mode of inquiry in comparative constitutional law – is bound to yield an incomplete picture concerning the realization of rights.³⁶

Another hurdle is the lack of incentives within legal academia to produce careful comparative work. Despite the increasing interest in comparative legal analyses, comparative law remains a niche field. Most leading law reviews seldom publish articles that engage in a meaningful comparative analysis. Even limited reference to comparative case law in these journals is rare. And, in the current atmosphere of cultural and ideological wars within the American polity (reflected, *inter alia*, in the completely overblown and hyperbolic debate concerning the sporadic references by the US Supreme Court to the constitutional norms of a handful of other polities), any serious reference to, or study of, comparative constitutional law designate its author as a member of

36. This is, at the most abstract level, the “take-home” message of books such as Charles Epp, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); Gerald Rosenberg, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

a legion of liberals, cosmopolitans, and progressives who are set to destroy America's unique constitutional legacy. The various Bar Associations do not require basic knowledge, let alone mastery, of foreign law – constitutional or otherwise. Whereas in several countries (such as Canada or Spain) multilingualism and genuine cosmopolitanism are considered winning cards in the competition for much coveted clerkship positions, these factors play a mere secondary role in most other western polities. As long as this remains the pertinent incentive structure, why would any aspiring legal academic engage in serious comparative work?

A related problem is that studying comparative law is a serious undertaking, a labor of love for this author as well as others in the field. It remains a difficult, labor-intensive, and time-consuming endeavor. The modern comparativist's basic toolkit must include pertinent linguistic and legal skills; detailed knowledge of foreign legal systems, jurisprudence, and legacies (as opposed to a sketchy acquaintance with two dozen foreign cases); familiarity with basic comparative methodologies, quantitative and qualitative (as opposed to an "E-Z Pass" methodology-light approach to comparative law scholarship); the ability to remain constantly informed about often under-reported legal and constitutional developments overseas (as opposed to a Montesquieu-like selective reliance on secondary and easily attainable sources that all too often adhere to the author's normative predispositions and support his or her arguments); cultural sensitivity; the willingness to spend lengthy periods of time doing fieldwork in less than dazzling conditions (as opposed to "armchair" anthropology research carried out with little or no fieldwork or systematic data collection).

In summary, the international migration of constitutional ideas and scholarly interest in comparative constitutional law have reached new highs. However, the field's epistemological and methodological matrix is still blurred. The bulk of work produced by scholars of comparative constitutional law is descriptive, speculative, normative, and above all doctrinal. Too little attention is given to empirically-grounded, explanation or inference-oriented comparative research. While comparative law's early twentieth-century confinement to encyclopedic knowledge and classification may be forgiven when viewed in its historical context, retaining these somewhat arcane approaches in the early twenty-first century is a missed opportunity. An international conversation among jurists aided by new information technologies has generated a considerable knowledge-bank about the

many different legal and constitutional systems of countries around the world. Thanks to this rich body of information, it is now possible – perhaps for the first time – to draw on comparative research to test hypotheses and to formulate generalizable insights concerning the causal relationships between law and various political, social, or economic phenomena. Common rules of causal inference will help comparativists make fuller use of the impressive corpus of constitutional law-related facts that we now possess. A serious dialogue between ideas and evidence, theory and data, must now replace, or at least complement, the detailed classification of laws and legal concepts as the ultimate goal of comparative legal studies, constitutional and otherwise.