Editorial

I have invited Ran Hirschl, who has recently joined our Board of Editors, to write the Editorial for the first issue of 2013. His contribution follows below.

From comparative constitutional law to comparative constitutional studies

Eighty years ago, John H. Wigmore, author of the seminal *Panorama of the World's Legal Systems*, characterized the comparative law journals of his time as offering

> an abundance of valuable materials on the customary laws of the Lagos and Bantus, on the principles of inheritance in Mohammedan Law, on the early sources of Rumanian Law, or on the principles of marriage law in China or in South Africa; but almost nothing by way of comparing and contrasting the ideas in different systems, and of elucidating their correspondence or divergence—in short, of the evolution of legal ideas. . . . Since the time of Henry Maine, the anthropologists and sociologists have done a great deal in the field of comparative social studies, but the jurists have not been so fertile in the field of comparative legal ideas.[1]

There is no doubt that comparative constitutional law has enjoyed a certain renaissance since the mid-1980s. However, despite the field's many scholarly advances, too little has changed since Wigmore's days with respect to comparative (constitutional) law's ambivalence towards the social sciences, admiration on the one hand, resentment and exclusion on the other.

An effervescent constitutional domain—a long-time hallmark of the American political order—is now a common feature of over one hundred countries and several supranational entities across the globe. Most of these polities can boast the recent adoption of a constitution or a constitutional revision that contains a bill of justiciable rights and enshrines some form of active judicial review and constitutional courts and their judges have emerged as the key translators of constitutional provisions into guidelines for public life. In so doing, they are increasingly relying on comparative constitutional law to frame and articulate their own positions on a given constitutional question. The brisk traffic in constitutional ideas has been accompanied by the rise of what may be termed generic constitutional law—a supposedly universal, Esperanto-like discourse of constitutional adjudication and reasoning, primarily visible in the context of rights and liberties.[2] In this new constitutional environment,

[1] John H. Wigmore, *Jotting on Comparative Legal Ideas and Institutions*, 6 Tulane L. Rev. 48, 49–50 (1932).

[2] *See, e.g.*, David Law, *Generic Constitutional Law*, 89 Minnesota L. Rev. 652 (2005); Colin J. Beck, Gili S. Drori, and John W. Meyer, *World Influences on Human Rights Language in Constitutions: A Cross-National Study*, 27 Int'l Socio 483 (2012).

even bastions of insular parochialism cannot entirely avoid developments taking place internationally.[3]

This transformation has brought about an ever-expanding interest among scholars, judges, practitioners, and policy-makers in the constitutional law and institutions of other countries as well as in the transnational migration of constitutional ideas more generally.[4] Once a relatively obscure and exotic subject studied by the devoted few, comparative constitutionalism has become one of the more fashionable subjects in contemporary legal scholarship. The burgeoning literature on the subject now includes monographs and textbooks published by leading academic presses as well as periodicals and symposia devoted to the study of comparative constitutionalism. Top-ranked law schools now regard courses on comparative constitutional law as essential components of a curriculum aimed at introducing students to a distinctly more cosmopolitan view of the law and legal institutions.

In all of this, a simple yet powerful insight is often overlooked: constitutions neither originate nor operate in a vacuum. Their import cannot be meaningfully described or explained independent of the social, political, and economic forces, domestic and international, that shape a given constitutional system. Indeed, the rise and fall of constitutional orders—the average lifespan of a written constitution since 1789 is 19 years—are important manifestations of those struggles.[5] Culture, economics, institutional structures, power, and strategy are as significant to understanding the constitutional universe as jurisprudential and prescriptive analyses.[6] Any attempt to portray the constitutional domain as a predominantly legal, rather than imbued in the social or political arena, is destined to yield thin, a-historical, overly doctrinal or formalistic accounts of the origins, nature and consequences of constitutional law. From Montesquieu and Weber to Douglass North and Robert Dahl, prominent social thinkers who have engaged in a systematic study of constitutional law and institutions across polities and through the ages have accepted this plain (and possibly inconvenient) truth.[7]

By their very nature, legal institutions—be they property rights, labor law, or electoral rules—produce differential distributive effects: they privilege some groups, interests, worldviews, and policy preferences over others. This effect is further accentuated when it comes to constitutions. After all, their *raison d'être* is to create, legitimize, allocate, and check power. Given their entrenched or "higher law" status, constitutions provide an ideal platform for "locking in" certain worldviews, policy preferences, and

[3] Vicki Jackson, Constitutional Engagement in a Transnational Era (2010); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 Virginia J. Int'l L. 985 (2009).

[4] The Migration of Constitutional Ideas (Sujit Choudhry ed., 2006).

[5] Zachary Elkins et al., The Endurance of National Constitutions (2009).

[6] Interestingly, none of Ronald Dworkin's six passionately argued books on constitutionalism cite any empirical work on the origins and consequences of constitutionalization and judicial review. *See* Mark Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 Law & Social Inquiry 309 (2002). For a European perspective on the challenge of doctrinalism *see*, Armin von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges facing Constitutional scholarship in Europe,* 7 Int'l J. Const. L. (I.CON) 364 (2009).

[7] Thinking about law as reflective of broader forces, rationales and interests is certainly not foreign to legal scholarship. The intellectual legacy of comparative legal sociology, from Henry Maine's Ancient Law and Max Weber's Economy and Society to Roberto Unger's Law in Modern Society, is well-known and need not

institutional structures, and disadvantaging, limiting or precluding the consideration of others. Constitution drafting, like constitutional interpretation does not occur out of thin air. Power will be differentially allocated at the drafting table and the likelihood of pertinent political, economic, and judicial stakeholders voluntarily conceding power, prestige or privilege during this process is not very high.

Nonetheless, much (though certainly not all) of the contemporary literature is focused on questions of jurisprudence. Often excluded from the canonical discourse are other crucial questions, such as the real-life impact of constitutional jurisprudence and its efficacy in planting the seeds of social change; how constitutions reflect and shape nationhood and identity;[8] how constitutions construct, not merely constrain, politics (e.g., by framing the goals and interests people believe they can pursue in politics);[9] the actors and factors involved in demanding or bringing about constitutional transformation; the place of constitutionalism, national and trans-national, in the emerging global economic order;[10] or the ever-increasing judicialization of politics worldwide and its impact on the legitimacy of the courts and the quality of democratic governance more generally.[11]

The narrowing down of the scholarly enterprise of comparative constitutionalism to court-centric analyses is neither inevitable nor grounded in the modern history of the field. Unlike the present disciplinary divide, early scholars of comparative constitutionalism saw the constitutional domain as an extension of, not separate from, the political domain. In 1884, William W. Crane and Bernard Moses published *Politics: An Introduction to the Study of Comparative Constitutional Law*—perhaps the first book in North America devoted to the study of comparative constitutionalism as a distinct phenomenon.[12] A given nation's constitution, they suggested, was a reflection of that nation's political realm, specifically people's will and the nation's enduring values and legacy. A similar emphasis on comparative constitutional law as the study of formal political institutions is evident in John William Burgess' seminal book *Political Science and Comparative Constitutional Law*, published in 1893.[13] Burgess was a professor of political science and law at Columbia University, and is considered one of the founding fathers of the discipline of political science in the United States.[14] The book occupies two volumes devoted to a systematic comparison of the constitutional formation of government branches and formal political institutions in the United States, Imperial

be discussed here. Legal Realism and Critical Legal Studies are two important strands within American legal academia of the 20th century. So is the influential branch of Law and Economics.

8 *See, e.g.*, Gary Jacobsohn, Constitutional Identity (2010); Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community (2009)

9 My thanks to Mark Graber for suggesting this point to me. *See, generally*, Mark Tushnet, Why the Constitution Matters (2010); Sanford Levinson, Framed: America's 51 Constitutions and the Crisis of Government (2012); Mark Graber, A New Introduction to American Constitutionalism Ch. 8 (2012).

10 *See* The New Constitutionalism and the Future of Global Governance (Stephen Gill and Claire Cutler eds., forthcoming 2013).

11 Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 Ann. Rev. Pol. Sci. 93 (2008).

12 William W. Crane and Bernard Moses, Politics: An Introduction to the Study of Comparative Constitutional Law (1884).

13 John William Burgess, Political Science and Comparative Constitutional Law (1893).

14 Among his many other contributions, in 1886 Burgess founded *Political Science Quarterly*, the oldest political science journal in the US.

Germany, the United Kingdom, and France alongside passing references to numerous other polities. Burgess regards the comparative approach as the book's major asset. "If my book," he wrote, "has any peculiarity, it is in its method. It is a comparative study. It is an attempt to apply the method, which has been found so productive in the domain of Natural Science, to Political Science and Jurisprudence."[15] For Burgess, the drafting of constitutions was inherently a political, rather than a legal, process. Placing his treatise under the heading of political science rather than constitutional law, Burgess declared:

> The formation of a constitution seldom proceeds according to the existing forms of law. Historical and revolutionary forces are the more prominent and important factors in the work . . . These cannot be dealt with through juristic methods.[16]

In short, as Dick Howard observes, in the scholarship of the late-19th century, the study of comparative constitutional law was perceived an extension of comparative politics.[17]

The tectonic political shifts of the mid-20th century—most notably World War II and its aftermath, post-colonialism, and democratization—brought about a burst of scholarly interest in a new field of inquiry: comparative constitutional design (or constitutional engineering). The premise of this field is that desirable social and political outcomes can be achieved through optimal institutional planning and painstaking implementation. The various approaches to constitutional design share the belief that constitutional provisions, institutions, and arrangements can and should be optimized so as to induce, support, or allow social and political change. By idealist accounts, constitutions evolve organically and are said to reflect the authentic people's will or a polity's enduring values; whereas constitutional design advocates a second-order, pragmatic vision of constitution-making as a response to concrete problems and challenges. In democratic settings, the purported goals of such design may be the enhancement of the political system's legitimacy and democratic credentials (e.g., participation and representation), increased accountability and transparency, as well as the balancing of the principle of majority rule with the idea that democracy may have more substance to it than mere adherence to that principle. In transitional settings—most commonly post-conflict situations or transition from an authoritarian regime—constitutional design is aimed at building trust and ensuring effective transition while maintaining the incentives of major stakeholders to maintain the transitional pact and accomplish its stated goals. Constitutions, it is supposed, may be engineered so as to accomplish these goals. The contribution of this research to the actual stabilization and tranquilization of conflict or post-conflict settings is very much an open question. Either way, as with most other theoretical developments in comparative constitutional studies, social scientists, not jurists, have taken the lead. Virtually all grand-masters of 20th-century constitutional design literature—Arend Lijphart, Donald Horowitz, Juan Linz, Giovanni Sartori, or Guillermo O'Donnell, to mention a few prominent names—are political scientists. The same generally holds

[15] *Id.*, vol. I, vi; cited in A. E. Dick Howard, *A Traveler from an Antique Land: The Modem Renaissance of Comparative Constitutionalism*, 50 Virginia J. Int'l L. 3 (2009).

[16] Burgess, *supra* note 13, at 90; cited in Howard, *supra* note 15, at 8.

[17] Howard, *supra* note 15.

true with respect to the literature on the transition to and consolidation of democracy following waves of democratization in Latin America, Asia, and most notably southern, central and eastern Europe; many prominent authors (e.g., Jon Elster, Stephen Holmes, Adam Przeworski, or Andrew Arato) are political scientists, or hold joint appointments in law schools but are certainly not doctrinal lawyers.

Meanwhile, institutional economists and political scientists have developed theories of constitutional transformation that see the development of constitutions and judicial review as mechanisms to mitigate systemic collective-action concerns such as commitment, enforcement, and information problems. One such explanation that derives directly from Max Weber's work (advanced by Nobel Prize Laureate Douglass North, among others) sees the development of constitutions and independent judiciaries as an efficient institutional answer to the problem of "credible commitments."[18] The constitutional entrenchment of limitations on a given regime's ability to behave unpredictably (e.g., property rights, independent judicial monitoring of legislative and executive branches) are seen as an effective way of increasing that regime's credibility *vis-à-vis* potential lenders and investors.

The broader premise that decision-makers tend to be risk-averse under conditions of systemic uncertainty is a textbook illustration of how core concepts and discoveries by social scientists may be fruitfully applied to the study of comparative constitutional law. It has been advanced by a wide array of non-legal thinkers, from John Rawls' "principles of justice" agreed upon behind a veil of ignorance;[19] to Marshall Sahlins' paradigm shifting explanation for the lack of food accumulation or storage among hunter-gatherer societies (a perception of unlimited resources and a pervasive belief in a "giving environment");[20] and to Tversky and Kahneman's seminal work on the psychology of choice under conditions of uncertainty.[21] The entire conceptualization of constitutions as pre-commitments or as predictability-enhancing instruments is based on a similar understanding of human nature and behavior.[22]

Taking the notion of constitutions as political institutions even further, more recent political science scholarship, quantitative and qualitative, attempts to move beyond the traditional focus on constitutionalization as emanating from broad public or organic pressures, to identify the concrete political conditions that are conducive to constitutional reform, and to the expansion of judicial power more generally. This new direction in comparative constitutional studies focuses on specific "supply-side" factors such as the nature of the political market, the arrival of a new constellation of power, and

[18] Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. Inst'l and Theoretical Econ. 286 (1993); Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 Am. Pol. Sci. Rev. 245 (1997).

[19] John Rawls, A Theory of Justice (1971).

[20] Marshall D. Sahlins, Stone Age Economics (1972).

[21] Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453 (1981).

[22] *See, e.g.*, Douglass North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 29 J. Econ. Hist. 803 (1989); Torsen Persson & Guido Tabellini, The Economic Effects of Constitutions (2005).

the changing interests and incentives of pertinent political stakeholders as a key determinant of constitutionalization and judicial empowerment more generally.[23]

Even when it comes to court-centric scholarship, social scientists have made great leaps, often in an attempt to analyze constitutional courts and their jurisprudence as integral elements of a larger political setting. The first steps in this direction were made by Robert Dahl's conceptualization of the US Supreme Court as a mainly political, not juridical, institution, and later by Robert McCloskey's detailed accounts of the US Supreme Court's interactions with the political sphere.[24] Martin Shapiro's *Courts: A Comparative and Political Analysis* was the first thorough application of Robert Dahl's theory of courts as political institutions to the study of comparative public law.[25] Meanwhile, in the mid-1960s political scientists such as Glendon Schubert and Walter Murphy laid down the basis for the empirical study of judicial behavior.[26]

Unfortunately, very little of this scholarship has found its way into comparative constitutional law course syllabi. The proliferation of constitutional courts, judicial review, and constitutional rights jurisprudence worldwide, indeed the rise of the human rights discourse more generally, turned the comparative study of constitutionalism into a predominantly legalistic enterprise that is heavily influenced by the prevalent case-law method of instruction. A dozen "celebrity" court rulings from South Africa, Germany, Canada, and the European Court of Human Rights now form the unofficial canon of global constitutionalism.

An indication of the law school's "expropriation" of contemporary comparative constitutional studies is the main disciplinary affiliation of the contributors to two recently published comprehensive handbooks on the subject. Of the 72 contributors to the definitive *Oxford Handbook of Comparative Constitutional Law*—a landmark scholarly accomplishment in many respects—64 (or 89 percent) are affiliated with law faculties, courts, or legal institutions; 8 (or 11 percent) are affiliated with social science or humanities disciplines.[27] Although many contributors refer to political science literature, relatively few depart from law-, court-, or jurisprudence-centric approaches to explore other actors and processes in the constitutional domain. The picture is slightly different in the *Comparative Constitutional Law* (2011). Of the 37 contributors, the main disciplinary affiliation of 28 (or 76 percent) is law; 9 (24 percent) are mainly affiliated with social science disciplines.[28]

Predictably, then, in contemporary comparative constitutional law, constitutional jurisprudence is considered the central component of the constitutional universe, and the main subject of inquiry. Other key actors and elements of the constitutional

[23] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (2003); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

[24] Robert Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. Pub. L. 279 (1957).

[25] Martin Shapiro, Courts: A Comparative and Political Analysis (1981).

[26] Glendon Schubert, Judicial Decision-Making (1963); Walter Murphy, Elements of Judicial Strategy (1964).

[27] The Oxford Handbook of Comparative Constitutional Law (Michel Rosenfeld & Andras Sajo eds., 2012).

[28] Comparative Constitutional Law (Tom Ginsburg & Rosalind Dixon eds., 2011).

domain—the constitutional text in its entirety; constitutional litigants and the legal profession; constitutional development and history; the extent to which constitutions actually shape or alter behavior; or the institutional, ideological, and political sphere with which the constitutional order constantly interacts—are not taken to be part of what scholars of comparative constitutional law "do."

Why look to the social sciences?

There are many reasons why the social sciences ought to be incorporated in the comparative study of constitutions, but in the interest of brevity I will here focus on three such core rationales. First, an overwhelming body of evidence suggests that extra-judicial factors play a key role in constitutional court decision-making patterns. Constitutional courts and judges may speak the language of legal doctrine but, consciously or not, their actual decision-making patterns are correlated with policy preferences, ideological and attitudinal tilts;[29] as well as appearing to reflect strategic considerations *vis-à-vis* their political surroundings, panel compositions, professional peers, or the public as whole. This can be explained by reference to the costs that judges as individuals or courts as institutions may incur as a result of adverse reactions to unwelcome decisions, or through the various benefits that they may acquire through the rendering of welcome ones.[30] A wide array of empirically grounded studies suggest that harsh political responses to unwelcome activism or interventions on the part of the courts, or even the credible threat of such a response, can have a chilling effect on judicial decision-making patterns. Variations on the same logic have been used to compellingly explain judicial behavior in countries as varied as Argentina, Brazil, Germany, Pakistan, Canada, Russia, South Korea, Taiwan, Georgia, Ukraine, Kyrgyzstan, and Mexico.[31] Other works point to the judges' relations with their epistemic communities of reference (the network of jurists), or their concern with the court's legacy, reputation and public stature both domestically and internationally as important determinants of judicial behavior, in particular in politically significant cases. In other words, insights from political science, social psychology, and organizational theory have never been more relevant to the study of comparative constitutional law even if one accepts the view of constitutional courts and their output as the constitutional universe's center of gravity.

Second, the study of constitutional jurisprudence seems limited without the study of its actual capacity to induce real, on-the-ground change, independently or

[29] A well-known exposition of the so-called "attitudinal" model of judicial behavior in the US context is Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002).

[30] For an overview of this approach *see* Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 Ann. Rev. L. & Soc. Sci. 341 (2010).

[31] *See, e.g.*, Jeffrey Staton, Judicial Power and Strategic Communication in Mexico (2010); Gretchen Helmke, Courts Under Constraints: Judges, Generals, and Presidents in Argentina (2005); Alexei Trochev, Judging Russia: The Role of the Constitutional Court in Russian Politics (2008); Diana Kapiszewski, *Tactical Balancing: High Court Decision Making on Politically Crucial Cases*, 45 L. & Soc. Rev. 471 (2011). In recent years, this Journal carried a number of articles that adopt a similar approach; *see, e.g.*, Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 Int'l J. Const. L. (I·CON) 885 (2010).

in association with other factors. A considerable body of research in comparative politics, sociology, and public policy suggests that there are important factors that explain the cross-jurisdictional variance in actual realization of constitutional rights and the implementation of landmark court rulings pertaining to these rights.[32] The comparative constitutional discourse on social rights provides merely one illustration of the puzzling disconnect between the study of rights and realities in comparative constitutional law. Of the world's approximately 170 written constitutions, roughly three-quarters make reference to a right to education, and nearly half to a right to health care. Most written constitutions also include a generic protection of "the right to life" or of "human dignity." And, several key regional and international human rights regimes protect a variety of subsistence rights. At the same time, the actual provision of education, healthcare, or housing, varies dramatically across the world. What may explain this gap? Which countries have fared better than others, and why? How much of the variance is explained by differences among pertinent constitutional texts and their interpretation versus other factors that lie beyond the formal constitutional domain? These key "how and why" questions cannot be answered simply by looking at constitutional provisions or social rights jurisprudence. The overemphasis on the role of courts (or, for that matter, on philosophizing, sometimes without having a wide, truly comparative factual basis, about how *should* courts decide) can hinder rather than advance a coherent explanation of the studied phenomenon.

Unlike the constitutional sphere, government policy—shaped, in turn, by political factors—seems to matter a great deal when it comes to the realization of socioeconomic rights. Luiz Inácio Lula da Silva became president of Brazil on January 1, 2003. Lula, as he is known popularly, has been advocating a socialist-progressive agenda. His administration introduced a series of social policies and new spending priorities aimed at eradicating poverty and illiteracy in Brazil. The results have been nothing short of staggering. From 2003 to 2009, the number of poor people in Brazil dropped from 58.2 million to 41.5 million while the overall population increased from 176 million to 198 million. The Gini-coefficient fell from 0.581 to 0.544; the illiteracy rate dropped from 13.6 percent to less than 10 percent; and the infant mortality rate per 1,000 live births fell from 35.8 to 22.6. The social and economic rights provisions in the Constitution of Brazil have not changed since 1988. The impressive improvements in alleviating poverty in Brazil have been achieved by targeted government policies, not by constitutional reforms or by more progressive constitutional jurisprudence as compared to jurisprudence in the pre-Lula years.

Despite these readily available facts, comparative constitutional law scholarship focuses almost exclusively on a few landmark rulings from South Africa or India as supposed indicators for the new and more generous approach towards social rights in these countries, and possibly an example of how jurisprudence should look in other, closer-to-home polities. Almost no attention has been given by legal scholarship to

[32] *See, e.g.*, Donald Horowitz, The Courts and Social Policy (1977); Gerald Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991); Charles Epp, The Rights Revolution Lawyers, Activists, and Supreme Courts in Comparative Perspective (1998).

factors that may explain the variance in judicial interpretation of socio-economic rights provisions or the divergence in the actual distributive consequences of social rights regimes. In the world of comparative social rights jurisprudence, there are no macro-economic doctrines, fiscal realities, political interests, legacies of welfare provision, elections, or patterns of executive-judiciary relations. Very few studies have been devoted to the actual potential of constitutional courts in different settings to advance pro-poor, redistributive policies.[33] In order to truly understand the status of social rights, a thicker, more holistic approach is required, one that goes beyond idealist normative accounts or insular case-law discourse to understand social rights as part of a larger matrix of public policy, economics, and politics, constitutional and otherwise.[34] A close look at the vast political economy literature on the welfare state and its varieties would be a natural starting point.[35]

A third reason to take a close look at the social science is that comparative constitutional law's methodological matrix is fuzzy and amorphous at best. Fundamental questions concerning the very meaning and purpose of comparative constitutional inquiry remain largely outside the purview of canonical scholarship.[36] The "comparative" dimension of the enterprise, both as a method and a substantive project, remains under-theorized and blurry. Selection biases abound, and purportedly universal insights are based on the constitutional experience of a handful of frequently studied, not necessarily representative, jurisdictions or cases. Descriptive, taxonomical, normative, and explanatory accounts are too frequently conflated. Most leading works in the field continue to lag behind the social sciences in their ability to engage in controlled comparison or trace causal links among germane variables, and consequently, in their ability to advance, substantiate or refute testable hypotheses. The field's potential to produce generalizable conclusions, or other forms of nomothetic, presumably transportable knowledge is thus hindered. Meanwhile, comparative constitutional scholarship that favors contextual, idiographic knowledge, seldom amounts to a true, inherently holistic, "thick description" the way Clifford Geertz—a grand champion of thorough, contextual "symbolic interpretation"—perceived of and preached for.[37] Whereas careful "constitutional ethnographies" are being published, too many scholars who profess to be students of comparative constitutional law rely on "armchair" constitutional research carried out with little or no fieldwork or systematic data collection. Add to that

[33] For a commendable exception, *see* Daniel Brinks and Varun Gauri, *Law's Majestic Equality? The Distributive Impact of Litigating Social and Economic Rights* (The World Bank Development Research Group 2012).

[34] Ran Hirschl & Evan Rosevear, *Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities*, *in* The Legal Protection of Human Rights 207 (2011); Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice*, 36 J. Comp. Econ. 103 (2008).

[35] For an overview of this vast body of literature, *see* Torben Iversen, *Capitalism and Democracy*, *in* Oxford Handbook of Political Economy 601 (2006).

[36] A few initial attempts to deal with these questions are: Vicki Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 Penn State Int'l L. Rev. 319 (2010); Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am. J. Comp. L. 125 (2005); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L. J. 1225 (1999). For a European perspective on these methodological issues, *see* Marie-Claire Ponthoreau, Droit(s) Constitutionnel(s) Comparé(s) 33–86 (2010).

[37] *See* Clifford Geertz, The Interpretation of Culture (1973).

a lack of established tradition of anonymous peer review in most leading law reviews and the outcome, unsurprisingly, is a loose methodological framework that seems to hold together by a rather thin intellectual thread: interest of some sort or another in the constitutional law of polity or polities other than the observer's own.

In contrast, the social sciences, despite (or perhaps because of) having bitter debates about approaches and methods, have developed a rich and sophisticated framework for guiding serious comparative work.[38] A close look at social science methods could suggest a toolkit of methodological considerations that should be addressed in the conduct of comparative constitutional inquiry, thus effectively supporting various types of comparative constitutional studies, qualitative and quantitative, inference-oriented or hermeneutic. It may also disperse some of the mist (from the standpoint of the legal academia) surrounding basic concepts such as participant observation, content analysis, selection bias, interaction effects, statistical significance, spurious correlation or intervening variables.

To be perfectly clear: there is little doubt that the high-quality comparative public-law scholarship produced over the past two decades has contributed tremendously not only to the mapping and classification of the world of new constitutionalism, but also to the creation of conceptual frameworks for studying comparative law more generally. Indeed, we must not underestimate the importance of concept formation through "multiple description" of the same phenomenon in various settings. 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.[39] Comparative constitutional inquiries' embedded cosmopolitanism and genuine curiosity about the constitutive laws of others is therefore a major methodological asset. Nonetheless, the key distinguishing mark of what may be called a unified logic of scientific inquiry is making valid inferences that go beyond the particular observations collected. Because of its traditional lack of attention to principles of research design, controlled comparison, case selection, and hypothesis testing, comparative constitutional law scholarship, its development in recent years notwithstanding, often fails to engage in theory-building of this type.

In fact, precisely because the concern with the a-systematic "cherry picking" of "friendly" examples (often raised by opponents of comparative inquiry) may not be easily dismissed, scholars who wish to engage in valuable comparative work ought to pay close attention to social science research methods, and the philosophy of comparative social inquiry more broadly. The response to the "cherry picking" concern is not to abandon comparative work; rather, it is to engage in comparative work while being mindful of key methodological considerations.

[38] *See, e.g.*, Gary King et al., Designing Social Inquiry: Scientific Inference in Qualitative Research (1994); John Gering, Social Science Methodology: A Unified Framework (2012).

[39] Indeed, it is well known that Charles Darwin's expedition to the Galapagos on the Beagle (1832–1836) was 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.

In summary, comparative constitutional law professors will continue to hold a professional advantage in their ability to identify, dissect, and scrutinize the work of courts, or critically assess the persuasive power of a given judge's opinion. No one is better positioned than comparative constitutional law professors to evaluate constitutional texts, trace patterns of convergence alongside persisting divergence in constitutional jurisprudence across polities, or to advance the research on how constitutional courts interact with the broader, trans-national legal environment within which an increasing number of them operate.[40] But theorizing about the constitutional domain as part of the outer world requires more than that. Many of the tools necessary to engage in the systematic study of constitutionalism across polities can be found in the social sciences. In fact, I would argue that there cannot be a coherent positivist (as in "is," not "ought") study of comparative constitutional law without the social sciences in general, and political science in particular. Maintaining the disciplinary divide between comparative constitutional law and other closely-related disciplines that study the same set of phenomena does not make sense.

The rapid development of information technology, and the tremendous improvement in the quality and accessibility of data sources on constitutional systems and jurisprudence worldwide have already had an effect on the way comparative constitutional inquiries are pursued. In particular, thanks to the accessible, rich body of pertinent information, it is now possible—perhaps for the first time—to engage in serious, methodologically astute, interdisciplinary dialogue between ideas and evidence, theory and data, normative claims and empirical analysis. Such a shift entails greater emphasis on explanatory modes of inquiry and inference-oriented research design, as well as a transition, already underway even if in a somewhat slow motion, from doctrinalism and formalism within legal academia towards more frequent engagement with the insights and methods of disciplines such as political science, sociology, and economics. The time has come to go beyond selective accounts of specific provisions or of court rulings (comparative constitutional *law*) towards a more holistic approach to the study of constitutions across polities (comparative constitutional *studies* that appreciates the tremendous descriptive depth and explanatory potential of the social sciences in analyzing various aspects of the constitutional universe). The intellectual foundations of such an approach are already in place; indeed, a close look at the "cosmology" of comparative constitutional studies as reflected in the seminal works of many of its grandmasters, from Montesquieu to Joseph Weiler, indicates that comparative constitutionalism as an area of inquiry is at its best when it crosses disciplinary boundaries with respect to both substance and method.

Ran Hirschl[*]

[*] Canada Research Chair, Professor of Political Science & Law, University of Toronto. Email: ran.hirschl@utoronto.ca. I am grateful to Joseph Weiler and Michel Rosenfeld for the invitation to write this Editorial. I thank Mark Graber and Ayelet Shachar for their excellent comments and suggestions, and Evan Rosevear for his skillful editorial assistance.

[40] A recent commendable illustration for such work is Wojciech Sadurski, Constitutionalism and the Enlargement of Europe (2012).

In this issue

This issue opens with four articles, each taking as its starting point the constitutional circumstances of a particular jurisdiction in order to discuss issues and questions of general theoretical concern. Or Bassok and Yoav Dotan address the legitimacy of judicial review in the United States, and make the provocative suggestion that the sociological legitimacy of the US Supreme Court assuages the "countermajoritarian difficulty" which is associated with judicial review. In the next piece, focusing on Palestinian constitutional law, Asem Khalil examines and evaluates the role played by the Palestinian Authority's Basic Law in the Palestinian political system. Adam Shinar and Anna Su follow with a discussion of the use of religious law in constitutional interpretation. Suggesting an analogy from the use of foreign law, the authors show how religious law can be used for several interpretive purposes, without offending the Establishment Clause of the US Constitution. In the fourth article, Lars Vinx uses the jurisprudence of the German Constitutional Court as a foil for attacking a "strong" conception of popular sovereignty. Tracing what he sees as its Schmittian roots, the author claims that this conception of sovereignty is incoherent and should therefore be rejected.

We continue with a symposium on the boundaries of public law, with an introduction by my co-Editor-in-Chief, Michel Rosenfeld. This symposium is dedicated to different aspects of the public-private distinction in law and in legal systems. Alain Supiot discusses the hybridization of the public and the private in what he describes as a process of "refeudalization" of modern law. Peter Goodrich follows with an account of a neglected aspect of our political theology—the political theology of private law—and traces its early modern origins. Finally, Judith Resnik addresses the tension between constitutionalization and privatization and considers the expansion of anti-privatization rights.

The *Lautsi* debate – Fin

In the Editorial of Issue 8(2), we invited reactions and comments to my Pleadings and the Grand Chamber decision in *Lautsi*. In this issue we publish two of the contributions we received, together with a brief comment by myself in response.

EUI, NYU and I·CON

Many readers and contributors to I·CON have been congratulating me on my appointment as the next President of the European University Institute (EUI). They have also been wondering if this will signify a masthead change at I·CON. I will be on leave from NYU for the duration of the appointment but the Dean has asked me to continue in my present role in I·CON during that leave. I am grateful for the expression of confidence.

JHHW