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ON WHAT MATTERS IN COMPARATIVE CONSTITUTIONAL LAW: A COMMENT ON HIRSCHL

KATHARINE G. YOUNG*

What matters in comparative constitutional law? The answer is, of course, situation-specific. One would answer differently in, say, 1648, 1787, 1948, 1989, and 2016. And one would answer differently if one were concerned with, say, the constitutional law of the United States, or of China, Hungary, South Africa, or Venezuela, or, say, of the World Trade Organization. In its striking ambition, and its inevitability, comparative constitutional law is a field of moving essentials. Enter Ran Hirschl's *Comparative Matters*, which, in extolling the field's "renaissance," identifies its new horizons, which Hirschl would rather articulate, not as comparative constitutional law, but as comparative constitutional studies.¹ Such horizons are vast, and, under Hirschl's steering, they include a range of approaches to comparison. The time horizons are stretched back to pre-modern religious law,² and the sites of analysis are pushed beyond "northern" and "western" references³ and away from its reported "court-centric" focus.⁴ But the most consistent theme is methods. *Comparative Matters* advances both methodological eclecticism and methodological rigor, with clear-sighted descriptions of each. This is a formidable, and singular, achievement and has grounded other path-breaking works by the author.⁵ In this short review essay, I wish to bring our focus back to one of the field's main anchors: not comparative constitutional studies but comparative constitutional law. An explicit focus on law, in all of its internal complexity, is critically important for this field and may at times suggest different answers, and indeed different questions, from those that Hirschl so adroitly provides.

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¹ RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 151-91 (2014) [hereinafter HIRSCHL, *COMPARATIVE MATTERS*]; Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 *INT'L J. CONST. L.* 1, 11 (2013).

² See HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 110.

³ See *id.* at 206.

⁴ See *id.* at 163.

⁵ See generally RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

Writing in 1998, political scientist Jennifer Widner considered the absence of a shared intellectual foundation in comparative law scholarship.⁶ Comparative politics, she pointed out, was in no better position.⁷ But her prescription was not to unify the field with a perfected method or approach.⁸ Instead, she advocated an appreciation of the efforts of scholars, “over the course of their careers, to use evidence from other geographical and historical settings to sharpen the accuracy of our expectations about political or legal affairs.”⁹ Perhaps this is a low baseline for coherence or disciplinary unity in the comparative enterprise. Yet Widner offered other criteria from political science—generality, accuracy, parsimony, falsifiability, and relevance—as generating good work.¹⁰ This, with an appropriate acknowledgement of trade-offs—that is, of “how much of the stock of limited social resources we should invest”¹¹ in, for example, interpreting the meaning of a legal provision as opposed to the frequency with which that interpretation is shared—can guide the research enterprise. The very best scholarship, she suggested, would engage multiple methods.¹²

Hirschl, like Widner, would bring methodological pluralism to the practice of comparative constitutional law. Such an embrace is, he acknowledges, beneficial for any discipline.¹³ And he emphasizes that such methodological openness should not sacrifice the rigor of method. Comparative constitutional law, writes Hirschl,

requires the mastery of multiple legal systems and languages, as well as proficiency in a more rigorous methodology than is usually found in legal academia that commonly focuses on elaborating disputed legal issues, carefully distinguishing cases and doctrines, refining modes of reasoning, or studying the art of effective client representation.¹⁴

⁶ Jennifer Widner, *Comparative Politics and Comparative Law*, 46 AM. J. COMP. L. 739, 739 (1998) (“Lawyers have long expressed concern about the ability of comparative law to generate the information and insight asked of the field.”). Along with Widner’s article, the Fall 1998 issue of the *American Journal of Comparative Law*, based on a symposium on new directions in comparative law, contains many other useful reflections on the state of the comparative law field at the turn of this century.

⁷ See *id.* at 740 (“The malaise about the future of comparative law as a sub-field echoes the thoughts political scientists have expressed about the study of comparative politics.”).

⁸ See *id.* at 744 (asserting that the “desire to identify the enterprise with a single method or approach is misplaced”).

⁹ *Id.* at 744.

¹⁰ See *id.* at 744–45.

¹¹ *Id.* at 743.

¹² *Id.*

¹³ See HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 280 (quoting David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1248 (2011)).

¹⁴ *Id.* at 229.

Mastery and rigor are, we might say, unqualified goods; but I want to suggest that this presentation of legal methodologies might be underestimating the complexities and the resources that legal analysis can provide for the comparative constitutional law field.

I. THE “C” WORD IN COMPARATIVE CONSTITUTIONAL LAW

Let me begin with the “c” word—which is actually Hirschl’s beginning, not mine.¹⁵ Hirschl provides an extensive definition of the “c” word—that is, of what it is to be “comparative.” He notes, of course, that “we are all comparativists now”¹⁶—that, particularly as lawyers, ours is the era of comparative law and that our current era of surging, globalized, physical and technological connections behooves us to be.¹⁷ Much of the task Hirschl sets for himself is to define what it means to be “comparative” in contemporary terms.

In trying to make the understanding of “comparative” the best it can be, Hirschl takes note of several other fields, including comparative psychology, comparative religion, comparative literature, and, critically, his own field of comparative politics.¹⁸ This stance enables him to meld the agenda of comparative constitutional law and engage its questions in different ways. It is a well thought-through posture and offers a more technical, circumscribed, and disciplinarily informed attitude rather than the more colloquial references to the worldly, internationalist, non-parochial, globalist, or even cosmopolitan perspectives (all terms which are often used interchangeably with “comparative” in comparative constitutional law). Instead, the would-be comparativist is invited to *compare*, with an articulated and clear methodology, distinct legal rules, distinct legal practices, distinct legal institutions, and distinct norms to carefully ascertain *what is similar and what is different*.¹⁹

It is hard to find fault with this definition with its careful categorization of no less than eight types of comparative constitutional scholarship.²⁰ Hirschl provides a broad depiction of these different projects, which range from free-standing, single-country studies to his favored type of “large-*N*” analysis.²¹

¹⁵ See *id.* at 1 (“Introduction: The C Word”).

¹⁶ *Id.* at 19.

¹⁷ Such connections were represented early in the work of, for example, Mark Tushnet and Anne-Marie Slaughter. See generally ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

¹⁸ See HIRSCHL, COMPARATIVE MATTERS, *supra* note 1, at 194 (exploring the “ambiguity as to what qualifies as truly comparative work” across disciplines including comparative law, literature, religion, and psychology).

¹⁹ See *id.* at 3-4.

²⁰ See *id.* at 193.

²¹ See, e.g., *id.* at 18, 193 (suggesting, in part, that ethnographies of countries distinct from the researcher’s own may be less deserving of the comparative label).

With trends in broader scholarship favoring comparative work,²² and trends in legal practice demanding it,²³ we need to understand what it means *to compare* and whether “controlled comparison,” or something more analytically open, warrants the title. At the same time, we need to be careful not to impute our own disciplinary prejudices on what makes good comparative work, which is an impression that might be given by Hirschl’s crescendo of listings. A single-country study, produced or even merely read by a foreign observer, can generate deep comparative insight without advancing a comparative method. The benefit of “constitutional ethnography,”²⁴ for example, was understood early on according to the early predictions of legal scholars’ intent to understand the peculiar role of law: “Ten good lectures on the jurisprudence of the Persians and Chinese would awaken more true juridical thought than a hundred on some wretched technical point, such as the basis of the Laws of Decedent’s Estates from Augustus to Justinian.”²⁵

So much for this “c” word—but let me turn to another. What does it mean for a law to be considered “constitutional,” or a legal practice to be “constitutional”? Hirschl spends far less time on defining the “constitutional” in comparative constitutional law, than he does on the “comparative” requirement of the field. His book refers often to the “constitutive laws of others,” which he suggests can include constitutional law and perhaps

²² A sociologist of the academy, in analyzing successful grants and fellowships in six major disciplines (but not law), demonstrated how comparative or cross-border scholarship is now favored. See MICHÈLE LAMONT, *HOW PROFESSORS THINK: INSIDE THE CURIOUS WORLD OF ACADEMIC JUDGMENT* 202-38 (2009) (describing trends towards funding for scholarship that features interdisciplinarity and diversity).

²³ See, e.g., STEPHEN G. BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015) (presenting the connections with international and comparative law in the work of the Supreme Court of the United States); see also S. AFR. CONST., 1996, ch. 2, § 39(1) (requiring courts, tribunals, and forums to consider international law and inviting them to consider comparative law); Tom Ginsburg, *Introduction to COMPARATIVE CONSTITUTIONAL DESIGN* 2-4 (Tom Ginsburg ed., 2012) (observing the frequency of constitutional redesign where “[c]onstitution making is always, and always has been, comparatively informed”).

²⁴ See, e.g., Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 L. & SOC’Y REV. 389, 390-91 (2004) (“The goal of constitutional ethnography is to better understand how constitutional systems operate by identifying the *mechanisms* through which governance is accomplished and the *strategies* through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context.”). Hirschl’s own examples of constitutional ethnography extend from what he describes as the “armchair” ethnography of Montesquieu to a number of important contemporary examples. See, e.g., HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 13, 233.

²⁵ GIORGIO DEL VECCHIO, *THE FORMAL BASES OF LAW* 54-55 n.43 (John Lisle trans., Macmillan Co. 1921) (1914) (citing ANTON FRIEDRICH JUSTUS THIBAUT, *CIVILISTISCHE ABHANDLUNGEN* 433 (1814)).

constitutional identity,²⁶ but sometimes the “constitutional” refers to the combination of structures, institutions, texts, and interpretive methods that are part of the constitutional domain.²⁷ Apart from the important insight that constitutions are political institutions, Hirschl does not entertain an analysis or categorization of approaches to what should be included in the category of the “constitutional,” much less promote methodological rigor in applying it.

This cannot be because the term is a settled one. Indeed, what is “constitutional” may be just as contested as what is “comparative” in this field. In order to understand the effect of a constitution, legal philosophers have presented various analytical distinctions, such as the distinction between the “written” versus “unwritten” constitution,²⁸ Constitution₁ versus Constitution₂,²⁹ the formal “Capital-C” Constitution versus the informal “small-c” constitution, and the “law of the constitution” versus the “constitution’s law.”³⁰ Into the first part of each distinction usually falls the text, or what has been called “the document.”³¹ In the second part of the distinction belongs the broader practices, institutions, and norms that are just as essential for our understanding of the constitutional project. Without a

²⁶ See HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 77-150 (canvassing engagements, in pre-modern and modern settings, with the “constitutive laws of others”).

²⁷ See *id.* at 205.

²⁸ See, e.g., A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 22-24 (3d ed. 1889) (explaining that constitutional law contains two elements—formal law and convention or practice—which help to shape it); see also DAVID STRAUSS, *THE LIVING CONSTITUTION* 1 (2010) (“A ‘living constitution’ is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.”); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1 (1999) (“Additional meaning cannot be discovered in the text through more skillful application of legal tools; it must be constructed from the political melding of the document with external interests and principles.”); Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 703 (1975) (considering the enforcement of liberty principles “when the normative content of those principles is not to be found within the four corners of our founding document”).

²⁹ Michael J. Perry, *What Is “the Constitution”?* (*And Other Fundamental Questions*), in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 99, 99-100 (Larry Alexander ed., 1998) (comparing the “Constitution₁” or “the document called the Constitution” with the “Constitution₂” or “the norms that constitute ‘the Supreme Law of the Land’”).

³⁰ See, e.g., DICEY, *supra* note 28, at 22-23 (differentiating between “a body of undoubted law” and “maxims or practices”); Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737, 1804-07 (2007) (arguing for an expansion of the originalist framework to consider developments in American jurisprudence of the recent past so that the Supreme Court “reflect[s] upon *all* the principles affirmed by the American people” while using “these principles as a check and balance on the political pretensions of the present day”).

³¹ See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 *HARV. L. REV.* 26, 26 (2000) (describing in Constitutional interpretation the measurement of the “document against the doctrine”).

combination of the two, constitutional comparison may lead to arid, and often misleading, constitutional analysis.³² Such comparison may attribute too much importance to constitutional text and too little importance to the broader juridical and political practices and ideas that contribute to the success, or failure, of constitutional arrangements.³³

Hirschl draws from political science, and its emphasis on institutional, societal, and cultural factors, to mark out the “small-c” constitution. He suggests variables encompassing different features of constitutional systems that are well-captured by empirical analysis, such as the legal tradition, the region, the composition of the judges and other elites, the size of the middle class, and the kinds of social, racial, and political cleavages that define any polity.³⁴ The relevance of these variables is borne out by the discipline of comparative politics.³⁵ For Hirschl, this division between “Capital-C” and “small-c” constitutions can sustain clear, transparent, comparative, and empirical analysis and generate general hypotheses of causal relations.

³² See, e.g., Ackerman, *supra* note 30, at 1750 (“[E]very American intuitively recognizes that the modern amendments tell a very, very small part of the big constitutional story of the twentieth century—and that we have to look elsewhere to understand the rest.”). Noting the disconnect between paper promise and outcome can itself be generative. See, e.g., David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 892-912 (2013) (evaluating global compliance with constitutional guarantees, which initially reveals “that the mere recitation of rights in a constitution does not translate into actual respect for those rights in practice”); Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861-62 (1962) (describing “façade constitutions”).

³³ See, e.g., KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* 170-71, 193-95, 233 (2012) (drawing attention to differences within judicial role understandings and social movement formations to explain the significance (or lack of significance) of certain constitutional text).

³⁴ See HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 271 (evaluating the factors considered by empirical research evaluating constitutional endurance). For a similar approach, see David S. Law, *Constitutions*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 376, 378-79 (Peter Cane & Herbert M. Kritzer eds., 2010) (describing how “de facto” or “small-c” constitutions have sustained more research in the social sciences, which use quantitative or statistical study, and de jure or “large-C” constitutions have sustained more legal analysis, where qualitative, case-study approaches are favored).

³⁵ See HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 278 (“If we contrast the approaches of legal academics with the approaches of social scientists to the same set 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.”). Hirschl’s “toolkit” is not simply comparative politics but includes an expressly open methodology. See *id.* at 280 (citing GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 209-12 (1994)).

Yet this position may obscure just how unsettled the division should be: is a “Capital-C” Constitution its text *and* its doctrine?³⁶ What about the methodologies of interpretation? To use an American example, is the influence of originalism a “Capital-C” or a “small-c” matter?³⁷ What about the “under-enforced norms” that the doctrine pursues, which are hidden in the choices of direction that the doctrine has taken?³⁸ What about the cases not accepted, the appeals not filed,³⁹ the case framings that were lost,⁴⁰ the landmark statutes left intact,⁴¹ or the practices of opposition that were buried?⁴² What can we tell about the “supra-positive” values⁴³ and “sub-terranean norms,”⁴⁴ the

³⁶ Such a question is, of course, one of the central planes in which to debate not only the category but also the substantive doctrine of constitutional law. *See, e.g.*, Amar, *supra* note 31, at 27-28 (evaluating the debate between “doctrinalists” and “documentarians”).

³⁷ Comparative studies have yielded a vast difference in the adoption, as well as the inflections, of originalism, giving further grist to disagreement within the United States. *See, e.g.*, Sujit Choudhry, *Living Originalism in India? “Our Law” and Comparative Constitutional Law*, 25 *YALE J.L. & HUMAN.* 1, 3 (2013) (explaining that in India “something akin to living originalism is married to deep comparative constitutional reasoning”); Yvonne Tew, *Originalism at Home and Abroad*, 52 *COLUM. J. TRANSNAT’L L.* 780, 783 (2014) (exploring originalism in Malaysia, and emphasizing “that whether originalism thrives, and the form that it takes, is context driven and culturally contingent”); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 *VAND. J. TRANSNAT’L L.* 1239, 1282-87 (2011) (comparing Turkish and American originalism).

³⁸ *See generally* LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES* (2004) (exploring the intersection of judicial discretion and constitutional doctrine). For an assessment across the branches, see Kristin A. Collins, *Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws*, in *THE PUBLIC LAW OF GENDER* 73, 76-79 (Kim Rubenstein & Katharine G. Young eds., 2016).

³⁹ For a clear and recent statement of such constitutional evolutions, see Linda Greenhouse, Opinion, *The Supreme Court’s New Era*, *N.Y. TIMES* (Mar. 3, 2016), http://www.nytimes.com/2016/03/03/opinion/the-supreme-courts-new-era.html?_r=0 [<https://perma.cc/G74E-XLR7>] (observing the “appeals withdrawn, appeals not filed” on the news of Justice Scalia’s passing).

⁴⁰ Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 *SYRACUSE L. REV.* 1, 3-4 (2005).

⁴¹ WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 1-28 (2010) (explaining that the constitutional process should be seen to include statutes, treaties and agency rules, and deliberative processes); *see also* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 *NW. U. L. REV.* 63, 67 (2009) (analyzing the Voting Rights Act in context of the Twenty-Fourth Amendment).

⁴² Aziz Rana, *The Many American Constitutions*, 93 *TEX. L. REV.* 1163, 1165 (2015) (observing a dominant approach among academics considering the Constitution to “downplay—if not ignore altogether—actual practices of opposition”).

⁴³ Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *STAN. L. REV.* 1863, 1868 (2003) (identifying certain positive fundamental rights as “superior to the positive legal system” and thus “suprapositive”). *See generally*

collective monuments and memories fostering such values,⁴⁵ and the theories of constitutionalism that gained or lost influence?⁴⁶ How do we identify these and what prominence should we give them? And, if we wanted to compare these, would we be seeking causal explanation? Or would we be seeking something else?

One can see that this question is not just about “capital-C” Constitutions and “small-c” constitutions: it’s about our understanding of “law.” If we call this “capital-L” Law and “small-l” law, we will see the incongruity. The question—what is law—is one to which jurists have many different answers.⁴⁷ Just as law must admit to an essential indeterminacy, as a relational, norms-bound system, so too can legal scholars equip the study of law with appropriately post-legal realist tools.⁴⁸ I want to suggest that Hirschl, by

CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS (András Sajó & Renáta Uitz eds., 2010) (evaluating constitutional precedent across geographic boundaries to consider “the relationship between constitutional text and judicial reasoning”); AN INQUIRY INTO THE EXISTENCE OF GLOBAL VALUES: THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW (Dennis Davis, Alan Richter & Cheryl Saunders eds., 2015) (evaluating the potential for a human rights globalization by reviewing constitutional developments across borders).

⁴⁴ See, e.g., Cristina M. Rodriguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 INT’L J. CONST. L. 30, 30-31, 36-43 (2010) (considering the constitutional implications and effect of lack of voting rights for immigrants); Cristina M. Rodriguez & Ruth Rubio-Marín, *The Constitutional Status of Irregular Migrants: Testing the Boundaries of Human Rights Protection in Spain and the United States*, in ARE HUMAN RIGHTS FOR MIGRANTS? 73, 73 (Marie-Bénédicte Dembour & Tobias Kelly eds., 2011) (discussing the limitation of geographical boundaries on constitutional protections).

⁴⁵ See, e.g., MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 203, 239-49, 301-05, 328-33 (2012) (observing the state’s cultivation of political emotions via public artworks, monuments, parks, celebrations, education, sports, and theatre by drawing on Indian culture, politics, and philosophy alongside the Western canon).

⁴⁶ See, e.g., David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 L. & CONTEMP. PROBS. 43, 43 (2014) (explaining how the minority position of libertarian constitutional thought has “had greater influence on constitutional law than first meets the eye”).

⁴⁷ Thus, the fact that legal norms may remain relatively indeterminate, due to an inability to anticipate their own application, is a complexity that is internalized in the study of law. See H.L.A. HART, THE CONCEPT OF LAW 128 (1961) (describing that the legal system requires discretion because of its “relative indeterminacy”). To understand the indeterminacy in a rule of law, see Martin Krygier, *Rule of Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 34, at 233, 233 (“Rule of law is one of a number of overlapping ideas, including constitutionalism, due process, legality, justice, and sovereignty, that make claims for the proper character and role of law in well-ordered states and societies.”).

⁴⁸ For an expansion of constitutional law into constitutional culture, see Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (“[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”).

shifting the gaze from comparative constitutional law to comparative constitutional studies, is perhaps gliding too quickly over these fundamental, unsettled, and contested questions of what is “law.”

By staying a little longer with these messy questions, I suggest we might have to forgo explanation, or establishing “causation,” which may not be equal to winning the throne of Persia, an ancient and very ironic quotation on which Hirschl draws.⁴⁹ Law is social, humanist, and unscientific (at least, compared with the natural sciences). Law is normative, prescriptive, and it demands justification. Law is language, it is interpreted, and it is constituted through interpretation. These messy, unruly facets of law, especially constitutional law as our “higher” law,⁵⁰ suggest a different enterprise for comparison. And the answer you give depends very much on where you are standing, as Hirschl clearly acknowledges.

The rise of written constitutions appears to have converged on certain features of constrained government and fundamental rights.⁵¹ Newer recognitions of environmental⁵² or gender equality rights⁵³ have come as the result of concerted international advocacy, much of which has leap-frogged national obstacles to constitutional reform.⁵⁴ Yet global trends move alongside

⁴⁹ See HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 278 (drawing upon the Greek philosopher Democritus (c. 460-370 BC) who said that “I would rather discover a single causal connection than win the throne of Persia”).

⁵⁰ Again, the exact contours of the “higher law” are a matter of disagreement. See Frank I. Michelman, *Constitutional Authorship*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS*, *supra* note 29, at 64, 69-74 (presenting a hypothetical debate between legal positivists and “legal nonvolitionists” on the proper influence of social norms on the “supreme law” that is the U.S. Constitution).

⁵¹ See, e.g., Law & Versteeg, *supra* note 13, at 1194-202 (identifying global constitutional trends through empirical analysis of all national constitutions since World War II).

⁵² For a substantive focus on a surge in environmental constitutionalism, see, for example, DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 76 (2012) (estimating that three quarters of the world’s constitutions contain references to environmental rights and responsibilities).

⁵³ See Priscilla A. Lambert & Druscilla L. Scribner, *A Politics of Difference Versus a Politics of Equality: Do Constitutions Matter?*, 41 *COMP. POL.* 337, 337 (2009) (considering the effects of the inclusion of gender-specific constitutional provisions); Eileen McDonagh, *Political Citizenship and Democratization: The Gender Paradox*, 96 *AM. POL. SCI. REV.* 535, 537 (2002) (analyzing empirical data on the combinations of electoral structure and state policies specifically directed toward women to determine the impact on rates of contemporary office-holding for women in 190 countries); Katharine G. Young, *Introduction: A Public Law of Gender?*, in *THE PUBLIC LAW OF GENDER*, *supra* note 38, at 1, 1-2.

⁵⁴ See, e.g., Sally Baden & Anne Marie Goetz, *Who Needs [Sex] When You Can Have [Gender]?: Conflicting Discourses on Gender in Beijing*, 56 *FEMINIST REV.* 3, 12 (1997)

counter-trends, and the outliers and caveats may represent the frontrunners of a different constitutional settlement around the world. One commentator recently suggested that we might currently be viewing “the precursors of a widespread trend towards illiberal constitutions.”⁵⁵ After noting “the worldwide trend towards greater nation-state commitment to the ideal of constitutionalism,” he suggested that we might now be witnessing the trend’s reversal, “and this could well be achieved through use of the same constitutional tools that were deployed in the pursuit of the ideal in question.”⁵⁶ To be appropriately equipped to document, but also criticize, this trend, we require the type of analysis that has already been the province of constitutional legal scholarship. We need to interrogate our analysis of law with tools appropriately informed by the social sciences but also by the humanities. And to our great good fortune, these influences have made their mark on legal methodologies for some time. This is not contrary to Hirschl’s message, but it is worth giving explicit emphasis.

II. THE ECONOMIC AND SOCIAL RIGHTS EXAMPLE

To get at these stakes more crisply, let me turn to an example from economic and social rights. The law of economic and social rights has generated a sub-field of comparative constitutional law—and is an important research field of its own, crossing comparative constitutional law, comparative administrative law, and international human rights law.⁵⁷ (Even “public law” may be an inaccurate umbrella category for economic and social rights, if one concedes that property rights are economic rights and thus that private law must become part of the analysis.⁵⁸) Economic and social rights are basic, or fundamental, rights, which for normative reasons are given priority and precedence over other areas of law.

The big, conceptual classification questions are very important in this field, due to the youth, ambiguity, and ideological contestability of such rights. Do we group rights to food, health care, housing, education, social security, and collective bargaining all together? From a philosophical point of view, we

(describing non-governmental organizations’ advocacy at the United Nations, which focuses on constitutional reform around women’s rights which would not be feasible at the national level).

⁵⁵ Michel Rosenfeld, *Is Global Constitutionalism Meaningful or Desirable?*, 25 *EUR. J. INT’L L.* 177, 181 (2014); *see also* David Landau, *Abusive Constitutionalism*, 47 *U.C. DAVIS L. REV.* 189, 191 (2013) (identifying the growing use of constitutional amendment and replacement in countries such as Hungary, Colombia, and Venezuela to undermine democracy).

⁵⁶ Rosenfeld, *supra* note 55, at 181.

⁵⁷ *See* YOUNG, *supra* note 33, at 1-2.

⁵⁸ *See* Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 *INT’L J. CONST. L.* 56, 59-61 (2004) (contrasting political theories of “property rights,” some of which focus on property as the core, or even the entirety, of economic rights).

might ask what links each right has with an especially important human value, like life, equality, freedom, or dignity.⁵⁹ That question might give us different answers. Or from a legal positivist view, do we see which countries are ready to entrench these rights in constitutional or statutory text?⁶⁰ Do we explore what rights were included in the Universal Declaration of Human Rights or other core international human rights instruments,⁶¹ or the rights that meet the test of customary international law?⁶² From a more pragmatic view, do we explore what complaints are treated as justiciable by courts in some, or most, countries around the world?⁶³ Do we include the role of other accountability mechanisms, such as national human rights institutions or Ombuds-

⁵⁹ See, e.g., HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 5, 13-34 (2d ed. 1996); Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFF.* 315, 316-17 (2004).

⁶⁰ See, e.g., Katharine G. Young, *Freedom, Want, and Economic and Social Rights: Frame and Law*, 24 *MD. J. INT'L L.* 182, 183 (2009) (comparing the United States and United Nations' treatments of economic and social rights).

⁶¹ For example, the Convention on the Rights of the Child ("CRC"), and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") both recognize a number of economic and social rights. See Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 *U.N.T.S.* 3 (entered into force Sept. 2, 1990); Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 *U.N.T.S.* 13 (entered into force Sept. 3, 1981). For the relevance of international law trends to comparative constitutional law, see Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 *HARV. INT'L L.J.* 61, 63-65 (2013) (finding both that international rights documents influence rights included in domestic constitutions and that domestic drafters in turn influence the efficacy of treaty ratification and implementation). One hundred sixty-four parties have ratified the International Covenant on Economic, Social and Cultural Rights; CEDAW has one hundred eighty-nine ratifying parties; and CRC has one hundred ninety-six ratifying parties. See *Status of Ratification Interactive Dashboard*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Mar. 30, 2016), <http://indicators.ohchr.org/> [<https://perma.cc/CR5E-VUHJ>].

⁶² For discussion of customary international law, see Young, *supra note* 60, at 198. For a discussion of the general principles of law that are a source of international law, see Olivier De Schutter, *Introduction to ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS* xiv (Olivier De Schutter ed., 2013).

⁶³ For an approach to "comparative international law," see, for example, Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW*, 109 *AM. J. INT'L L.* 534, 534 (2015), and Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing the Field*, 109 *AM. J. INT'L L.* 467, 474 (2015) (suggesting that the focus on courts in comparative international law can be rebalanced by a focus on legislatures, executives, and administrative bodies, and on states outside of the Western common law tradition).

institutions?⁶⁴ Further, do we consider what rights have actually been remediated in court, or have been acted on by agencies, against utilitarian or majoritarian objections?⁶⁵ From a legal pluralist view, do we focus on the counter-narratives of rights in local settings?⁶⁶

This is an exciting time to be asking these questions, not least due to another “c” word—*capitalism*. With the globalized world now transformed into varieties of capitalism,⁶⁷ rather than more distinct forms of economic organization, and with the staggering instances of material wealth and material deprivation that our global lens allows us to see,⁶⁸ the study of economic and social rights is a consequential matter.

Where Hirschl would take these inquiries is absolutely critical to our understanding of economic and social rights. He would both broaden and tighten the questions to be asked and seek to explain the variance and find its causes.⁶⁹ Hirschl’s pioneering study, with Courtney Jung and Evan Rosevear, identifies the status of 16 distinct economic and social rights in the world’s 195 Constitutions.⁷⁰ This is a large-*N* study focusing on formal constitutional text⁷¹

⁶⁴ See Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, on Economic and Social Rights: The Missing Links* (forthcoming 2016) (presenting an “RAI” framework based upon recognition, accountability, and institutionalization); see also NATIONAL HUMAN RIGHTS INSTITUTIONS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Eva Brems, Gauthier de Beco & Wouter Vandenhole eds., 2013).

⁶⁵ See generally COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008); SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2009).

⁶⁶ Jeremy Perelman & Katharine G. Young, *Rights as Footprints: A New Metaphor for Contemporary Human Rights Practice*, 9 NW. J. INT’L HUM. RTS. 27, 28-29 (2010) (introducing the metaphor of human rights as “footprints,” which reflects the capacity of human rights to take on different meanings and engender different responses in local contexts).

⁶⁷ See generally DEBATING VARIETIES OF CAPITALISM: A READER (Bob Hancké ed., 2009); GØSTA ESPING-ANDERSON, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990).

⁶⁸ For the development of a metric to assess the fulfillment of economic and social rights, see SAKIKO FUKUDA-PARR, TERRA LAWSON-REMER & SUSAN RANDOLPH, *FULLFILLING SOCIAL AND ECONOMIC RIGHTS* (2015). Sakiko Fukuda-Parr had been the lead author for the United Nations Development Programme’s *Human Development Report* from 1995 to 2004.

⁶⁹ HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 244.

⁷⁰ Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1046 (2014).

⁷¹ There is some ambiguity in what is counted. See *id.* at 1048-49 (observing that the study’s “dataset includes the entire corpus of national constitutions and constitutional documents (such as the U.K. Human Rights Act) serving as *de jure* or *de facto* higher law” (footnote omitted)). The inclusion of such examples raises a number of definitional questions. See, e.g., Richard Bellamy, *Political Constitutionalism and the Human Rights*

and counting instances of the presence of economic and social rights within that text.⁷²

This ambitious exercise allows Hirschl and his collaborators to see that not all rights are equally entrenched—“[w]hereas a right to education is so common as to be practically universal, a right to food and water is still very rare.”⁷³ Almost one-third of the world’s constitutions recognize economic and social rights as justiciable, another third identify those rights as aspirational or absent, and a third contain a mix.⁷⁴ But rather than mere counting, Hirschl and his co-authors attempt explanation: what causes the form that these rights take?⁷⁵ Hirschl and his coauthors use their data to show that legal tradition plays a large part in the constitutional form that such rights take, and that civil law countries incorporate more than five times as many justiciable economic and social rights as purely common law countries.⁷⁶ But they also show that regional differences are an independent cause, namely that Latin America and the post-communist states are the places with the greatest constitutional entrenchment of economic and social rights.⁷⁷ Since legal tradition and regional differences are lasting, Hirschl and his co-authors predict that economic and social rights will continue to vary in formal status, nature, and scope.⁷⁸

These findings are extraordinarily useful for a scholar of economic and social rights. At the very least, they redirect attention away from the “usual suspects” of analysis, whose previous influences, contemporary contributions, or even English-language sources, have tended to dominate the research.⁷⁹

Act, 9 INT’L J. CONST. L. 86, 94-98 (2011) (evaluating whether the U.K. Human Rights Act illustrates a shift away from “political constitutionalism” to “legal constitutionalism”). For a different challenge to counting constitutional text, consider the decision of the French Constitutional Court in 1971 that the principles referred to in the preamble of the Fourth Republic’s Constitution have constitutional value under the Fifth. *See* Conseil constitutionnel [CC] [Constitutional Court], July 16, 1971, J.O. 7114, No. 71-44 DC (Fr.); *see also* 1946 CONST. pmb. (Fr.). With thanks to Camille Martini for this reference.

⁷² *See* Jung, Hirschl & Rosevear, *supra* note 70, at 1045.

⁷³ *Id.* at 1046; *see also* HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 273 (citing Jung, Hirschl & Rosevear, *supra* note 70).

⁷⁴ Jung, Hirschl & Rosevear, *supra* note 70, at 1046.

⁷⁵ *See id.* at 1056-67 (investigating possible relationships between economic and social rights and the common law, civil law, Islamic law, and customary law legal traditions).

⁷⁶ *Id.* at 1047.

⁷⁷ *See id.*

⁷⁸ *See id.* at 1044.

⁷⁹ For criticism of the scholarly attention paid to the “usual suspects,” *see* HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 192, 205-23. In relation to economic and social rights, specifically, *see id.* at 185. For a recent attempt to redirect the trend, *see*, for example, *CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA* 41-159 (Daniel Bonilla Maldonado ed., 2013) (considering the approaches of the Indian Supreme Court, the South African Constitutional Court, and

Nonetheless, much of the interesting material is in the caveats to the study's findings.⁸⁰ Such caveats signal, but do not answer, a number of questions that have already surfaced in this field. For example, India is an outlier in Hirschl's study, but its Supreme Court has been one of the leading sources of economic and social rights jurisprudence, developing this jurisprudence without express justiciability in its constitutional text.⁸¹ The U.S. Supreme Court is well-recognized for its rejection of constitutional economic and social rights, yet its history tells another story: that it moved closely to recognize constitutional economic and social rights in the 1960s,⁸² and that many U.S. state courts now adjudicate state constitutional guarantees of livelihood opportunities or safety nets.⁸³ The Nordic countries deliver on rights realization without "capital-C," justiciable rights protections in ways that nevertheless fail to track clear "small-c" pathways.⁸⁴ The divisions between justiciable, aspirational or absent,

the Colombian Constitutional Court to socioeconomic rights), and CÉSAR RODRÍGUEZ-GARAVITO & DIANA RODRÍGUEZ-FRANCO, *RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH* (2015).

⁸⁰ See Jung, Hirschl & Rosevear, *supra* note 70, at 1052-53 ("If it is true that in fact there is a fairly consistent relationship between constitutional justiciability and judicial treatment of ESRs, then India and its South Asian neighbors are outliers.")

⁸¹ Whether the Constitution of India plays an over-sized role in the field of comparative constitutional law is a matter of debate. For evidence that this role is justified, see, for example, *THE OXFORD COMPANION OF THE INDIAN CONSTITUTION* (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

⁸² See Sunstein, *supra* note 40, at 20 (listing Supreme Court cases demonstrating "a serious and partially successful effort, in the 1960s and 1970s, to understand the existing Constitution as creating social and economic guarantees"); see also Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 *INT'L J. CONST. L.* 663, 665 (2008). But see Jeff King, *American Exceptionalism over Social Rights*, in *REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT* 357, 358-63 (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds., 2014) (arguing that, despite the conventional view that the shift from the Warren Court to the Burger Court in 1969 marked the end of the trend towards recognizing constitutional support for economic and social rights, "there are at least four areas in which US courts have given considerably more protection under the US Constitution to welfare interests than have the courts in any other comparable country").

⁸³ See Helen Hershkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 *STAN. L. REV.* 1521, 1534-35 (2010); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 *U. CHI. L. REV.* 1641, 1683-95 (2014) (observing the similarities between American state constitutions and constitutions abroad in relation to rights to education, labor, social welfare, and the environment).

⁸⁴ See HIRSCHL, *COMPARATIVE MATTERS*, *supra* note 1, at 180-81; Ran Hirschl, *The Nordic Counter Narrative: Democracy, Human Development, and Judicial Review*, 9 *INT'L J. CONST. L.* 449, 450-51 (2011). For a counter to this "counter narrative," see Malcolm Langford & Johan Karlsson Schaffer, *The Nordic Human Rights Paradox: Moving Beyond Exceptionalism* 7-11 (Univ. of Oslo, Paper No. 2013-25) (highlighting, amongst other problems, discrepancies between Nordic states themselves), and Ruth Slagstad, *The*

or mixed categories rights tells us little about the balance between civil, political, and economic and social rights in each category, although this balance may be critical to the role played by such rights within a given constitutional scheme.⁸⁵ And, in the categorization of what Hirschl terms “standard” and “non-standard” social rights (in the former belong rights to child protection, education, health care, and social security, and in the latter, rights to development, land, housing, and food and water),⁸⁶ one sees a reflection of the Washington Consensus, pointing to the need for a more scholarly interrogation of how such categories are created. For instance, the right to water is rarely constitutionalized and the right to education is prevalent, yet there are far more conspicuous declarations about the right to water at the United Nations General Assembly, suggesting a disconnect worthy of analysis.⁸⁷

While Hirschl and his collaborators’ data is necessary, it is not sufficient to answer these questions. Further insights are gained from the kind of comparative legal scholarship that the field has been striving for in recent times. This analysis focuses on law’s primary conduit: the state. For example, what conception of our government institutions do we need if economic and social rights require positive action? Do we need new political branches, and what would they look like?⁸⁸ Do we need an additional, perhaps reimagined, understanding of the separation of powers or new theories of judicial review?⁸⁹

Breakthrough of Judicial Review in the Norwegian System, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 81 (Eivind Smith ed., 1995).

⁸⁵ See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1382 (2006) (arguing that the failure to include positive socioeconomic rights as well as negative liberty rights in a Bill of Rights may lead judges to give improper weight to those rights that are included).

⁸⁶ See Jung, Hirschl & Rosevear, *supra* note 70, at 1055.

⁸⁷ See, e.g., Saki Bailey & Ugo Mattei, *Social Movements as Constituent Power: The Italian Struggle for the Commons*, 20 IND. J. GLOBAL LEGAL STUD. 965, 987-1001 (2013) (describing the success of the Italian Water Referendum in 2011); Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over Privatization*, 31 BERKELEY J. INT’L L. 89, 97-107 (2013) (exploring the lag between constitutional and international human rights law as exemplified by the rights to water and sanitation). See generally OSCAR OLIVERA & TOM LEWIS, ¡COCHAMBAMBA! WATER WAR IN BOLIVIA (2004) (describing the Bolivian government’s attempt to privatize water in 1999 and the organized civilian response).

⁸⁸ See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 725-27 (2000) (advocating, along with other constitutional reforms, a “distributive justice branch” that would independently deliver guaranteed cash grants).

⁸⁹ See, e.g., SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 92-123 (2008) (arguing for a proactive role for the judiciary in influencing the development of positive human rights duties, but discouraging judges from mimicking political decision-making); STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM 222-44 (2013) (assessing whether the “new Commonwealth model” of

Should we refine our understanding of democracy, or do we need new theories of rights themselves?⁹⁰ Or do we need new tools to appraise the techniques of balancing, proportionality, remedies, legislative scrutiny, or administrative protections?⁹¹ How should such rights interact with the market, and how varied should we be in our prescriptions? Are vouchers for education consistent with the right to education?⁹² Are evictions automatically suspect if a right to housing is recognized?⁹³ Are queueing mechanisms as justifiable as market mechanisms?⁹⁴ Could even non-justiciable economic and social rights challenge the choice of baseline to determine whether the state is responsible for private conduct (the state action doctrine), or is the better focus the constitution's "horizontal effect"? Must criminal law be evaluated with an overt attention to poverty? How do scientific developments impact the state's

judicial review, in use in New Zealand, Canada, and the United Kingdom, has in practice lived up to its theoretical promise and suggesting reforms that might bring practice of the model closer to its theoretical ideals); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 33-42 (2008) (evaluating weak-form judicial review as an alternative to the United States' model of strong-form judicial review).

⁹⁰ See, e.g., *SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 4* (Helena Alvia Garcia, Karl Klare & Lucy A. Williams eds., 2015) ("[D]emocracy and [social and economic rights] are mutually constitutive—social and economic rights that are in some sense constitutionally binding are of the essence of democracy." (emphasis omitted)).

⁹¹ See, e.g., Stephen Gardbaum, *Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?*, in *PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES* (Vicki Jackson & Mark Tushnet eds., forthcoming 2016) (arguing that courts typically do not utilize proportionality and balancing "in cases of positive and horizontal rights); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT'L L.* 72, 97-164 (1998) (explaining the international adoption of proportionality analysis); Katharine G. Young, *Proportionality, Reasonableness and Economic and Social Rights*, in *PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES*, *supra*.

⁹² See Katarina Tomasevski, *Progress Report of the Special Rapporteur on the Right to Education*, Katarina Tomasevski, Submitted in Accordance with Commission on Human Rights Resolution 1999/25, 14-15, U.N. Doc. E/CN.4/2000/6 (Feb. 1, 2000) (evaluating the debates surrounding vouchers in the context of the right to education).

⁹³ For comparative examination of the procedural requirements of eviction in the context of mortgage foreclosure, compare U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Comm'n 2/2014, at 12-15, U.N. Doc. E/C.12/55/D/2/2014 (Oct. 13, 2015) (evaluating mortgage requirements in the context of the right to adequate housing), with MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 94-107, 128-133 (2016) (describing current United States eviction practices in renter contexts).

⁹⁴ For attention to this topic, see Katharine G. Young, *Rights and Queues: On Distributive Contests in the Modern State*, 55 *COLUM. J. TRANSNAT'L L.* (forthcoming 2016).

human rights obligations?⁹⁵ What visions of transnational economic integration are compatible with economic and social rights?⁹⁶ What new conceptions of authority, coercion, legitimacy, and justice do we require if material interests are truly matters of right?⁹⁷

These questions are key to the field. The degree of sophistication with which they can be answered is undoubtedly higher after comparative large-*N* studies of the type Hirschl provides, even if some of the most important findings are in the caveats.

CONCLUSION

Let me conclude with what we can ascertain about the “small-c” constitution and “small-l” law. Clearly, we need as many links as possible with comparative politics, history, and political economy; with law and development; with findings on constitutional “culture”; and with an understanding of judicial strategy, and executive-judiciary, legislative-executive, and legislative-judiciary relations. In the several textbooks, handbooks, articles, and edited collections that have shifted the field in the last two decades, we have made great strides in our understanding of comparative constitutional law.⁹⁸ Hirschl’s magisterial body of work has been a major part of that effort. Implied in this approach is the linking of law with the toolkit of the humanities, just as with the social sciences. Correspondingly, in fostering

⁹⁵ See, e.g., Matthew M. Kavanagh et al., *Evolving Human Rights and the Science of Antiretroviral Medicine*, 17 HEALTH & HUM. RTS. J. 76, 77 (2015) (arguing that “significant advances in the science of using antiretroviral medicines (ARVs) to fight HIV” have “implications for the health-related human rights duties of states and international bodies”).

⁹⁶ See, e.g., Aoife Nolan, *Introduction to ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* 3-5 (Aoife Nolan ed., 2014) (describing the policies of deregulation, economic liberalization and market reforms in imposed austerity requirements); cf. DANNY NICOL, *THE CONSTITUTIONAL PROTECTION OF CAPITALISM* 7-8 (2010) (exploring the connections between neoliberalism and a denationalized constitutional law).

⁹⁷ See, e.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004) (examining the modern “experimentalist” approach to public law litigation, which “combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability”); Jeremy Waldron, *Socioeconomic Rights and Theories of Justice*, 48 SAN DIEGO L. REV. 773, 778-80 (2011) (arguing that the theories of socioeconomic rights and justice must be reconciled because “a theory of justice necessarily brings together with the consideration of socioeconomic rights a consideration of all the claims and principles with which such rights might be thought to compete or conflict”).

⁹⁸ See, e.g., VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (3d ed. 2014); NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2d ed. 2010). As an example of the growing surge of comparative attention in particular issue areas, see generally *THE PUBLIC LAW OF GENDER*, *supra* note 38.

these links, we need the kind of inclusivity towards knowledge—of paying attention to explanation but also to understanding as *verstehen*, interpretation, and justification—as demanded by our field of law. We need the category questions, the normative questions, and the interpretive questions answered, as well as questions of explanation and causation. All this matters for comparative constitutional law.