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## FROM RENAISSANCE TO ENLIGHTENMENT?

Lisa Hilbink\*

RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (OXFORD UNIVERSITY PRESS 2014). PP. 320. HARDCOVER \$ 45.00.

Every March at George Washington University Law School, a group of scholars gathers for a one-day “Comparative Constitutionalism Round Table” to give and receive comments on the latest and greatest work on comparative constitutional topics. Most of those who attend regularly are law professors, with a smaller contingent of social (mostly political) scientists in the mix.<sup>1</sup> Only an elite few have degrees in both law and a social science discipline. Ran Hirschl, author of *Comparative Matters: The Renaissance of Comparative Constitutional Law*<sup>2</sup>, is one of them, and this magisterial volume represents his effort to unite into a common enterprise the various scholarly and professional communities in which he circulates. Despite what the book’s subtitle suggests, Hirschl is not simply documenting or celebrating the recent proliferation of legal analyses of constitutional court decisions from different countries or the expanded judicial practice in various countries of citation to foreign law. Nor is his only goal (though it is a central one) to demonstrate that this trend represents a resurgence, and not a new development, among scholars, lawmakers, and legal interpreters. Rather, from the outset, Hirschl seeks to offer a critical perspective, informed by intellectual history, on all three elements of the phenomenon—that is, on the “comparative,” the “constitutional,” and the “law” components thereof. As I will elaborate below, Hirschl argues for a broader understanding of the *constitutional* domain as being *political* as much as or more than it is juridical. With that in mind, he issues a call for the field to expand beyond the narrow disciplinary confines of law to incorporate perspectives and approaches from the social/human sciences—that is, to move from comparative constitutional *law* to comparative constitutional *studies*. But lest this perpetuate what he assesses to be a low “substance-to-ink ratio”<sup>3</sup> in the field, he urges jurists to escape the “intellectual cul-de-sac in which traditional, encyclopedic, taxonomic-style, or legal families-based comparative law is stuck”<sup>4</sup> and to

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1. This author feels privileged to be included in the list of invited participants, though I am not able to attend every year.

2. RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (2014).

3. *Id.* at 193.

4. *Id.*

learn and, where appropriate, apply principles of the *comparative method* in their work.

While Hirschl's plea for increased social scientific awareness and greater rigor in the field of comparative constitutional inquiry is sincere and in some ways compelling, it suffers from three main problems. First, Hirschl puts the onus on jurists to embrace and practice the comparative method of positivist social science, seemingly (and ironically) overlooking the fact that the social, cultural, and political context in which they operate is unlikely to offer many incentives for them to adopt positivist goals and methods. Second, he directs his arguments almost exclusively to jurists and neglects to build much of a case for social scientists to meet legal specialists at least part of the way across the disciplinary divide. Finally, and relatedly, although he explicitly and repeatedly states that the field of comparative constitutional studies should encourage methodological pluralism and analytical eclecticism, he sometimes slips into positivist proselytization, shifting from a 'renaissance spirit' of free inquiry and fluid interchange across scholarly fields to a more systematizing and rigid 'enlightenment' mode that holds out the scientific method (with all its ontological and epistemological assumptions) as the superior path to true knowledge.

This review proceeds in three parts. Part I provides an overview of the book, including a brief summary of each chapter and a general assessment of its contributions and tone. Part II moves into an analysis of the three main elements of Hirschl's case for revamping the field of comparative constitutional law, or what I am characterizing as an attempt to move the field from renaissance to enlightenment. Part III elaborates on the flaws in that argument.

### I. GENERAL OVERVIEW OF THE BOOK

Notwithstanding the criticisms I have of the book, it bears stating at the outset that *Comparative Matters* is an intellectual tour-de-force, offering much of interest and pedagogical utility for those who research and teach in comparative law, comparative politics, and comparative socio-legal studies. In six rich chapters, as well as a "roadmap" introduction and a brief epilogue, Hirschl displays his dazzling erudition and virtuosity, summarizing, categorizing, and critically assessing a stunning array of arguments and research findings from law, philosophy, political science, and beyond in order to build his case for a more historically-informed and methodologically-conscious pursuit of comparison in constitutional studies. The book is an invaluable resource for orienting or re-orienting students to the burgeoning and very diverse field of comparative constitutional studies. The footnotes alone, which provide a virtual goldmine of sources, render it indispensable for old hands and neophytes alike.

Chapter 1 focuses on judicial citation of foreign sources, highlighting empirical findings regarding patterns in such citations. Hirschl notes that cross-jurisdictional reference happens more on rights issues than on other constitutional provisions, and emphasizes that courts and judges engage in selective reference (or "cherry-picking") as they seek to shape their nation's identity in one direction or another. To illustrate, he offers a detailed discussion of patterns of foreign citation by the Supreme Court of Israel (which is a secular entity with a very European gaze), contrasting this with the same court's infrequent citation of Jewish law (and, more recently, overruling of decisions from rabbin-

ical courts based therein). Hirschl follows this with a brief review of other similar examples in which, through its selective citation patterns, “a constitutional court has positioned itself as a bastion of universalism and cosmopolitanism.”<sup>5</sup> Through this discussion, he establishes convincingly that the practice of foreign citation is “as much an identity-constructing political phenomenon as it is a juridical one.”<sup>6</sup>

Chapters 2 and 3 offer a historical perspective on the practice of comparative legal engagement. As Hirschl notes: “Contemporary discussions in comparative constitutional law often proceed as if there is no past, only present and future. . . . [M]any of the debates that take place within the field are presented as being grounded in ideas or situations that are fresh and hitherto unknown to mankind.”<sup>7</sup> These two chapters serve to dispel this notion, revealing the ancient roots of “engagement with the [constitutive] laws of others.”<sup>8</sup> In them, Hirschl highlights parallels between debates over this practice in pre-modern religion law and those in contemporary constitutional law, and drives home the point made in chapter 1 regarding the role of politics (as one of three “extra-doctrinal factors”),<sup>9</sup> across the ages, in motivating and steering which jurisdictions are deemed worthy sources of ideas or models, as well as when and how comparative constitutional engagement takes place (or is eschewed, as in the contemporary U.S.).

Chapters 4 through 6 then return to the critical examination of the “renaissance” of comparative constitutional law and the development of the case for a more “holistic,” more empirically inclusive, but also more methodologically rigorous, analytical approach.

Chapter 4 makes the case for moving from an overly narrow juridical study of “comparative constitutional law” to an interdisciplinary enterprise more informed by the social sciences, or what Hirschl calls “comparative constitutional studies.” He highlights the fact that, although it is “social scientists [who] have taken the lead”<sup>10</sup> in theoretical development of comparative constitutional issues, their work is absent from comparative constitutional law syllabi. Moreover, in several major handbooks on comparative constitutional law, as well as in the leading journal in the field (I-CON), the vast majority of chapters and articles are written by legal academics. He then presents “five core rationales” for incorporating the social sciences into the comparative study of constitutions, including their theoretical insights on judicial behavior, the rise of constitutionalism and judicial review, constitutional design, and the actual effects of judicial decisions, as well as the methodological toolkit they employ and model.<sup>11</sup> Breaking down the disciplinary divide between law and the social sciences, he concludes, will expand the “scope, depth, and breadth of questions we can address, the choice of methods we make, and the kinds of accounts we can offer.”<sup>12</sup>

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5. *Id.* at 68.

6. *Id.* at 76.

7. HIRSCHL, *supra* note 2, at 77.

8. *Id.* at 77, 112.

9. *Id.* at 111. The other two factors he highlights are necessity and inquisitiveness, though politics (ideological or instrumental) is never absent.

10. *Id.* at 160.

11. *Id.* at 166.

12. HIRSCHL, *supra* note 2, at 190.

Chapter 5 takes up the question of how universal comparative constitutional law is or should be, through a discussion of debates between “universalists” and “particularists,” as well as through an analysis of the “global south” critique of the dominant works in the field, which have an established/developed democracy and/or Anglo bias.<sup>13</sup> Hirschl argues that there is a healthy combination of unity and plurality in constitutional practice around the globe, making it possible for scholars to pursue credible and meaningful comparative analysis.<sup>14</sup> However, as the global south critique suggests, scholars should avoid making universal or generalizing claims on the basis of a few country cases that are an unrepresentative sample of the globe, or that ignore the diversity within any given hemisphere, continent, or region (including, he emphasizes, the “global south” itself).<sup>15</sup>

The final chapter (chapter 6) takes up the question of how those interested in building a robust field of comparative constitutional studies should proceed. In Hirschl’s estimation, this requires moving beyond (though not necessarily abandoning) purely descriptive or taxonomical works to embrace and emulate social scientific studies that permit analysts to draw causal inferences and produce generalizable arguments. To build his case, he first provides a useful classification of different types of studies represented in the field to date, before moving into a sort of “crash course” in the comparative method. He then provides brief summaries of works he deems to be models of the various options for those seeking to advance causal claims, making it clear that future (small-n) scholarship in comparative constitutional studies “should look more like these works.”<sup>16</sup> He also surveys, and finds much to praise, in the growing literature that uses new databases on constitutions to conduct large-n, statistical studies.<sup>17</sup>

Although Hirschl clearly aims to shape the future of this reborn field of study and, in this effort, takes issue with the way the field has developed thus far, he is, on the whole, quite diplomatic in his approach. He never singles out works for direct criticism, nor maligns or dismisses those scholars whose topics and methods he finds wanting.<sup>18</sup> He explicitly acknowledges the contributions of those who have published in the field to date, despite their (indirectly imputed) oversights and limitations. For example, he underscores that “we must not underestimate the importance of concept formation through ‘multiple descriptions’ of the same phenomenon in various settings.”<sup>19</sup>

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13. *Id.* at 213-214.

14. *Id.* at 205.

15. *Id.* at 222.

16. *Id.* at 17, 248, 250, 258, 259, 261, 264, 255 (discussing MARTIN SHAPIRO, *COURTS* (1981); GERALD ROSENBERG, *THE HOLLOW HOPE* (1991); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* (2003); HELEN KELLER & ALEC STONE SWEET, *A EUROPE OF RIGHTS* (2008); MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* (2013); MITCHELL LASSER, *JUDICIAL DELIBERATIONS* (2004); CHARLES EPP, *THE RIGHTS REVOLUTION* (1998); RAN HIRSCHL *TOWARDS JURISTOCRACY* (2004); RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010).

17. *Id.* at 274 (discussing ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 270-72 (2009); David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 NYU L. REV. 762 (2012)).

18. This can, however, leave the reader guessing about exactly which works are in need of Hirschl’s corrective.

19. HIRSCHL, *supra* note 2, at 187. Just prior to this quote, he states forthrightly:

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

Moreover, Hirschl strives to frame his prescriptions in terms that are broad and inclusive. Even as he seeks to persuade his fellow law professors, and perhaps judges, to be more mindful of research design and methods, he insists that he is not seeking to impose one particular model of social inquiry on the field: “No research method enjoys an *a priori* advantage over any other without taking into account the scope and nature of the studied phenomenon or the question the research purports to address.”<sup>20</sup> In the end, he endorses “methodological pluralism and well-thought-out analytical eclecticism” and advances a rather modest proposal: That scholars working in the field of comparative constitutional studies be conscious that “the research design and methods of comparison reflect the analytical aims or intellectual goals of the study.”<sup>21</sup> Specifically, he lays out a set of four “guiding principles” to which comparative constitutional scholars should adhere:

- (i) [D]efine clearly the study’s aim—descriptive, taxonomical, explanatory, and/or normative; (ii) articulate clearly the study’s intended level of generalization and applicability, which may range from the most context-specific to the most universal and abstract; (iii) encourage methodological pluralism and analytical eclecticism when appropriate; and (iv) ensure that the research design and methods of comparison reflect the analytical aims or intellectual goals of specific studies.<sup>22</sup>

## II. REVAMPING COMPARATIVE CONSTITUTIONAL LAW FROM RENAISSANCE TO ENLIGHTENMENT?

Having covered the basic structure and content of the book, I now take a more analytical tack, elaborating on what I see as the three main strands of Hirschl’s case for improving the comparative constitutional enterprise, or what I characterize as his attempt to usher comparative constitutional law from renaissance to enlightenment.

### A. Redefining the “Constitutional” in Comparative Constitutional Law

A consistent theme throughout *Comparative Matters* is that constitutions and constitutional interpretation are as much, if not more, about politics as they are about law. Whether discussing patterns in judicial citation of foreign law, ancient or modern engagement with foundational law from other jurisdictions, or how constitutions originate and operate, Hirschl returns time and again to the point that such phenomena “cannot be understood in isolation from the broader political context” within which they arise.<sup>23</sup> Putting it more directly, he states, “constitutional law is a species of politics and . . . courts are a part of the social and political system in which they are embedded.”<sup>24</sup> Thus,

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the mapping and classification of the world of new constitutionalism, but also the creation of conceptual frameworks for studying comparative law more generally.

20. *Id.* at 18.

21. *Id.* at 280.

22. *Id.* at 18.

23. *Id.* at 115.

24. HIRSCHL, *supra* note 2, at 170.

“[c]ulture, economics, institutional structures, power, and strategy are as significant to understanding the constitutional universe as jurisprudential and prescriptive analyses.”<sup>25</sup> This, of course, is not a new or controversial claim in the social sciences, where legal realism or “political jurisprudence”<sup>26</sup> is a basic premise, and Hirschl reminds readers that “prominent social thinkers who have engaged in a systematic study of constitutional law . . . across polities and through the ages have accepted this plain (and possibly inconvenient) truth.”<sup>27</sup> It would appear, however, that “the typical mainstream legal approach”<sup>28</sup> ignores this truth.

The first strand of Hirschl’s argument, then, is that legal scholars need to accept that comparative constitutional inquiry must go beyond courts and judicial interpretation. Although a focus on judicial decisions, and in particular on judicial reasoning, has its value, “theorizing about the constitutional domain . . . requires more than this.”<sup>29</sup> It requires, for example, the consideration of “extrajudicial factors” on judicial behavior, and of structures and dynamics “beyond the courtroom” on whether and how constitutions originate, function, and impact political and social life.<sup>30</sup> This means moving away from what Hirschl considers to be an excessive “juridification of the comparative study of constitutions” to take “a considerably broader perspective according to which constitutions are basic instruments of government, and the study of comparative constitutionalism and that of comparative government are adjoined.”<sup>31</sup>

#### *B. Relegating the “Law” in Comparative Constitutional Law*

Once Hirschl has established the centrality of extra-doctrinal factors to decisions and events in the constitutional domain across time and space, he then moves to arguing for “the importance of understanding comparative constitutional law in a broader, interdisciplinary framework rather than merely focusing on doctrinal analysis.”<sup>32</sup> He claims that today, “comparative constitutional law syllabi throughout much of the English-speaking world” have a “court-centric focus,” and more specifically are informed by “[t]wo dozen court rulings from South Africa, Germany, Canada, and the European Court of Human Rights alongside a more traditional set of landmark rulings from the United States and Britain and an occasional tribute to India or Australia.”<sup>33</sup> But focusing uniquely on court decisions to understand the workings of constitutionalism, he argues, is akin to focusing uniquely on the anatomy of the heart to try to comprehend heart health, ignoring, in both cases, the relevance of complex and interconnected external or contextual factors.<sup>34</sup> Furthermore, treating “insights based on the constitutional experience of a small set of ‘usual suspect’ settings” as a “gold standard” for understanding and

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25. *Id.* at 152.

26. See Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1963).

27. HIRSCHL, *supra* note 2, at 152.

28. *Id.* at 149.

29. *Id.* at 14.

30. *Id.*

31. *Id.* at 157.

32. HIRSCHL, *supra* note 2, at 149.

33. *Id.* at 163.

34. *Id.* at 14.

assessing constitutional experiences worldwide reflects what Hirschl calls the “World Series syndrome in comparative constitutional law,” that is, claiming that a privileged subset of possible contenders somehow represents the whole world.<sup>35</sup> “The time has come,” he thus declares,

to go beyond selective accounts of specific provisions, inward-looking jurisprudential debates, or detailed analyses of a handful [of] highly regarded court rulings (comparative constitutional *law*) toward 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 with respect to the constitutional universe.<sup>36</sup>

Legal scholars who maintain an “intra-legal focus and ‘case law’ method of instruction,” often accompanied by the “normative persuasion that public law is a politics-free domain driven by analytical principles” cannot on their own “fully grasp, and then go on to explicate, the comparative constitutional enterprise, revealing in the process its various meanings, aims, and promises.”<sup>37</sup> To accomplish this, “a break-up of traditional disciplinary boundaries” is necessary, such that the work of lawyers is “complemented with pertinent insights and methods from the human sciences, qualitative and quantitative.”<sup>38</sup>

### C. Remediating the “Comparative” in Comparative Constitutional Law

Having thus made the case that all things constitutional involve politics (and other extra-legal factors) as much as or more than they do law, and that, therefore, the substantive concerns and empirical insights of social scientists must be integrated into any effort to fully understand constitutional matters across time and space, Hirschl then proceeds to argue that comparative constitutional inquiry should be oriented around, or, better yet, adhere to, principles of the comparative method from the social sciences. He laments that “much of the canonical contemporary comparative law scholarship replicates the formalistic and largely descriptive or taxonomic approach to comparative legal scholarship carried out a century ago”<sup>39</sup> and that, too often, articles in comparative law journals “engage in a predominantly encyclopedic pursuit of knowledge, without much attention to theoretical innovation.”<sup>40</sup> This reflects, for Hirschl, a deeper problem, namely that within comparative law “the ‘comparative’ aspect of the enterprise, as a method and a project, remains under-theorized and blurry.”<sup>41</sup> Moreover, “purportedly universal insights concerning constitutions and constitutionalism” in the literature “are based, more often than

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35. *Id.* at 16.

36. *Id.* at 191.

37. HIRSCHL, *supra* note 2, at 283.

38. *Id.*

39. *Id.* at 195.

40. *Id.* at 196.

41. *Id.* at 3.



not, on a handful of frequently studied and not always representative settings or cases.”<sup>42</sup> The result, in Hirschl’s estimation, is that “comparative constitutional law scholarship, its tremendous development in recent years notwithstanding, often . . . falls short of advancing knowledge.”<sup>43</sup> Even the “more sophisticated”<sup>44</sup> examples of scholarship in comparative constitutionalism “provide[] only limited ‘methodology-proof’ insight into the origins and causes” of the phenomena under analysis.<sup>45</sup>

In order for the field to live up to its “potential to produce generalizable conclusions, or other forms of nomothetic, presumably transportable knowledge,” then, legal scholars must become familiar “with basic concepts of social science research design and case-selection principles.”<sup>46</sup> While Hirschl is careful to state that “[a]dhering to inference-oriented principles of research design and case selection is not a requirement”<sup>47</sup> for comparative constitutional scholars, his message is clear: Comparative constitutional studies will only flourish insofar as a lot more of those trained and working in the field of law learn to think and proceed a lot more like social scientists.<sup>48</sup>

### III. PITFALLS OF AN ENLIGHTENMENT PROJECT, OR REVIVING THE RENAISSANCE SPIRIT

In the introduction to *Comparative Matters*, Hirschl argues that the “future of comparative constitutional inquiry as a field of study . . . lies in relaxing the sharp divide between constitutional law and the social sciences, *in order to enrich both*.”<sup>49</sup> All told, however, the primary audience for this book is not really social scientists, especially not established or aspiring comparative political scientists, but rather legal scholars, law students, and curious judges. While social scientists engaged in comparative inquiry will find Hirschl’s foray into intellectual history stimulating and his catalog of literature useful, they already (or should already) know and accept the basic concepts and principles that he uses to categorize and critique existing comparative constitutional work, and have far less need for the schooling in the comparative method that he offers. Indeed, as a comparative political scientist, I found myself nodding in agreement with many of the arguments Hirschl makes throughout the book—even worrying at one point early on that I would not have much to say in this book review beyond “Amen!” As I completed my reading, however, three concerns arose.

First, notwithstanding Hirschl’s valiant effort to inspire his fellow lawyers and judges, it seems possible that his prescription will simply fall on deaf ears. Although his critique of “cherry-picking” by legal scholars and judges rings true, what incentive do most lawyers and judges have to embrace social science methods? If, as Hirschl’s work has always recognized,<sup>50</sup> constitutional court judges are ideologically-motivated and often strategic actors whose decisions reflect and play into the ideological battles of the

42. HIRSCHL, *supra* note 2, at 212.

43. *Id.* at 244.

44. *Id.* at 238.

45. *Id.* at 244.

46. *Id.* at 14-15.

47. HIRSCHL, *supra* note 2, at 228.

48. *Id.* at 6.

49. *Id.* (emphasis added).

50. See RAN HIRSCHL, TOWARDS JURISTOCRACY (2004).

polities in which they function,<sup>51</sup> doesn't "cherry-picking" of "friendly" examples<sup>52</sup> make more sense than a country/case selection that might be more representative/less biased, in empirical terms, but won't serve their ends as effectively, if at all? Indeed, one could argue that "cherry-picking" is the bread and butter of lawyers and judges, in a context where what is sought is "persuasive authority" and the audience to which any legal argument is directed is unlikely to raise methodological objections grounded in positivist standards of social research.<sup>53</sup>

Hirschl explicitly recognizes the professional norms and incentives that inform choices about what to study, teach, or cite, noting in the introduction to chapter 6 that, "[u]ndoubtedly, the constitutional lawyer, the judge, the law professor qua professor, the normative legal theorist, and the social scientist engage in comparison with different ends in mind," and, one by one, he acknowledges that, given the ends they pursue, these different types of jurists may be "forgiven" for selectively drawing on "a small number of possibly unrepresentative cases."<sup>54</sup> Further, he admits that law professors are in the business of "teaching students to 'think like lawyers,'" rather than to carry out comparative inquiry "with a view to establishing broad causal links," and notes that "[b]ar associations do not require knowledge of comparative constitutional law and [law school] hiring and tenure committees gloss over it."<sup>55</sup> Given these and other disincentives, it seems unlikely that all but a few self-motivated legal scholars will be inclined to learn and practice not just "the language, history, and laws of other polities" but "a more rigorous methodology" aimed at causal inference and the formulation of generalizable insights,<sup>56</sup> so as to respond to what Hirschl refers to on the final page of the book as "the call of the hour."<sup>57</sup>

Second, by appealing primarily to those with legal training, and by seeking to bridge the gap between law and social science by providing a sort-of "Scope and Methods 101" tailored to those lawyers with interests in comparative constitutional questions, Hirschl may have missed an opportunity to move those on the other side of that gap—namely comparative social scientists. As Hirschl knows all too well, many social scientists tend to dismiss, if they are even aware of, work on legal reasoning, which they often fail to take seriously, "treating it as merely post-hoc rationalization."<sup>58</sup> Yet, he notes, the "need for scholars of comparative government to understand the constitutional vocabulary of the polities they study is as urgent as it has ever been,"<sup>59</sup> and work by legal scholars, even if not written in an explanatory mode or with the intent of contributing to general theory-building, can be enormously helpful in orienting analysts to the constitutional politics of any given country, in translating or uncovering inconsistencies, similarities,

51. See, e.g., HIRSCHL, *supra* note 2, at 22 ("What constitutional courts and judges regard as 'relevant' or 'irrelevant' sources of reference reflects in no small part their vision of a concrete set of values they wish their country to be associated with and the 'right' club of nations to which they prefer their country to belong.")

52. *Id.* at 19.

53. *Id.* at 25.

54. *Id.* at 225.

55. *Id.* at 229.

56. HIRSCHL, *supra* note 2, at 229.

57. *Id.* at 284.

58. *Id.* at 170.

59. *Id.* at 191.

and differences in legal provisions and judicial rulings over time in one or more countries, as well as in provoking or inspiring explanatory and theory-oriented work.<sup>60</sup> My own analysis of Chile,<sup>61</sup> for example, would have been impossible had I not been able to read and learn from the work of local legal scholars. In addition, I continually rely on, and cannot imagine ever eliminating, numerous works by legal scholars in the syllabi of my various comparative law and courts courses in order to provide my political science students with important examples of, details about, and insights on the “modes of legal reasoning” and/or “constitutional histories and interpretive legacies” of any given country or event we discuss.<sup>62</sup> To be sure, no less a figure than Tom Ginsburg, who is one of the key scholars leading the effort to build and analyze large-n databases on constitutions around the world, has argued:

we cannot conceivably know whether any particular legal rule or institution will be of broader theoretical or practical interest until we know what it is we are looking at. And this requires a certain degree of local knowledge, of willingness to understand legal systems on their own terms. There is therefore virtue in having a group of scholars studying foreign legal systems for their own sake, independent of the need to resolve any particular theoretical or practical question.<sup>63</sup>

It is a pity that such points are mentioned almost in passing in *Comparative Matters*. It would have been helpful to have a scholar of Hirschl’s stature make a stronger case for how and why social scientists, and political scientists in particular, might meet legal specialists at least part of the way across the disciplinary divide and, thereby, contribute to a more “holistic” and truly inter-disciplinary field of comparative constitutional studies.<sup>64</sup>

Third, and finally, Hirschl’s call for a methodologically plural and analytically eclectic interdisciplinary field, in which “both constitutional law and the social sciences are enriched,” is sometimes overshadowed, and thus weakened, by his insistence on the construction of “shared, enduring, foundational commitments” to “epistemic and methodological norms.”<sup>65</sup> What I found most compelling about *Comparative Matters* were passages like “collaboration, dialogue, mutual awareness, and cross-reference between comparative constitutional law and comparative politics are essential to yielding a complete account of social rights in theory and in practice;”<sup>66</sup> and “[a]ny type of academic analysis that advances our knowledge and understanding of the enterprise of public law in a meaningful way—be it qualitative or quantitative, normative or positivist, descrip-

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60. *Id.*

61. *See, e.g.*, LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007).

62. HIRSCHL, *supra* note 2, at 191.

63. Tom Ginsburg, *Studying Japanese Law Because It’s There*, 58 AM. J. COMP. L. 15, 16 (2010).

64. Maurice Adams, *Disabling Constitutionalism: Can the Politics of the Belgian Constitution be Explained?*, 12 INT’L J. CONST. L. 279, 281 (2014) (arguing that what is needed in comparative constitutional inquiry is “reciprocity” between law and political science, “and what we should pay attention to is how political reality and constitutional law inform and influence *each other*”).

65. HIRSCHL, *supra* note 2, at 13-14, (quoting LARRY LAUDAN, BEYOND POSITIVISM AND RELATIVISM: THEORY, METHOD, AND EVIDENCE 83 (1996)).

66. *Id.* at 186.

tive or analytical—is potentially of great value.”<sup>67</sup> And who could argue with the minimalist and ecumenical (“sensible”) guiding principles he lays out for anyone engaged in the comparative constitutionalist enterprise?<sup>68</sup>

Yet Hirschl’s conviction that positivist social science should take precedence in the quest to advance knowledge reveals itself at numerous points. For example, though he tries to praise works of comparative legal scholarship that have “generat[ed] thick, multifaceted descriptions, concepts, and tools for thinking,” he diminishes their value by emphasizing that they “lag behind the best of the social sciences in their ability . . . to trace causal links” or “to substantiate or refute testable hypotheses.”<sup>69</sup> Given that the works he compares unfavorably to “the best” were not likely written to achieve such social scientific goals, what Hirschl really seems to be saying is that their “lag” derives not from their poor performance in social science terms (how could they perform poorly at something they did not attempt?) but from their playing in a different and inferior league from positivist social scientists. Hirschl’s zeal for the social scientific approach is also evident in phrases like, “[a] serious dialogue between ideas and evidence, theory and data, can now *replace*, or at least complement, the detailed classification of laws and legal concepts as the ultimate goal of comparative legal studies, constitutional and otherwise.”<sup>70</sup> And he basically gives himself away near the end of the book when, even after including as one of his “sensible guiding principles” the encouragement of “methodological pluralism and analytical eclecticism,”<sup>71</sup> he identifies one of the problems with the field of comparative constitutional law as being that it “remains quite eclectic, and continues to lack coherent methodological and epistemological foundations.”<sup>72</sup>

It is for this reason that I have characterized Hirschl’s project in *Comparative Matters* as an attempt to bring comparative constitutional law from renaissance to enlightenment. Although he praises the flowering of work in the field, celebrating its diversity and, in at least some areas, growing sophistication and innovation (a humanistic “renaissance spirit,” if you will), he clearly believes that the advancement of knowledge about constitutional matters depends on uniting scholars around the more specifically rationalist goals of greater rigor, exactitude, and system.<sup>73</sup> In other words, he seems—at times more directly than others—to want a sort of “scientific revolution” within comparative constitutional studies, calling upon legal scholars, where possible, to learn, apply, and teach the scientific method as the key to a fuller understanding of constitutions and constitutionalism, within or across countries. In so doing, I contend, Hirschl partially undermines his stated goal of cultivating interdisciplinary dialogue and cross-fertilization in comparative constitutional studies. Although I fully agree that the field cannot be truly comparative unless, and until, it expands its horizons beyond the “usual suspects” and that both small and large social scientific studies should be a central pillar of the comparative constitutionalist enterprise, to sustain and enhance the renaissance of recent years, we

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67. *Id.* at 228.

68. *Id.* at 231.

69. *Id.* at 278.

70. HIRSCHL, *supra* note 2, at 226 (emphasis added).

71. *Id.* at 231.

72. *Id.* at 278.

73. See STEPHEN TOULMIN, *COSMOPOLIS* (1990), which was my inspiration for the final section.

would do better not to press for greater uniformity or certainty from our colleagues, whatever their disciplinary homes, but instead to accommodate and even encourage difference, reciprocity, and ongoing dialogue within and between law and the social sciences.