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THE CONTINUED RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW

Ran Hirschl*

Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge U. Press 2009). Pp. 270. \$88.99.

Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford U. Press 2010). Pp. 536. \$68.00.

The past two decades have witnessed a sharp comparative turn in legal practice and scholarship. Centripetal processes of global convergence, transnational governance, and complex economic interdependence aided by the development of new communication and information technologies have all contributed towards making the legal profession more international in scope than it has ever been before. The ever-expanding interest among practitioners, scholars, and policy makers in the laws and legal institutions of other countries is remarkable. “We are all comparativists now” has increasingly become the motto of many jurists and legal scholars worldwide. This new interest is particularly striking in comparative constitutional law and the transnational migration of constitutional ideas. There is no doubt that the systematic study of constitutional law, jurisprudence, and institutions across polities has enjoyed a certain renaissance since the mid-1980s. From a relatively obscure and exotic subject studied by the devoted few, comparative constitutionalism has emerged as one of the more fashionable subjects in contemporary legal scholarship, with ever-closer ties to comparative politics, law and society, and empirical legal studies.

Over 150 countries as well as several supra national entities (e.g., the European Union) covering approximately three quarters of the world’s population have gone through major constitutionalization processes over the last few decades. Most of these countries have introduced a bill of rights and have established some form of active judicial review. Meanwhile, various transnational rights regimes, most notably the emerging pan-European rights regime based on the European Convention of Human Rights and enforced by the European Court of Human Rights (“ECtHR”), have transformed rights jurisprudence and the practice of judicial review in all their member states. The constitutions of an increasing number of countries in other continents require judges to consider international law in interpreting their bill of rights. As a result, constitutional courts worldwide increasingly rely on comparative constitutional law to frame and articulate their own position on a given constitutional question. This has brought about “a brisk international traffic in ideas about rights,” carried on through

advanced information technologies by high court judges from different countries.¹ Indeed, “constitution interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication.”² An international epistemic community of jurists has emerged. In short, “[c]ourts are talking to one another all over the world.”³ Even the U.S. Supreme Court – one of the last bastions of resistance among the world’s leading constitutional courts – has hesitantly joined the comparative reference trend.⁴

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

These global trends and the corresponding demand among students and jurists alike for quality teaching and scholarship in the field have not gone unnoticed in legal scholarship. Scholarly books and monographs dealing with comparative constitutional law are no longer considered a rarity. Entire textbooks, even research guides and handbooks, are now devoted exclusively to comparative constitutional law, or draw upon selected comparative constitutional jurisprudence to highlight distinct characteristics of American constitutional law. More edited collections than ever before deal with various aspects of constitutionalism beyond the United States. New periodicals (e.g., *International Journal of Constitutional Law*) and symposia are devoted to the study of comparative constitutional law as a distinct phenomenology and field of inquiry. Top-ranked law schools in the United States and elsewhere now regard courses on comparative constitutional law as essential additions to the curriculum. While certain foundational, ontological, epistemological, and methodological questions concerning the field’s purpose, scope, and nature remain largely unanswered, there is no doubt that this is the heyday for scholars of comparative constitutional law and politics.

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1. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 158 (Free Press 1991).

2. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *Ind. L.J.* 819, 820 (1999).

3. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 *U. Rich. L. Rev.* 99 (1994).

4. See e.g. *Roper v. Simmons*, 543 U.S. 551, 575-578 (2005); *Lawrence v. Tex.*, 539 U.S. 558, 573, 576-577 (2003). In *Atkins v. Virginia*, the majority opinion referred to an amicus brief by the European Union. 536 U.S. 304, 316-317 n. 21 (2002).

5. David Law, *Generic Constitutional Law*, 89 *Minn. L. Rev.* 652, 659 (2005). See also Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 *Penn. St. Intl. L. Rev.* 89 (2008).

6. David Beatty, *The Ultimate Rule of Law* 159-160 (Oxford U. Press 2004). See also Aharon Barak, *Purposive Interpretation in Law* (Princeton U. Press 2005); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *Colum. J. Transnatl. L.* 73 (2008).

This transformation serves as the springboard for Professor Jackson's exceptionally erudite book *Constitutional Engagement in a Transnational Era*.⁷ Jackson is one of the most prominent cosmopolitan voices in American constitutional scholarship. Very few people in North America, or indeed anywhere else, can lay credible claims for being more knowledgeable with respect to both American and comparative constitutional law matters. These rare qualities are reflected in every page of her book, which in many ways marks the culmination of Professor Jackson's decades-long exploration of the "love-hate" relationship between engrained particularist legacies and overarching universalist values in American constitutional law. It is an exceptionally rich, at times even overly dense, book that engages in both empirical exploration and normative prescription. At the investigative level, Jackson provides useful vocabulary and ample illustrations for understanding the various domestic constitutional reactions to transnational law, and then meticulously explores how transnational law treaties, customary international law, the decisions of foreign or international tribunals, and other transnational legal influences affect constitutional interpretation and adjudication. At the prescriptive level, she advances a cosmopolitan agenda that endorses wider engagement with transnational law for both pragmatic and principled reasons.

At the book's core is the notion that constitutional law in the United States and elsewhere now operates in an increasingly transnational legal environment of international treaties and supranational human rights, trade, and monetary regimes.⁸ As many have observed, in our changing world, every issue has become global, whether it is health, finance, security, or, yes, constitutional law. There are very few truly domestic issues any more. It is thus unrealistic, and indeed unwise, to assume that constitutional law in general, and the strangely insular American constitutional law in particular, may continue to defy universalism in favor of particularism. Constitutional courts commonly thought of as the guardians of the nation's constitutional legacy and enduring values *ought* to adjust and *are* adjusting, in some places admittedly faster than in others.

Jackson moves confidently from identifying various ways in which transnational law affects constitutional jurisprudence to drawing analogies, distinctions, and contrasts between American constitutional issues and pertinent constitutional adjudication of various other countries. The bulk of the book engages in comparative work from an American standpoint, as a tool for self-reflection or self-betterment through analogy, distinction, and contrast. The underlying assumption here is that by referring to the constitutional jurisprudence and practices of other, presumably similarly situated polities, scholars and jurists might be able to gain a better understanding of the set of constitutional values and structures in their own sets of constitutional values.

Accordingly, there is a bit of an "American in Paris" undercurrent to some of Jackson's analyses of foreign law (much like the way Canada, my own home country, is often portrayed by American progressives as an all-out social justice paradise and true antithesis to American conservatism). But on the whole, Jackson is an excellent constitutional sojourner. Most of her comparative examples come from countries that are

7. Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford U. Press 2010).

8. *Id.* at 1.

now considered the “usual suspects” in such analyses (Canada, South Africa, Germany and, India), although there is a fair bit of reference to less frequently travelled constitutional destinations as well. Little attention is given to constitutional law in the non-liberal democratic world, but that is quite understandable given the nature of Jackson’s project as well as the liberal overtone of global constitutionalism. She speaks with authority about a wide array of issues, ranging from interpretive methods to reproductive freedoms, and from the laws of federalism to gender equality. Jackson correctly notes that rights issues are more conducive to a meaningful transnational conversation and collective enrichment than other core constitutional issues such as federalism or the incorporation of international treaties.⁹ Her mastery of comparative case law is beyond impressive, even if - as I think Jackson herself would readily admit - most of the discussion of foreign case law probably will not be considered novel by constitutional scholars in each of the cases’ “country of origin.” But by that harsh criterion, 99% of comparative jurisprudence analyses, let alone hundreds of U.S. Supreme Court case commentaries published each year, would not get an A+ for “novelty by local standards” either. The bottom line is that the “whole” of Jackson’s book is greater than the sum of its parts, although the sheer sum of the book’s parts, over 500 pages of exhaustive analyses of comparative constitutional cases, ideas, and practices, is in itself more than worth the admission ticket.

From an empirical standpoint, Jackson’s claim that the changing nature of constitutional law in these transnational times and the inevitability of such changes is fully persuasive. Likewise, her argument that engagement with foreign constitutional jurisprudence may enlighten and enrich domestic constitutional discourse with respect to a host of concrete issues makes perfect sense. The strength of Jackson’s broad cosmopolitan premise depends on one’s own position with respect to these trends, or indeed the very framing of “transnationalism” or “globalization.” The political left often shares an agnostic view of globalization processes. Yet in the constitutional arena, global convergence and interjurisdictional cross-fertilization are more often than not supported by liberal-progressive scholars.

Constantly hovering over and feeding into Jackson’s book is the heated debate in the United States Supreme Court and in American legal academia more generally about reference to foreign constitutional case law and principles, and more generally adherence to international tribunals, customary, and treaty-based international law norms. Of the several arguments advanced by those opposed to constitutional borrowing, of whom Justice Antonin Scalia is the best known, the two that carry the most weight in the context of Jackson’s book are, first, that there are serious methodological problems in reference to foreign cases, for example, problems of “cherry-picking” favorable cases, out-of-context analysis, and selective designation of relevant sources (why certain countries but not others are considered legitimate sources to borrow from); and, second, that reference to foreign constitutional jurisprudence amounts to little more than “social progressiveness by stealth.”¹⁰ Because the rights jurisprudence of most other leading democracies is more progressive than that of the United States, reference to these

9. *Id.* at ch. 7.

10. *Id.* at ch. 6.

countries' rulings advances, almost by definition, a more progressive line of interpretation that in the context of the current culture wars in American society tends to prefer views favored by, say, the Kennedy-Clinton circle over those of the Bush-Cheney clan.

All pertinent arguments against borrowing reflect a view of American constitutionalism as unique, exceptional, and particular, whereas the main arguments for the practice are neatly aligned with a universal and cosmopolitan view of constitutionalism and human experience more generally. Republicans and right-wingers tend to resent borrowing; Democrats, liberals, and progressives tend to support it. Moreover, the political split in the U.S. Supreme Court is closely aligned with the Justices' positions on foreign reference. Most or all of the five Justices who voted against a recount in the *Bush v. Gore* courtroom battle over the fate of the American presidency (thereby paving George W. Bush's way to the White House) reject reference to foreign judgments. Most or all of the Justices who voted for a recount (i.e., those who sided with Al Gore's argument) tend to support, either tacitly or explicitly, reference to foreign judgments.¹¹ Much like other ostensibly principled interpretive debates that Jackson refers to, the debate over reference to foreign law in the United States is portrayed as analytical but is mainly political. It cannot be understood separately from the deep culture wars that have characterized the American polity for decades and are omnipresent in the American public sphere, from Michelle Obama to Laura Bush, from Martha's Vineyard to Wyoming's ranches, and from PBS to Fox News. While from a comparative jurisprudence angle Jackson's book is hands down a magnum opus, it takes the sociopolitical context for the charged domestic-transnational encounters too lightly.¹²

The Endurance of National Constitutions by Professors Elkins, Ginsburg, and Melton¹³ ("Melkinsburg") is more "political" than Jackson's book if admittedly less passionately argued. Melkinsburg are men on a mission. Their goal: injecting new life into the hitherto numb area of comparative constitutional design.¹⁴ Interest in "constitutional engineering" peaked with the prolific consociational democracy literature of the late 1970s, and then again in the early 1990s with the vibrant debates about transition to and consolidation of democracy and free markets in post-authoritarian settings. With the exception of debates on the externally promoted constitutionalization in media hotspots such as Afghanistan (2004) or Iraq (2005), or a few powerful takes on the shortcomings of American constitutional configuration, the field has been crying out for new directions over the last fifteen years.¹⁵ Enter Melkinsburg.

At the core of this pioneering book - its core concept reflects what is arguably one of the most intriguing new directions in comparative constitutional scholarship we have

11. *Bush v. Gore*, 531 U.S. 98 (2000).

12. Two recent books that examine comparatively the often charged interaction between constitutional aspirations and political realities are my own Ran Hirschl, *Constitutional Theocracy* (Harvard U. Press 2010) and Gary Jacobsohn's *Constitutional Identity* (Harvard U. Press 2010).

13. Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge U. Press 2009) [hereinafter Melkinsburg].

14. *Id.* at ix.

15. See e.g. Robert A. Dahl, *How Democratic Is the American Constitution?* (2d ed., Yale U. Press 2002); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (Oxford U. Press 2006).

seen in the last few years is the question, how can we explain the variance in the lifespan of national constitutions, or, why is it that some national constitutions live much longer than others.¹⁶ To answer this question, the authors draw on a comprehensive, never-before-assembled dataset on the constitutions of the world from 1789 to 2005 – a mere 216 years of modern constitutionalism.¹⁷ Melkinsburg provide a fair bit of stunning news at the descriptive level. Ancillary powers, or even what is included in national constitutions, vary tremendously across polities. So whereas constitutional theory assigns certain tasks or functions to a constitution, the constitutions of the world diverge in addressing these functions. While constitutions are written to last, the authors report, they vary considerably in terms of their endurance.¹⁸ Some constitutions are relatively long lived. In addition to the U.S. Constitution, Norway’s constitution was adopted in 1814 and is the second oldest constitution currently in existence. Sweden’s 1809 constitution was replaced in 1974, at the age of 165. The 1874 constitution of Switzerland was replaced by a new one in 1999, at the age of 125. The life expectancy of other constitutions is quite short. Melkinsburg find that only half of all constitutions last more than nine years, with an overall average of below twenty years. Thus, the average citizen outside of North America, they report, should expect to see her country cycle through four constitutions in her lifetime.

Why the variance in constitutional endurance? Possible responses are grouped into two main categories: “environmental” factors (as in non institutional, “software”-like aspects, mainly the social, political, or economic context within which constitutions operate), and “design” factors (matters of constitutional drafting and institutional design).¹⁹

Melkinsburg tend to emphasize the latter aspect; while extra constitutional factors do affect a constitution’s endurance, design choices (that reflect social, economic, and political factors, to be sure) matter a greater deal, they argue. Their data supports the significance of the “design” factor – this in itself is a major contribution to the constitutional and institutional design literature, even if Melkinsburg do not treat the full range of “environmental” factors with the same meticulousness as they treat quantifiable design elements. They do acknowledge the significance of “environmental” factors such as ethnic homogeneity/heterogeneity or a tradition of enduring constitutions. However, these feed into the design process; the more heterogeneous a given polity’s ethnic makeup is, the greater the likelihood it will be addressed by constitutional framers.

Enduring constitutions emerge by virtue of a relatively open drafting stage (e.g., the inclusiveness of the constitutionalization process, acceptance by various constituencies during the constitutional order’s early years); tend to be specific (the extent to which the design of a constitution is detailed); and more often than not are adaptable (they have relatively flexible amending formulae and modernization processes). These three design choices “result from the constitution-making process itself, but are also features of ongoing practice. All three mutually reinforce each other to

16. Melkinsburg, *supra* n. 13, at 2.

17. *Id.* at ix.

18. *See id.* at 12-35.

19. *Id.* at 134-142.

produce a vigorous constitutional politics in which groups have a stake in the survival of the constitution."²⁰

Melkinsburg's analysis skillfully defies the annoying, non-analytical tone that often accompanies normative constitutional discourse. They treat their research subjects (constitutions of the world) much like hospital triage doctors treat patients: with empathy and urgency yet ultimately in a distant, composed fashion. Multivariate quantitative analysis is drawn upon in several chapters, others are based on brief illustrative case-studies, old and new, trivial and exotic. The grasp of pertinent constitutional theory arguments and political science literature is impressive. Perhaps most importantly, this project, even if somewhat overly a-contextual and "non-ethnographic" at times (Clifford Geertz's own life-expectancy would have certainly not increased had he read this book), opens up an entire set of new research and constitutional drafting possibilities, notably the possibility of a "scientific," perhaps even computerized, process of constitutional design, macro (e.g., containing pressures in a multi-ethnic polity) or micro (e.g., what is the most suitable judicial appointments strategy).²¹ Not too many books can boast such a new, potentially groundbreaking beginning.

All of this is not only a must-read to any serious student of constitutional design, but is also conveyed in an unusually entertaining, witty fashion; this book is an enjoyable read even if you are not into comparative constitutional law. One thought-provoking insight follows a cool factoid-like bit of information. Amusing metaphors abound. Melkinsburg identify "risks to constitutional life" (chapter 5) and provide "an epidemiological analysis of constitutional mortality" (chapter 6).²² They talk about "constitutional autopsies" (postmortem analyses of constitutional collapse); the "Kawasaki Ninja" risk-factor (an extremely powerful sport motorcycle; the life expectancy of a Ninja owner following the date of purchase is six months); and about "the Goldilocks problem" (radically different readings on the dependent variable resulting from minor changes in the independent variable).²³ Elsewhere in the book, they draw parallels between the life expectancy of constitutions and marriage (both symbolic, covenant-like contracts) in several Western countries.²⁴ The risk of divorce peaks at six years of marriage before decreasing gradually; in the case of constitutions, the hazard rate peaks at fifteen but then decreases steadily and substantially until by age fifty the rate is approximately .02, or 20 deaths per 1,000 constitutions.²⁵ Curiously, Melkinsburg report, "not only does the shape of the hazard rate match across the two domains, but the magnitude of the hazard rate itself is almost equivalent when both rates are at their peak."²⁶

If there is a pertinent aspect of this project that Melkinsburg should probably have

20. *Id.* at 89.

21. On the possibility of "computerized" constitutional design, see for example David Law, *Constitutions*, in *The Oxford Handbook of Empirical Legal Research* (Peter Cane & Herbert M. Kritzer eds., Oxford U. Press 2010).

22. Melkinsburg, *supra* n. 13, at ch. 5 & 6.

23. *Id.* at 124-125.

24. *Id.* at 131.

25. *Id.* at 130-131.

26. *Id.* at 131.

considered more closely, it is the basic question of what counts as “success” in constitutional design and to what extent a long lifespan is indeed a suitable criterion for measuring it. To be sure, this omission is not exclusive to this book. Considering how central the question of “success” and how to define and measure is, it has not been thoroughly addressed in the canonical constitutional-design literature. Endurance may be an intuitive standard by which to measure the relative success of a given constitution. Akin to a reliable vehicle, the longer a given constitution is able to withstand the test of time, the stronger the indication, so the argument may go, that it is a good or suitable constitution. So by that criterion, the United States Constitution is a stunning success story. But the continued existence of a constitution may reflect path-dependence factors as well as the dominant ideological ambiance and constellations of power that are conducive to its endurance.

The longest standing constitution is the U.S. Constitution, with several other constitutions also surpassing or approaching their first centennial anniversary. But a constitution is supposed to accomplish, or at least facilitate, the accomplishment of substantive goals. Its endurance per se seems of secondary significance. The proof of its success is in the pudding itself, not in its lifespan. There is also the problem of silence or irrelevance. Older constitutions are not likely to provide adequate responses to new challenges; old constitutions’ oversight of say, the metropolis as a third order government, may be attributed to the fact that massive urbanization and the emergence of the mega-city is a phenomenon of the last 70 or 80 years.

Or think of it this way: what is the *raison-d’être* of a commercially grown plum? A wax-coated, hormone-induced plum (assuming that botanically it is still a plum) at a chain supermarket may sit on the shelf for weeks without rotting. But flavor, size, and health-wise, a natural, from-the-orchard-to-your-table fruit is exponentially more appealing. So unlike toys, cars, or homes, durability is not necessarily an indication of success in the constitutional context. What is more, even an above average endurance of a given constitutional order may not necessarily reflect a perfect design or a nirvana-like ultimate harmony as much as it may reflect path-dependence factors, as well as the constellations of power that are conducive to its endurance and are able to block calls for change.

A more substantive way to define and measure the “success” of a given constitutional design is by its ability to deliver, independently or in association with other factors, the substantive goods it purports to advance. So, for example, an empirical assessment of the actual contribution of federalism and proportional representation on mitigating strife in multi-ethnic polities, suggests that both “highly touted solutions to ethnic divisions,” have at best mixed effects.²⁷ Or, to pick another example, while active judicial review is regarded by the emerging global consensus that both Melkinsburg and Jackson explore, as the epicenter and *sin-qua-non* of any vibrant democratic political system, very few if any of the top twelve countries in the comprehensive *Democracy Index* conducted by *The Economist* sport a long tradition of American-style written constitutionalism, high-voltage judicial review, or a culturally engrained constitutional

27. Zachary Elkins & John Sides, *Can Institutions Build Unity in Multiethnic States?* 101 *Am. Pol. Sci. Rev.* 693 (2007).

sanctity.²⁸ And judicial interpretation of constitutional provisions, an aspect that Melkinsburg do not address in this book, seems to matter a great deal in determining a given constitution's "success" as courts strive to translate broad constitutional provisions into practical guidelines for public life. In short, unlike most other large-scale "design sciences" (e.g., urban planning or macroeconomic policy making) where the correlation between the stated intentions at the design stage and actual, on-the-ground delivery is seldom perfect but is often quite significant, when it comes to constitutions, that correlation may be notably more modest than is commonly thought.²⁹ As Elkins and Ginsburg readily admit in another piece of theirs, "[c]onstitutional design processes are loaded with expectations about endurance, efficacy, the resolution of conflicts, and political reconstruction . . . In the real world, however, most constitutions fail."³⁰

While the Melkinsburg and Jackson books differ in their approach to comparative inquiry, a key common denominator is their cosmopolitan outlook and corresponding treatment of constitutions and constitutionalism as universal phenomena. An often-cited hurdle in advancing a general theory in comparative constitutional law is the potential oversight of the specific institutional, political, and doctrinal context within which laws evolve and function. Without attention to such contextual details, important nuances and idiosyncrasies are easily lost.³¹ There is, no doubt, some truth in the contextualist concern, for there are indeed significant differences in the constitutional history, law, and jurisprudence of countries worldwide. Having said that, the contextualist concern seems to provide an all too easy excuse for not engaging in general theory building. Very few of the supposedly "contextualist" works on the spread of constitutional review provide distinctly "thicker descriptions" than Vicki Jackson's take on the subject. More importantly, even social anthropology – arguably the most "contextual" and "hermeneutic" discipline in the social sciences – attempts to produce generalizable insights regarding human development and behavior that are based on, but ultimately go beyond, detailed ethnographies.

One of my favorite examples here is Richard Lee's meticulous ethnographic work on patterns of food gathering and consumption among the !Kung San in the Kalahari.³² His work led to the expansion of the "homo-economicus" thesis to the least likely of settings, and ultimately to a paradigm shift in our understanding of the economic and political organization of hunter-gatherer societies.³³ Besides, there seems to be a notable

28. The *Democracy Index* conducted by *The Economist* focuses on five general categories of democracy: electoral process and pluralism, civil liberties, functioning of government, political participation, and political culture. Regimes are assigned a score on a zero to ten scale, where ten is the closest a country can get to full democracy. According to *Democracy Index 2009*, North Korea scored the lowest with 0.86, while Sweden scored a total of 9.88 (the highest result). The rest of the top dozen countries include Norway, Iceland, the Netherlands, Denmark, Finland, New Zealand, Switzerland, Luxembourg, Australia, Canada, and Ireland. The United States was ranked eighteenth with a score of 8.22. 29. Ran Hirschl, *The "Design Sciences" and Constitutional "Success"*, 87 *Tex. L. Rev.* 1339 (2009).

29. Ran Hirschl, *The "Design Sciences" and Constitutional "Success"*, 87 *Tex. L. Rev.* 1339 (2009).

30. Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?* 5 *Annual Rev. L. & Soc. Sci.* 201, 219 (2009).

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

32. See e.g. Richard B. Lee, *The !Kung San: Men, Women, and Work in a Foraging Society* (Cambridge U. Press 1979).

33. See generally *id.*

difference between the significance of context when one studies the transition from childhood to adolescence in early twentieth-century New Guinea (Margaret Mead), patterns of reciprocity in remote Melanesian islands (Bronislaw Malinowski), or magic rituals among the Nuer of southern Sudan (E. E. Evans-Pritchard) – to name but three ethnographic classics – and the much more modest significance of context when one studies pervasive phenomena such as the mass media, air traffic, professional sports, scientific discoveries, or modern constitutionalism. In other words, the more universal and widespread certain norms and practices become – the astounding convergence worldwide toward constitutional supremacy and judicial review would be a good example here – the less effective or significant are the contextualist concerns.

Constitutionalization certainly is universal and widespread by any quantitative or qualitative measure. Given other broad economic, technological, and cultural convergence processes, let alone the dramatically improved availability of, and access to comparative constitutional jurisprudence, jurisprudential cross-fertilization, and the globalization of constitutional law more generally, seem inevitable.³⁴ However idiosyncratic or rooted in local traditions and practices a given polity's constitutional law may be, it is unavoidably open to liberalizing global influences. In a transnational age, even bastions of insular parochialism, let alone leading members of the Western world, cannot avoid certain degrees of international impact. While each instance of constitutionalism is surely unique or idiosyncratic in many respects, it is the development and substantiation of a core common element or a general principle that can be applied to many or all of these examples that make for a great scientific discovery. To draw an analogy with linguistics, while every language or dialect is distinctive in many ways, there is nonetheless the possibility that there are common elements among many or all of them, as proposed in Noam Chomsky's renowned theory of "generative grammar." Aspiring to trace broad patterns or formulate such general rules, applicable across contexts, is arguably one of the meta-goals of modern scientific inquiry. The Jackson and Melkinsburg books, each in its own captivating way, are to be loudly applauded for attempting to accomplish precisely that.

34. See Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 Va. J. Intl. L. 985 (2009).