Conceptualizing the Field of Comparative Constitutional Law

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I don't like casebooks that much.
They answer the questions that have already been asked and answered.

Aharon Barak, President of the Supreme Court of Israel (ret.),
to the author

1. Introduction: The Problem of Capacity

The comparative study of constitutional law and constitutional politics suffers from an embarrassment of riches. The very qualities that make the field so rewarding for scholars—interdisciplinary foment and dialogue, a subject matter and an audience as broad and varied as the world itself, vast unexhausted possibilities and low-hanging fruit as far as the eye can see[1]—make it difficult even to agree on a name for the field that does justice to the enterprise. ("Comparative constitutional law"? "Constitutionalism?" "Comparative constitutional studies?"[2]) The absence of a widely shared vision of what we should be trying to do, or how we should be trying to do it, is not necessarily a pressing problem for the average researcher: one need not conceptualize a sprawling field in order to contribute to it. For the average teacher, however, the problem looms larger.

An overabundance of material ensures that we cannot hope to teach everything that deserves to be taught. Pedagogy becomes an exercise in triage, which cannot be done thoughtfully unless we confront certain questions head-on. What can we afford to pare away, and what is essential? What do we believe the next generation needs most, and why? When push comes to shove and we are forced to prioritize, what do we choose? These questions are bound to be challenging for a field that cannot even figure out its own name. Yet we must face them squarely if we are to make the most of the scarce time that we have. Indeed, there is much more at stake than just classroom time management; the stakes are nothing less than the conceptualization and reproduction of the field. Pedagogy is how a field perpetuates itself: the pedagogy of today defines the field of tomorrow. To teach a truncated conception of the field is therefore to limit the field.

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[1] See Tom Ginsburg, 'The State of the Field', in David S. Law (ed.), *Constitutionalism in Context* (Cambridge University Press, 2022).

[2] Compare e.g. Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014) at ch. 4 (observing that "comparative constitutional law" is dominated by the "predominantly legalistic" study of "constitutional courts, judicial review, and constitutional rights jurisprudence," and contrasting it with the broader enterprise of "comparative constitutional studies," which encompasses the interdisciplinary study of constitutional design, democratization, "constitutional transformation," "constitutions as political institutions," and judicial behavior), with Mark Tushnet, 'Comparative Constitutional Law', in Mathias Reimann and Reinhard Zimmermann (eds.), *Oxford Handbook of Comparative Law* (Cambridge University Press, 2007), 1193–1221, at 1198–99 (defining "comparative constitutional law" broadly as the study of every governmental system with a constitution, and defining "constitutionalism" narrowly as the branch of "classical and modern liberalism concerned with institutional design and fundamental rights").

"Too much material, not enough time" is a familiar complaint across any number of fields, but the problem of insufficient capacity is especially acute for comparative constitutional studies due to the interaction of four factors: *time*, *content*, *expertise*, and *audience*. In terms of time and content, instructors already struggle just to cover domestic constitutional law. Adding the constitutional law of every other country in the world to the agenda does not make things easier. The interdisciplinarity of the field only compounds the challenge. Scholars have responded to the multidimensionality and complexity of the subject matter by bringing to bear a range of interdisciplinary approaches from political science, history, sociology, anthropology, economics, and so on. Each of these approaches, in turn, is characterized by distinctive research methods and traditions that valorize different types of materials. And this is to say nothing of the materials in other languages that our own limitations hold at bay. The growing availability of translations continues to lower language barriers and expand our access to entire realms of new material.

All of this diversity means that there is even more to teach. At the same time, the time pressure is guaranteed to be worse. Assuming that it is offered at all, comparative constitutional law is almost certain to be an elective that is allotted fewer hours than mandatory offerings in domestic constitutional law, which are already pressed to their limits by a smaller universe of material.[3] And it is not just the clock on the wall that limits our pedagogical options, but also the extent of our expertise. We cannot teach what we do not know, and we are hard-pressed to master the whole of a multinational, multidisciplinary, and multilingual field that keeps expanding in ambition and scope.

To the problems of too much content and too little time and expertise, add the further problem of too many audiences. Courses that go by the name of "comparative constitutional law" are taught around the world to very different types of students with very different expectations and career paths. There are undergraduates in LL.B. programs, graduate students in LL.M. and J.D. programs, research postgraduate students in S.J.D. and Ph.D. programs. And that is to speak only of law faculties and law schools, never mind the graduate students in cognate disciplines such as political science, economics, sociology, and history who need exposure to the scholarly literature in this highly interdisciplinary field. The fact that courses of the same name can be found everywhere does not necessarily mean that the same content should be taught the same way everywhere, to everyone.

Consider just a single institutional setting—a comparative constitutional law elective at a US law school. Some of those enrolled may be domestic JD students; others may be foreign LLM students from a wide variety of professional and legal backgrounds. Still others may be exchange students or visiting scholars who defy easy generalization. Some may have a keen interest in constitutional litigation; some may be aspiring academics; some may be actual judges. Some may be from places abroad where overseas-educated lawyers play a hands-on

[3] A notable exception is CEU's LLM program in comparative constitutional law—the only one of its kind thus far, but also living proof that the field offers more than enough material for an entire degree program. Central European University, Department of Legal Studies, 'Master of Laws in Comparative Constitutional Law Program', https://perma.cc/KH89-QNVR.

role in writing new constitutions; others may approach constitutional law as strictly a spectator sport. Some may be interested in learning *from* other countries, others might prefer to learn *about* other countries. What does such a motley assortment of students want or need? Something "useful"? Something "interesting"? Is it possible to generalize about what the class might find either "useful" or "interesting"? Or should we expect that each class will have needs and tastes as diverse as its membership?

Surely they need an overview of the main substantive, methodological, and conceptual debates in the academic literature. Or would they be better served by studying a sampling of topics and jurisdictions that captures the diversity of contemporary constitutionalism? Or perhaps what they need, instead, is to see what lessons other countries hold for their own, or to acquire a solid foundation in the de facto canon of materials that are most widely discussed, or to learn to think like a foreign lawyer, or to acquire basic survival skills for dealing with constitutional issues in unfamiliar environments.

The basic dilemma is that all of these answers are highly plausible, yet the act of teaching forces us to choose among them. It is impossible to teach comparative constitutional law—to determine how a textbook or syllabus should be organized, what it should include, what it should omit—without acting on some understanding of what our goals are and how we should achieve them. In other words, pedagogy forces us to choose among competing conceptions or models of the field itself—whether we realize it or not.

The good news is that we have options, and they are not mutually exclusive. It is unnecessary and indeed unwise to embrace a single conception of the field to the exclusion of all others, or to adopt a one-size-fits-all approach to the varying needs of diverse audiences. The bad news is that we may not be aware of our options: they are rarely articulated, much less compared or critically examined. Part 2 of this essay identifies and assesses five competing models, which might be called *instrumentalism*, *tourism*, *immersion*, *abstraction*, and *representation*. Instrumentalism and tourism dominate existing pedagogical practice, while immersion and abstraction pervade the scholarly literature. Representation is the least traditional and least prevalent of the five models, but it has an essential role to play. Among other things, it embraces the study of nontraditional forms of constitutionalism that are easily neglected under the other models.

Instrumentalism, discussed in section 2.1, aims to equip domestic lawyers with a comparative repertoire that can be brought to bear on domestic issues. In practice, this often translates into an emphasis on case law from other jurisdictions on hot-button issues in domestic law. Tourism, as defined in section 2.2, revolves around the idea that certain materials are in some sense canonical and ought to be studied for that reason. It seeks to implement the notion that there are certain things students ought to study, whether because they are already widely studied (de facto canon) or objectively deserving of study (explicit canon) or some combination of the two.

Immersion and abstraction stand for opposing traditions in the comparative literature. In particular, they take opposite approaches to the tradeoff between depth and breadth of

coverage. As described in section 2.3, the goal of the immersion model is to enable students to see the world through the eyes of the other or least develop a rich understanding of context, which in methodological terms entails a deep dive into a very small number of topics or jurisdictions. The abstraction model, by contrast, aims to impart generic skills and knowledge that are broadly applicable. Generalization and categorization are the defining tools of this approach, as explained in section 2.4.

The representation model, introduced in section 2.5, is explicitly anti-canonical: it aspires to maximize exposure to the diversity of real-world constitutionalism, in both its traditional and nontraditional forms. On this view, nothing is off limits and everything merits study because the study of constitutionalism should pursue knowledge of all constitutionalism, not just the bits that particular audiences may find praiseworthy or useful.

Part 3 uses a new hybrid handbook-textbook, *Constitutionalism in Context*,[4] to illustrate how the representation model might be implemented, and what the benefits of such an approach might be. The book in question adopts a case study approach to the study of an unconventional yet broadly representative selection of topics and jurisdictions. This approach to implementing the representation model doubles as a strategy for mitigating the tradeoff between depth and breadth: the case study format ensures a degree of depth and context, while the case selection guarantees a degree of breadth and diversity.

Part 4 concludes by arguing that the diversity of the audience and the subject matter alike calls for pedagogical and methodological pluralism, meaning the practice of multiple complementary approaches to the study and teaching of comparative constitutional law and politics. No single conceptualization or approach can be superior to all others across all situations. The right choice is, instead, the choice that is made mindfully, deliberately, and with attention to the context, rather than out of habit or by default.

2. Five Models of the Field: Instrumentalism, Tourism, Immersion, Abstraction, and Representation

Every time that we teach this subject, we answer a host of profound, big-picture questions—even if only implicitly or inadvertently. To name but a few: what is this subject that we are trying to teach? Who are we trying to teach, and what do they need? What is most worth knowing, and how do we cultivate that knowledge? To answer these questions explicitly and coherently is to avow not only a pedagogical model, but also a conception of the field itself.

Critical reflection on existing practice suggests at least five plausible models or conceptions. Each is defined by a theory of what our objectives should be, and a strategy for achieving those objectives. The first two, which we might call the *instrumentalism* and *tourism* models, dominate pedagogical practice. The next two, the *immersion* and *abstraction* models, pervade the scholarly literature but are less common in the classroom. The last option, the *representation* model, is the least traditional. Not coincidentally, it is also uniquely well suited

[4] Law (ed.), *Constitutionalism in Context* (n 1).

to the study of a world in which constitutionalism assumes increasingly diverse and nontraditional forms.

All five models offer valuable baseline benefits that are inherent to the enterprise of comparative law. Training in comparative law develops critical evaluation and creative problem-solving skills and cultivates the ability to "think like a lawyer" by equipping students with an awareness of other ways of doing things, a multitude of perspectives on the problems lawyers tend to face, and an expanded set of potential solutions.[5] Comparative legal training is effective in part because it incorporates multiple levels of learning by doing: it forces students to go beyond absorbing and applying law, to comparing and evaluating law. Moreover, the critical lens of comparative law points inward as well as outward: it produces lawyers who are reflective and self-aware about their own legal systems. Comparison of "us" versus "them" breeds awareness of not only the strengths and weaknesses of our own practices, but also the contingency of those practices.

Beyond these shared benefits, each of the five models has distinctive strengths and weaknesses. Thoughtful pedagogy must be tailored to the audience, and the audience for an international and interdisciplinary subject like "comparative constitutional law" or "constitutionalism" is bound to vary greatly. Accordingly, there is probably no uniquely correct or superior choice across the board among these models. The diversity of the audience, and of the field itself, calls for a commensurate level of pedagogical and methodological pluralism.

2.1 Instrumentalism

Suppose that you are an American who makes roast beef sandwiches, and in the spirit of self-improvement, you set out on a world tour to find the best roast beef sandwiches. And you discover—oh how interesting, the French put mustard on theirs, whereas the Germans put sauerkraut on theirs, and maybe you get some ideas for how to make tastier roast beef sandwiches. Your journey may be eye-opening. But your explorations ultimately begin and end with your interest in roast beef sandwiches. If a particular place lacks roast beef sandwiches, then you simply leave it off your itinerary, no matter how celebrated the local cuisine may be. The tour will skip over vast reaches of the world, and even where it does stop, it will not necessarily expose you to the things that the locals like most. The goal is not to learn what people in other countries like to eat, or why they like to eat those things, or how to make them.

There is an analogous way of approaching the study of constitutionalism. You travel not out of wanderlust, but in search of things that might be valuable to you upon your return home. The point is to learn *from* other countries, not *about* other countries. The topics you study are therefore those that lawyers and judges back home find important, while the countries you consider are those that face constitutional issues and challenges similar to those in your own

[5] Jaakko Husa, 'Comparative Law in Legal Education—Building a Legal Mind for a Transnational World' (2018) 52(2) *The Law Teacher* 201, at 203–04.

country. You engage in comparativism not for the sake of understanding or learning about foreign law, but instead for the purpose of exploring and developing arguments for and against various approaches to domestic constitutional issues. For example, if you come from the United States, then your goal might be to craft constitutional arguments for judicial consumption, and you might accordingly limit your search to other liberal constitutional democracies with active traditions of judicial review. In other words, you are engaged in an instrumentalist form of comparativism. Instrumentalism solves the problem of capacity by supplying a principle of case selection: it pares down the universe of potential materials to those that have some direct parallel in domestic constitutional practice.

The pedagogical goal of this model is to help domestic lawyers identify comparative materials that can be used to probe and critique existing domestic law or to develop and refine comparative arguments for domestic use. In other words, the goal is to improve the ability of students to think and act as domestic lawyers by equipping them with a comparative repertoire that can be brought to bear on domestic issues. The underlying normative stance is that domestic lawyers ought to broaden their horizons and adopt a stance of "engagement" with foreign law, for the purpose of enriching domestic law.[6] The corresponding pedagogical imperative is to emphasize case law from other jurisdictions on hot-button issues in domestic law.

A telltale sign of this approach is a syllabus or textbook organized around substantive topics that correspond to the preoccupations of a domestic audience. Another sign is the wholesale omission of jurisdictions that do not belong to the right club—for example, countries that lack judicial review or are not liberal democracies. Coverage is limited to a peer group of countries that are seen as sufficiently similar and respectable to serve as sources of inspiration or objects of emulation.[7] Even for countries that make the cut, however, the coverage will be

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[6] Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010) (contrasting three normative models—"resistance," "convergence," and "engagement"—of the relationship between domestic and transnational constitutional law, and advocating the latter).

[7] The instrumentalist approach is exemplified by the Calabresi, Silverman, and Braver casebook, which seeks to identify ideas "that might be of relevance to U.S. constitutional law" and to expose an American audience to "good ideas" worth borrowing and "bad things" to be avoided. Steven Gow Calabresi, Bradley G. Silverman and Joshua Braver, *The U.S. Constitution and Comparative Constitutional Law: Text, Cases, and Materials* (Foundation Press, 2016), at vii–viii, 10–11. Their reasons for limiting their coverage to "the 15 of the G-20 countries that we think provide for independent judicial review," plus Israel and the European Court of Human Rights, appear to be instrumentalist. They start with the G-20 because these countries are, by dint of their "global economic heft," deserving of "special study and attention": what happens in "powerful, wealthy, and very populous continental-sized nations," they assert, is "more important" than what happens in 'tiny, powerless emerging nations." Ibid at 9—11. If they mean that larger, wealthier countries are "more important" in the sense that American lawyers are more likely to have dealings with big, wealthy countries than with small, developing countries, that is a plausible instrumentalist justification for ignoring much of the world.

However, the authors further limit their coverage to constitutional democracies and make a point of excluding China and Russia, notwithstanding their power, wealth, and size. Their reason for doing so appears to be that "[c]onstitutional democracy is the wave of the future and not Chinese, Russian, or Saudi Arabian authoritarian rule." Ibid at 6. This assertion is belied by actual developments around the world. See e.g. Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018); Freedom House, *Freedom in the World 2021: Democracy Under Siege* (Freedom House, 2021) 1 at 1–

highly selective and map onto domestic debates. Thus, for example, instructors in both the United States and South Korea are likely to spend at least some time on Germany, but they will emphasize different aspects of the German experience. The American instructor might make a point of covering German hate speech jurisprudence but skip over German case law on the prohibition of political parties. For an audience in South Korea—which, like Germany but unlike the United States, has a constitutional court charged with deciding the legality of political parties[8]—the emphasis would likely be the other way around.

The instrumentalism model has several drawbacks that follow directly from its strengths. First, it demands the creation of bespoke teaching materials that do not travel well. By definition, an instrumentalist approach is useful to lawyers who practice constitutional law in a particular jurisdiction, and in order to function, it requires materials tailored to their particular needs. The more that materials are tailored to a particular audience, the more useful they become to that audience—but the less useful they become to *other* audiences. Lengthy coverage of abortion, for example, may be on point in the United States yet meet with befuddlement from students in China or Japan who struggle to comprehend the degree of controversy surrounding the topic. The more faithful the implementation of an instrumentalist approach, the narrower its appeal.

Second, the simultaneously resource-intensive and jurisdiction-specific character of the instrumentalism model means that it may not be viable everywhere. The viability of the model turns on the existence of a local market with the scale and resources to generate and reward investment in the creation of teaching materials tailored to the needs and interests of local students. A potential result is the emergence of a divide between haves and have-nots. For example, a country like the United States might enjoy a multitude of competing textbooks tailored to domestic tastes, while smaller markets might have to make use of ill-suited materials or pursue a different approach.

Third, instrumentalism is not especially conducive to the development of either a holistic understanding of constitutionalism or a genuinely inclusive and transnational discourse about constitutionalism. It risks balkanization of the field of comparative constitutional law into cliques or clubs of countries that share the same preoccupations and regard each other as instrumentally useful or worthy of emulation. In the worst-case scenario, every country that is big and wealthy enough will have its own version of "comparative constitutional law," geared toward its own needs and interests and riddled with blind spots, while those in smaller or poorer jurisdictions that lack robust domestic demand may have little choice but to borrow mismatched materials from a privileged jurisdiction or else pursue a different pedagogical

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3, https://perma.cc/U9H8-RWU7 (noting the "15th consecutive year of decline in global freedom," and reporting that less than 20% of the world's population now lives in a free country, the lowest proportion since 1995). However, if one assumes counterfactually that authoritarianism faces imminent extinction, then the exclusion of authoritarian regimes becomes justifiable on instrumentalist grounds: it is presumably of limited professional value to study a variety of constitutionalism that will soon cease to exist.

[8] See Park June Hee, Choi Jung Yoon and Park Dami (eds.), *Thirty Years of the Constitutional Court of Korea* (Constitutional Court of Korea, 2018) at 335–339 (discussing the 2014 ruling that dissolved the Unified Progressive Party).

model entirely.

Perhaps most troubling of all, a narrow instrumentalist focus on what seems most useful may blind us to the very knowledge that we need most. Instrumentalism leads to the study of jurisdictions that are similar to our own or worthy of emulation, but in many cases, we may have the most to learn from the places that are the *least* like our own or the *least* suitable for emulation. It is difficult to tackle pressing real-world concerns such as democratic erosion and the spread of authoritarianism, for example, if we confine ourselves to the study of thriving liberal democracies. Attempting to tackle existential threats to liberal democracy by studying only successful liberal democracies is akin to trying to combat fatal diseases by studying only healthy athletes: the population we are studying provides little opportunity to understand the most serious problems we are facing.

2.2 Tourism

Tourism is paradoxical. It is the direct expression of a desire to see the world and experience new things, and yet it often occurs in formulaic or even parochial ways. The desire may be sincere. Alas, the world is a big place: there is much to see, and only so much time in which to see it. In other words, tourists face an acute version of the problem of capacity. So then: what to see?

Notwithstanding the virtually limitless choices at their disposal, tourists tend in practice to be at least somewhat predictable. It is often possible to identify some shared sense of the things that people see, or want to see, because they are the most impressive, or the most memorable, or perhaps simply because they are the things that other people also see, and seeing them is the price of entry into a conversation among those who are, by some standard, "well-traveled". Some tourism is about checking off the sights that are classics, if not clichés. Other tourism may focus on the latest travel fads or cater to the cognoscenti. Either way, however, tourists tend to focus on certain things and places rather than others—hence the very real phenomenon of the "tourist destination".

There are two principal criteria for identifying the pedagogical equivalent of tourist destinations—the things and places that a short-term, first-time visitor to the world of constitutionalism might want to encounter. The first is popularity: what do others want to see? The second is merit: what are the "best" things and places to see?

2.2.1 Popularity

In practice, there are certain sights that people want to see simply because so many other people have seen them. Other sights might in some objective sense deserve at least as much attention, if not more, but these are so popular that they feel obligatory and come to define what it means to be "well traveled". There is a shared sense of, and appetite for, the greatest hits. On a bus tour of Europe, Paris is bound to be a stop, and in Paris, the bus will almost certainly stop at the Eiffel Tower and the Champs-Élysées. By contrast, it almost certainly will not stop in the northeastern *banlieue* for a taste of *la vie quotidienne* in an impoverished

beur community, no matter how illuminating or authentic such an experience might be.

This type of tourism is already widely practiced in the world of comparative constitutional law. Students around the world can expect exposure to what has been dubbed an "unofficial canon" consisting of roughly "[t]wo dozen judicial 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."[9] It is likely that at least some of the cases in this unofficial canon deserve the attention that they receive and are worthy of canonization in principle as well as practice. It is also true, however, that cases can become ubiquitous for reasons that have little to do with their inherent superiority for pedagogical purposes, such as their linguistic accessibility or their prestigious pedigree. In comparative constitutional law as in any other field, popular materials can be overrated, while worthy materials may be underappreciated or overlooked. The standard repertoire is thus, strictly speaking, more of a "greatest hits" compilation than a true canon.

2.2.2 Merit

Some might turn up their noses at the type of tourism that rewards popularity for its own sake. Perhaps the most ignorant and least sophisticated tourists may be content to visit the equivalent of the Eiffel Tower and the Arc de Triomphe before calling it a day. But we should aspire to more than that. Why not attempt, instead, to identify the things that are most *deserving* of coverage? On this view, the question of what to cover should not be reduced to a mere popularity contest. Instead, it is the responsibility of instructors to use their judgment and expertise to separate the silver from the dross, and to spend the precious commodity of class time on what is *best* for the students. In other words, the selection criterion ought to be merit, not popularity, and the pedagogical goal is the study of a sacred canon, not a crass greatest hits collection.

A thought experiment might help to guide the creation of a genuine canon of materials that are deserving rather than merely popular. We might imagine a hypothetical "well-read lawyer" and ask ourselves what materials such a person ought to have read.[10] Whatever the classics happen to be in our field, by this measure, is what belongs in the canon. Who could possibly object in principle to the tourism model, defined thusly? Is the training of well-read lawyers not already at the core of the pedagogical enterprise?

The idea of focusing on "the best" or "the most deserving" materials has obvious appeal. Surely it is the case that, in comparative constitutional law as in any other domain, some

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[9] Hirschl, *Comparative Matters* (n 2) at 163; see also e.g. ibid at 40–41; Sujit Choudhry, 'Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies', in Sujit Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008) 3 at 8 (observing that the comparative constitutional law literature is oriented around judicial protection of human rights in "a standard and relatively limited set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and to a lesser extent, India").

[10] For plausible examples, see nn 14–17 and accompanying text.

things are worth more of our time than others. So why not give those things more time? After all, why would anyone deliberately choose to spend their time covering the "worst" or "least deserving" materials? It is equally obvious, however, that "the best" is diabolically difficult to define, much less judge. What are the "best" materials to study in a field as broad and multidimensional as constitutionalism? Should we choose the most important cases? The most interesting cases? The most revealing cases? The most influential? Does the definition of these qualities vary with the audience? How do we evaluate any of these qualities, much less weigh them against each other? Perhaps we are often able to arrive at a consensus about what is "best" or "most worthwhile" on the basis of a Potter Stewart "I know it when I see it" approach:[11] even if we cannot articulate why certain materials are worth covering, we can nevertheless agree that they are worth covering. Judgments based on inarticulate agreement only hold as long as people actually agree, however, and in comparative constitutional law as in any other domain, people are not always going to agree.

The contested and perhaps even undefinable character of "merit" suggests that any effort to articulate a canon runs the risk of devolving into a popularity contest. For both practical and conceptual reasons, it may prove difficult to separate entirely what is popular from what is best. First, there may be some wisdom in the judgment of the crowd, with the result that the popular is a proxy for the good (assuming, of course, that "good" can be independently defined). Second, teaching materials are characterized by a version of network effects. The more widely that certain cases are taught, the more functional and thus valuable that those cases become as points of reference and vehicles for scholarly interaction and discussion.[12] Third, pedagogy is characterized by a degree of path dependence. The act of repeatedly teaching certain cases is likely in and of itself to enhance the perceived value and importance of those cases: the more that instructors around the world portray certain topics and jurisdictions as important and worthwhile, the more that those topics and jurisdictions will come to be seen as important and worthwhile. The paradoxical result of these dynamics, however, may be a canon of cases that do not inherently deserve to be canonical.

2.2.3 The pros and cons of tourism

It is not difficult to see the appeal of the tourism model. First, it is an intuitively reasonable response to the problem of capacity. At least in principle, it seems sensible to put together a syllabus or textbook that covers the highlights of the field. The difficulty of determining what are the true highlights in some objective sense may mean as a practical matter that instructors are likely to fall back on the most popular materials instead, but generally speaking, the greatest hits are the greatest hits for a reason. The Eiffel Tower is not the only thing in Paris worth seeing, or even the most worthwhile thing to see, but it is not a monumental waste of time either.

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[11] *Jacobellis v. Ohio*, 378 US 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within [the definition of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it[.]").

[12] For example, the casebook by Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law,* 3rd edn (Foundation Press, 2014), has been so widely adopted that some of the cases it includes have probably become canonical in part because of their inclusion, above and beyond their inherent pedagogical value.

Second, the tourism model relies on tried-and-true materials with a proven ability to prompt critical comparison and reflection. There are many reasons why instructors might keep teaching the same cases year after year, such as a lack of readymade alternatives or sheer laziness, but the repeated use of the same cases does offer at least some evidence of their pedagogical suitability. The wisdom of the crowd can be systematically flawed and incomplete,[13] but it is better than nothing.

Third, this approach offers a gateway to membership in an epistemic community. Proportionality,[14] the basic structure doctrine,[15] the notwithstanding clause,[16] *Grootboom*[17]: all of these are shorthand for key ideas, common points of reference for a far-flung scholarly community, and building blocks of discussion and debate. This standard tourist itinerary enables students to be part of a conversation by exposing them to terminology and knowledge that insiders take for granted. The tourism approach is formulaic, but therein lies one of its strengths: there is real value in knowing familiar formulae.

Last but not least, the tourism model will be better suited to certain audiences than the instrumentalism model. It will often be the case that many or even most of the students who enroll in a course on "comparative constitutional law" or "constitutionalism" will not pursue anything resembling the practice of constitutional law, comparative or otherwise. Some may be future corporate lawyers who have selected the course out of curiosity or for a change of pace. Others may not be training for legal practice at all: they may be graduate students preparing for an academic career, for example, or students in a cognate field such as political science. For these students, the instrumentalist approach makes little sense: there is no specific body of substantive material that they can apply professionally and therefore no obvious way of implementing the instrumentalist approach.

These benefits come, however, at a price. Like instrumentalism, tourism yields a distorted and unrepresentative picture of the world. This may be fine for actual tourists who are simply out to enjoy themselves or claim bragging rights, but it may pose more of a problem in a classroom setting if the goal is to actually teach people about the world or prepare them to deal with real-world problems. To approach the subject in this vein is, in all likelihood, to study "a small number of overanalyzed, 'usual suspect' constitutional settings [and] court rulings."[18] The standard tourist itinerary is skewed toward Western liberal democracies and

[13] See e.g. Cass R. Sunstein, *Conformity: The Power of Social Influences* (NYU Press, 2019) at 35–46 (discussing informational cascades).
[14] See e.g. *R. v. Oakes* [1986] 1 SCR 103; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012); Jud Mathews and Alec Stone Sweet, *Proportionality Balancing and Constitutional Governance* (Oxford University Press, 2019).
[15] *Kesavananda Bharati v. State of Kerala* [1973] 4 SCC 225; see section 1.4 of Law and Hsieh, 'Judicial Review of Constitutional Amendments: Taiwan', in Law (ed.), *Constitutionalism in Context* (n 4).
[16] Canadian Charter of Rights and Freedoms, § 33 (also known as the "notwithstanding clause"); see section 1.2 of Law and Hsieh, 'Judicial Review of Constitutional Amendments: Taiwan' (n 15).
[17] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC); see Julieta Rossi and Daniel M. Brinks, 'Social and Economic Rights: Argentina', in Law (ed.), *Constitutionalism in Context* (n 4), at section 3.2.
[18] Hirschl, *Comparative Matters* (n 2) at 4; see also e.g. ibid at 211–14; Rosalind Dixon and Tom Ginsburg,

the common law world in particular. The handful of non-Western countries that do receive a significant amount of attention—mainly India, Israel, and South Africa—cannot easily be described as "representative" of their respective regions. Entire regions—including most of Asia, Africa, South America, and the Middle East—remain "understudied and generally overlooked."[19] Reliance on the de facto canon of "usual suspects" constructs and reinforces a distinction between core and periphery, the privileged and the marginalized. Moreover, the resulting blind spots are likely to mirror those of the instrumentalism approach, with similar implications for the field. The result of focusing on the most familiar or most admired bastions of liberal constitutional democracy is that we tend to ignore the very problems and threats that require the most attention. Once again, this amounts to a perverse strategy of tackling disease by studying only the healthy.

As troubling as these omissions are, the tourism model may not do a much better job of depicting the specific jurisdictions that are included in the tour either. Landmark rulings by assertive courts in liberal democracies may be eye-catching and crowd-pleasing, but they can also be misleading. Students risk reading such materials out of context and failing to understand their significance or meaning as a result. In lieu of a coherent picture of some other system, one sees only bits and pieces. Trying to make sense of one landmark decision in isolation is akin to visiting Egypt for an hour to see the Sphinx: the sight may be striking, but the meaning is lost. These criticisms are, however, open to a blunt rejoinder: so what? Since when have tourists demanded authentic representation and contextualized understanding of the places they visit? Tourists do not purport to be anthropologists. So why judge tourism by the standards of anthropology?

2.2.4 The problem of canon

The "merit" conception of tourism and the impulse to canonize raise special concerns. Any effort to fashion a canon is likely to run into a Goldilocks problem of being overinclusive, underinclusive, or both. On the one hand, if we err on the side of including everything that arguably deserves canonization, the canon becomes unmanageably large for teaching purposes. Insufficient curation does not solve the problem of capacity but instead passes the buck to individual instructors. On what basis are they to pick and choose from a canon that is far too broad to cover?

On the other hand, if the canon—the universe of the worthy—is too small, it will marginalize and exclude in unjustifiable and invisible ways. The content of the corpus may be influential and worthy of study, but it is also nowhere near representative of the range of human experience and wisdom that deserves study. The idea of canon—in the guise of a list of "great works" or a "Western canon"—has already proved treacherous in higher education for this

'Introduction', in Rosalind Dixon and Tom Ginsburg (eds.), *Research Handbook on Comparative Constitutional Law* (Edward Elgar, 2011) 1 at 13 ("It is probably the case that 90% of comparative work in the English language covers the same ten countries, for which materials are easily accessible in English.").

[19] Hirschl, *Comparative Matters* (n 2) at 4.

reason.[20]

Two related objections require attention here. The first concerns opportunity cost. The question is not whether canonical works deserve to be studied in absolute terms, but rather whether they deserve to be studied *in lieu of* other works that have not been similarly anointed by the prevailing tastemakers. There is a difference between saying that Machiavelli is worth reading, for example, and saying that Machiavelli should be read at the expense of reading Mahatma Gandhi or Martin Luther King, Jr. That difference is of decisive importance because—to return to the root problem of capacity—we simply do not have the capacity to cover everything that deserves to be covered.

The second objection concerns the problem of structural bias. The gatekeeping that goes into the construction of a canon is inescapably an exercise of judgment and power. The result may reveal more about the tastes and aptitudes and power dynamics of those doing the canonizing than about what works are truly great and in what order of greatness. It is for this reason that the idea of canon is divisive. Its response to very real problems of marginalization and exclusion is to double down—to draw and celebrate an explicit line between the deserving insiders and the undeserving outsiders. Efforts to graft broader representation onto existing canon, meanwhile, can reek of tokenism because that is often what they are.

There is little reason to think that the construction of a canon in comparative constitutional law would escape these difficulties. On the contrary, by reifying a problematic and truncated understanding of what people ought to study, the project of canonization might instead entrench and reinforce some of the worst tendencies of a field already characterized by a poorly justified preoccupation with certain jurisdictions and topics. To be sure, progress has been made as of late to diversify away from the usual suspects,[21] but that is perhaps all the more reason for a dynamic and expanding field to steer clear of the inherently backward-looking endeavor of canonization, in favor of intellectual growth, exploration, and diversification.

2.3 Immersion

A very different approach—and the polar opposite of tourism—is to go native. The idea behind this approach is to immerse oneself in another world and try to see the world through the eyes of the locals, to the greatest extent possible. To continue with the culinary analogy, you might try to figure out what the most popular local dish is, what the ingredients are, why it's popular, what's the best way to make it, and so on. The questions are internal, not external to the local enterprise. Along the way, you pick up and indeed place a premium upon whatever cultural information is embedded in, or necessary to understand, the local culinary ways. The inquiry

[20] Compare e.g. Allan Bloom, The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students (Simon & Schuster, 1987) at 62–67, 336–82, with John Guillory, Cultural Capital: The Problem of Literary Canon Formation (University of Chicago Press, 1993) at 3–84.

[21] See Ginsburg, 'The State of the Field' (n 1) at section 3.2.

is closer in spirit to fieldwork than to tourism.

The analogous genre of comparative constitutional scholarship and pedagogy aims to see the world through the eyes of the other. The goal is to understand how lawyers in other countries think, where they are coming from, what they find important and interesting and why, what their needs and preoccupations are, and so on. In short, one tries to learn to think like a Japanese lawyer, or a Dutch lawyer, or an Iranian lawyer, and so on.[22] What do they care about, what do they find interesting and relevant, and why? If one happens to glean insights and lessons along the way that people back home might find useful, that is a welcome benefit, but not the point of the enterprise.

The immersion model addresses the problem of capacity and dramatically pares down the universe of content by prioritizing depth over breadth. The idea is not only to go into greater depth in a smaller number of jurisdictions, but also to learn as much as possible about each jurisdiction before delving into any particular topic. Methodologically, it is associated with thick description, constitutional ethnography, and sensitivity to political, social, economic, and historical context.[23] In terms of pedagogy, teaching materials that focus on a limited number of jurisdictions and employ a context-rich case-study approach would be appropriate, if not essential.[24] At the extreme, one might even attempt to use the very same textbooks that foreign lawyers use to learn about their *own* constitutional systems. What better way to see foreign constitutional law through the eyes of a foreign lawyer than to learn it the same way that a foreign lawyer would? Even if the foreign textbook ultimately proves just too foreign to serve as an instrument of study, it can still serve as an object of study.

Like the instrumentalism and tourism models, the immersion model is highly defensible and might even seem beyond criticism. Who could argue for a superficial rather than sophisticated understanding of other jurisdictions? But the immersion model has very real disadvantages, some of which are a direct function of its advantages. First, its solution to the problem of capacity comes at a tremendous opportunity cost. Time spent learning one jurisdiction in depth is time spent not learning about other jurisdictions at all. It may be

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[22] Some might question on epistemological grounds whether this goal can actually be achieved. See e.g. Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International & Comparative Law Quarterly* 52 at 75.

[23] See e.g. Kim Lane Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38(3) *Law & Society Review* 389–406; Jaakko Husa, *A New Introduction to Comparative Law* (Hart, 2015) at 155–57, 205–07; William Ewald, 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?' (1995) 143 *University of Pennsylvania Law Review* 1889 at 1947–48.

[24] A real-world example of the immersion approach in action, in all but name, would be Stephen F. Ross, Helen Irving and Heinz Klug, *Comparative Constitutional Law: A Contextual Approach* (LexisNexis, 2014), which focuses exclusively and in considerable depth on just four common law jurisdictions—Australia, Canada, South Africa, and the United States. Their justification of this limited focus draws explicitly on the rationale of the immersion approach: an inquiry into why doctrines are institutions are chosen, they explain, is "best served by a careful study of a limited number of countries, rather than a necessarily thinner study of many. To the extent that legal doctrine is inevitably context-specific, understanding why different countries have followed different paths requires at least a modest understanding of the history, values, and institutions that have created the doctrine." Ibid at 2.

perfectly legitimate to strike the depth/breadth tradeoff so strongly in favor of depth, but it is a tradeoff nonetheless. Second, the immersion model is inherently resource-intensive. Instructors who have not been immersed in a foreign system themselves may be hard-pressed to offer their students much of an immersive experience. Credible implementation of the immersion model probably demands major investments in human capital in the form of instructors who have spent time abroad or are themselves foreign.

Third, widespread adoption of the immersion model may replicate and even reinforce the blind spots of the field. Not only does the immersion model narrow the focus to a very small number of jurisdictions, but those jurisdictions are unlikely to be chosen at random or representative of the world at large. The high degree of expertise required by the immersion model will encourage instructors to stick with the jurisdictions they know best. These jurisdictions are likely to be the same ones that they already write about, with predictable results: the same handful of jurisdictions that dominate the scholarly literature will also come to dominate teaching, and students will lack even small doses of exposure to most of the world.[25] To an even greater degree than under the tourism model, the practical result of the immersion model is likely to be feast or famine—an embarrassment of riches with respect to the usual suspects, and little or nothing on the rest of humanity.[26]

2.4 Abstraction

A fourth approach might be called the abstraction model. Suppose that, instead of hunting for improvements on one's favorite dish (instrumentalism), or trying the most famous dishes (tourism), or learning to eat like a foreigner (immersion), you seek a bird's eye overview of the phenomenon of cuisine. You might set out to see how different cuisines resemble or differ from each other, to systematize the similarities and differences alike, and to identify global trends and patterns. Your survey of the entire world in all its glorious diversity would highlight the resoundingly obvious fact that there is no such thing as one single world cuisine. Yet you might *also* conclude that, at a certain level of abstraction, there are useful generalizations that can be made about culinary similarities and differences alike.

One might observe, for example, that beef is a common meat dish, and it is usually cooked, to varying degrees. There are prominent exceptions to the general rule that beef is cooked—such as steak tartare if you're French, kitfo if you're Ethiopian, or yukhoe if you're Korean—but the exceptions too can be grouped together. The idea is not that all cuisines the world over are the same, but rather that there exist certain recurring themes and persistent patterns of both similarity and variation that permit admittedly imperfect but still meaningful

[25] See n 18 and accompanying text.

[26] The Ross, Irving, and Klug casebook, for example, forthrightly embraces both the strengths and weaknesses of an immersion approach. It does not claim to cover anything resembling a broad or representative sample of jurisdictions but instead limits itself to four liberal democracies—all of them English-speaking, common law jurisdictions and former British colonies—and it justifies this narrow focus on the grounds that the considerable similarities among these jurisdictions allow for more meaningful exploration and understanding of the differences that remain. See Ross et al., *Comparative Constitutional Law* (n 24) at 2 (likening their pedagogical approach to the scientific technique of "'controlling' for as many variables as possible").

categorization.

The end result would be akin to a global and generic overview of cooking. It would not be an actual cookbook, because it would be pitched at too high a level of abstraction to tell anyone how to make any particular dish from any particular place; nor would that be the goal. For this reason alone, many people might spurn it as too abstract or general to be of much value. Nevertheless, such a book would still be profoundly useful in the right situations and generate insights that might elude a more granular perspective.[27] It would equip the reader with basic knowledge, skills, and principles that are useful with respect to virtually any dish and would jumpstart the process of learning specific cuisines and dishes. Such a book would be the equivalent of a Swiss Army knife: it would be no substitute for specialized knowledge and insufficient for in-depth professional work, but it would still be useful as a foundation for beginners across a range of common situations.

Once again, there is an analogous way of approaching the study—and teaching—of comparative constitutional law. This approach aims to equip students with basic skills and knowledge that they can use to find their bearings wherever they happen to run into problems of public law. It is the polar opposite of the immersion model in that it addresses the problem of capacity by sacrificing depth for breadth. It directs us to think about constitutionalism at a relatively high level of abstraction and, ideally, to see the forest for the trees.

Generalization and categorization are the bread and butter of this approach. To the extent that similarities across legal systems are pervasive and prominent enough to permit talk of "generic constitutional law,"[28] or even constitutional convergence,[29] the abstraction model thrives on such talk. Likewise, to the extent that certain differences tend to repeat themselves in patterned or structured ways, the abstraction model invites us to group together jurisdictions and speak of "legal families,"[30] or "legal cultures,"[31] or "legal traditions,"[32] or even polarization.[33]

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[27] For an illustration of how abstraction about food can generate deep insights, see Claude Lévi-Strauss, *The Raw and the Cooked* (John and Doreen Weightman trans., Harper & Row, 1969) at 149–53, 240–45.

[28] David S. Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652; Tushnet, 'Comparative Constitutional Law' (n 2).

[29] See e.g. Konrad Zweigert and Heinrich Kötz, *Introduction to Comparative Law*, 3rd rev. edn (Tony Weir trans., 1998).

[30] See e.g. René David and John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3rd edn (Stevens & Sons, 1985); Mathias M. Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' (2016) 12(3) *Journal of Institutional Economics* 579–602.

[31] See e.g. David Nelken (ed.), *Comparing Legal Cultures* (Routledge, 1997); Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1993).

[32] See e.g. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th edn (Oxford University Press, 2014).

[33] See e.g. David S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163 (documenting differentiation and polarization among bills of rights along an ideological dimension ranging from "statist" and "libertarian"); David S. Law, 'Constitutional Archetypes' (2016) 95 *Texas Law Review* 153 (documenting the existence of "liberal," "statist," and "universalist" vernaculars or archetypes that account at a linguistic level for the content of constitutional preambles).

The abstraction model invites skepticism along the following lines. In order for substantive principles or analytical tools of this type to be applicable across a broad range of settings, they must be pitched at a certain level of generality or abstraction. The same level of generality that renders them relevant across all jurisdictions, however, also renders them inadequate for performing fine-grained work in specific jurisdictions. Their breadth reflects a lack of depth that renders them essentially useless. By trying to learn about too many places at once, we risk learning about none of them at all. There is no point in learning some global constitutional Esperanto that promises to be helpful everywhere but is actually useful nowhere.

In principle, these are highly plausible objections, but in practice, they are probably overstated. First, for lawyers who are highly global and mobile, knowing a little about a lot may be the right strategy. Nothing beats a detailed mental map of the local terrain for getting around, but that kind of map is not always available. Knowing that the sun rises in the east and sets in the west may be shallow knowledge, but it is also incredibly useful knowledge because it enables a basic form of navigation everywhere. Sometimes, one simply needs to know where to get started, which requires nothing more than a general sense of which way to head.

Second, legal education in much of the world already involves a high degree of abstraction and generalization across a range of jurisdictions. Consider for example the training of American lawyers. Rarely if ever do mandatory basic courses in US law schools limit themselves to the law of a particular state. The fact that there are important differences from one state to the next does not drive law schools to throw up their hands in defeat and say that they can only effectively teach the law of their respective states. What any self-styled "national" or even "regional" law school does, instead, is to teach recurring themes and doctrines and tools, while also flagging the important and recurring variations and exceptions.

Experience demonstrates that the same approach can be used internationally as well as nationally. There already exist law school curricula that aim to pick out fundamental ideas and problems that recur at the transnational level, and to teach the kinds of arguments and techniques used in response.[34] Every lawyer in Europe who has ever grappled with the concept of "general principles of EU law"[35] or "constitutional traditions common to the Member States"[36]—in other words, every lawyer in Europe alive today—has engaged in such an exercise. So too has every public lawyer who has ever grappled with the explicitly universalistic concepts of "fundamental rights" and "human rights"—which is to say, every public lawyer in the world.

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[34] See Maartje de Visser and Andrew Harding, 'Mainstreaming Foreign Law in the Asian Law School Curriculum', (2019) 14 *Asian Journal of Comparative Law* S149–S172, at S165 (describing Tilburg University's LLB in "Global Law," in which "each legal field is taught from a global perspective, with different solutions … used to illustrate how the underlying core legal issue can be addressed"); Central European University, 'Master of Laws in Comparative Constitutional Law Program' (n 3) (describing an LLM curriculum centered on "fundamental issues in comparative constitutional law").

[35] See e.g. Takas Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford University Press, 2007).

[36] Treaty on European Union, art. 6(3).

The same intellectual operation that European lawyers perform upon the laws of the member states, and the same operation that human rights lawyers perform upon a combination of national and international law, can also be performed by comparative constitutional scholars upon the laws of the two hundred or so nation-states in existence today. For example, proportionality analysis is not identical everywhere. Books can be—and have been—written about the differences.[37] Nevertheless, the forms of analysis under this rubric share enough in common that they can be lumped together and taught under the name of "proportionality".

There are at least two natural audiences for the abstraction model. First, it is a logical choice for those who aspire to be, or to train, "global lawyers". To take full advantage of an interconnected and interdependent world where transnational law is inescapable, lawyers need to have a view of the big picture and to develop adaptable and "pluralistic" legal minds that are at ease operating both across and within the borders of legal systems.[38] Second, the abstraction model lends itself to the training of future academics. Secondary materials are a natural fit for the abstraction approach because they tend to be more abstract and theory-driven, and less jurisdiction-specific, than primary materials. The abstraction approach is thus likely to rely heavily on academic scholarship, to the benefit of future academics whose training demands familiarity with such materials anyway.

2.5 Representation

Still another strategy is to focus our limited capacity on a *representative* sample that showcases the main dimensions of variation and the diversity of constitutional experience around the world. It is obviously impossible to study every manifestation of constitutionalism in every country. By focusing on a representative selection of topics and jurisdictions, however, it may be possible to gain a sense of how much constitutionalism varies throughout the world, and in what ways. The educational value of this approach grows in proportion to the breadth of coverage: the more varied and inclusive the coverage, the more likely that students will have something in their toolkit that is at least somewhat analogous to whatever they may encounter in the future.

The core values of this model are pluralism, diversity, inclusion, and equality. The representation model takes a very broad and pluralistic view of what teachers and scholars alike ought to cover—namely, whatever is actually out there in the world. Its goal is to convey as much of the diversity of the real world as possible within the constraints of capacity. We might think of it as the Noah's ark model of pedagogy. To learn about the animal kingdom, we do not dwell on fish because they are abundant, or bears because they are strong, or dogs because they are helpful. Instead, we aim for representation of the broadest possible range of species, because each species is a different facet of the thing that we are trying to understand.

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[37] See e.g. Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press, 2013); Mathews and Stone Sweet, *Proportionality Balancing* (n 14).
[38] Husa, 'Comparative law in legal education' (n 5) at 208.

The underlying normative stance is that all jurisdictions and all forms of actual constitutional experience are equally worthy of study—at least in principle. It does not skip the road less traveled merely because it is less traveled. It does not ignore poor countries as opposed to rich countries, or small countries as opposed to large countries, on the grounds that the experience of smaller or poorer countries is somehow less important or less informative. From the perspective of the representation model, that would be as nonsensical as arguing that the study of richer or taller people is more informative or valuable than the study of poorer or shorter people, or prioritizing the study of whales over the study of dolphins because whales are bigger. Nor does the representation approach exclude illiberal jurisdictions or nondemocratic jurisdictions on the basis that they are too dissimilar or too unpalatable to hold any lessons for us. Constitutional experience dissimilar from our own is embraced, not ignored, because the point is to study constitutionalism in all its shapes and forms, not simply the aspects we find normatively pleasing or instrumentally useful.

In practice, there may be excellent reasons to favor certain issues and places over others for classroom use. Some materials simply offer greater bang for the buck, in the sense that they illuminate certain ideas in a particularly clear or memorable way, or they cover many bases at once. Favoring certain materials on practical grounds for their pedagogical efficiency is, however, not the same as favoring them because they are inherently more important or more worthy.

Like the other models, the representation model is open to both practical and normative objections. On the practical side, it calls for teaching materials that are difficult to collect and curate. Representation of the world's constitutional diversity and variation in student-friendly form may be easier said than done. The sheer range of experience to be represented is staggering. Fortunately, other fields have experience grappling with the challenge of capturing diversity in an efficient manner, and inspiration can be drawn from their solutions.

For example, social scientists are routinely in the situation of trying to learn as much as they can about large and diverse populations that they can barely begin to explore, and they have responded by devising techniques such as stratified sampling: one first divides the population in question into all of the categories (or strata) that ought to be represented, before drawing a sample from each group. The representation model might be conceptualized as an exercise in stratified sampling. Likewise, museums face their own version of the problem of capacity: they have too much to show and not enough space to show it. The typical museum exhibits no more than two to four percent of its collection at any given time.[39] Within these tight constraints, curation is not simply about selecting the most popular or most famous items; curators seek also to convey the diversity and strengths of their collections, for instance, and to educate as well as entice visitors. Museum curation—like syllabus or textbook curation—is thus a juggling act that incorporates a significant element of judgment. But it is not an impossibility.

[39] Geraldine Fabrikant, 'The Good Stuff in the Back Room', New York Times, Mar. 12, 2009, at F30, https://perma.cc/KJ7T-YLRM.

Another practical challenge for the representation model is finding student-friendly materials on underexplored topics and jurisdictions. This is the exact opposite of searching for one's keys under the streetlight: it involves looking for material in the very places where material is most scarce and least accessible. By definition, the areas that are poorly represented are the areas that we have the least capacity to navigate. Assembling appropriate materials is likely to demand international and interdisciplinary collaboration, among other things.

More troubling from a normative perspective is the possibility that the representation model can devolve into tokenism. Nothing can be done about the fact that a small number of specimens must stand in for vast swaths of constitutional experience and entire regions that are fantastically diverse unto themselves: the very concept of representation implies that the few represent the many. What can be done, however, is to ensure that representation is meaningful, in the sense that whatever specimens we do select are studied in a context-rich and non-superficial way. For example, even if we do not commit to full-scale immersion, we can at least opt for the use of case studies that provide adequate context. Contextual understanding is valuable for its own sake but also serves the goal of meaningful representation. No country is reduced to the status of a mere token if it is given the attention that it deserves. This may mean a reduction in the sheer number of specimens that we can examine, but it may also be a tradeoff worth making if we wish to avoid tokenism in the worst sense of the word.

3. The Representation Model in Action: *Constitutionalism in Context*

Constitutionalism in Context is, by design, a demonstration of how the representation model might be implemented and what benefits it might offer. In this context, "constitutionalism" is used here in its descriptive sense to refer broadly to "the whole of a community's practices and understandings about the nature of law, politics, citizenship, and the state."[40] It is thus capable of assuming as many shapes and forms as there are constitutions and governments in the world. This is the "constitutionalism" that the book aims to showcase, in all its diversity.[41]

The coverage is, accordingly, highly diverse along multiple dimensions, including subject matter, geographical region, regime type, and economic stratum. Virtually every corner of

[40] Alec Stone Sweet, 'Constitutions, Rights, and Judicial Power', in Daniele Caramani (ed.), *Comparative Politics*, 4th edn (Oxford University Press, 2017) 155, at 157; see also Albert H.Y. Chen, 'Constitutions and Constitutionalism: China', in Law (ed.), *Constitutionalism in Context* (n 1), at section 1.4.

[41] However, all of the jurisdictions covered in the book might also be said to satisfy a "thin" but still normative definition of "constitutionalism," under which constitutions must amount to more than mere window dressing and establish principles by which those in power ought to abide, however variable or imperfect actual compliance may be. Chen, 'Constitutions and Constitutionalism: China' (n 40) at section 1.4.3. Iran's constitution, for example, lays out the institutional machinery of government, while China's constitution occupies a privileged position in popular and political discourse. See Mirjam Künkler and David S. Law, 'Islamic Constitutionalism: Iran', in this volume; Wen-Chen Chang and David S. Law, 'Constitutional Dissonance in China', in Gary Jacobsohn and Miguel Schor (eds.), *Comparative Constitutional Theory* (Edward Elgar, 2018) 476–513; Chen, 'Constitutions and Constitutionalism: China' (n 40) at section 2.3.

the world [42] and every type of state—large and small, old and new, democratic and authoritarian, liberal and illiberal, secular and religious, wealthy and poor, common law and civil law—is represented. The volume spans twenty jurisdictions that range in population from 1.2 million (Cyprus) to 1.4 billion (China) and together comprise over a third of humanity. Rather than emphasizing judicial review—as most books do[43]—*Constitutionalism in Context* strikes a roughly equal balance among five major areas: constitutional drafting, constitutional adjudication and interpretation, rights, structure, and challenges to liberal democratic constitutionalism. The jurisdictional diversity and the substantive diversity are mutually reinforcing: to look beyond the usual handful of liberal democracies with judicial review enables and even requires us to consider topics other than judicial review, and vice versa.

The result is a volume that represents and reflects the diversity of the world in ways that the field of comparative constitutional law typically does not. For example, Asia claims 60% of humanity but nowhere near that proportion of the scholarly literature; in this book, it is proportionately represented with over half of the case studies. Likewise, the Global South tends to receive short shrift[44] but accounts for around half of this volume. Even though one-quarter of the world's population is Muslim, it is difficult to find more than incidental coverage of the Muslim world in most casebooks. In the case of this volume, the representation is once again proportionate. The five case studies of Muslim countries comprise one-quarter of the total and convey the diversity of the Muslim world, meaning in particular that they are not simply drawn from the Arab world and South Asia.[45] Nor is any of this mere tokenism. The case study approach ensures that each jurisdiction is covered in a meaningful and immersive way that also promotes reader comprehension.

Take for example the first five case studies in the volume. The first explores the history and meaning of core concepts in the context of China,[46] while the next four tackle issues of constitutional drafting and revision in the context of Afghanistan,[47] Nepal,[48] Hungary,[49] and Sudan.[50] Among these five countries, only Hungary appears with much frequency in the

[42] The exception is North America, which—with the exception of Mexico—is already highly accessible and well represented in the literature.
[43] See Ginsburg, 'The State of the Field' (n 1) at section 8.
[44] See Philipp Dann, Michael Riegner and Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction', in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020), 1-38.
[45] The five in question are Afghanistan, Indonesia, Iran, Sudan, and Turkey. By contrast, the literature on constitutionalism and public law in the Muslim world tends to favor Egypt and Pakistan.
[46] Chen, 'Constitutions and Constitutionalism: China' (n 40).
[47] Clark B. Lombardi and Shamshad Pasarlay, 'Constitution-Making for Divided Societies: Afghanistan', in Law (ed.), *Constitutionalism in Context* (n 1).
[48] Mara Malagodi, 'Constitutional History and Constitutional Migration: Nepal', in Law (ed.), *Constitutionalism in Context* (n 1).
[49] Yaniv Roznai, 'Constitutional Transformation: Hungary', in Law (ed.), *Constitutionalism in Context* (n 1).
[50] Markus Böckenförde, 'International Law and Constitution-Making: Sudan', in Law (ed.), *Constitutionalism in Context* (n 1).

existing literature.[51] The remainder all belong to the Global South, and the majority also belong to the Muslim world. Two hail from Central and South Asia, which are usually represented in the literature by India (and India alone); the last is from Africa, which is usually represented by South Africa (and South Africa alone).

This kind of representation is not just a celebration of diversity for its own sake. Nor is it merely about enabling students around the world, rather than just those in a privileged few jurisdictions, to see their own experiences reflected in the study of constitutionalism and to relate first-hand to the material (although that is certainly a benefit). Rather, there are compelling intellectual and pedagogical reasons to study global phenomena like constitutions and constitutionalism in a correspondingly global manner. Broadening the field of study means not only new knowledge of unfamiliar things, but also fresh insight into familiar things. There is only so much one can learn about constitutionalism through the study of judicial review in Western liberal democracies. Indeed, even Western liberal democracy itself cannot be understood exclusively through the study of Western liberal democracies: the comparative study of a particular genre of constitutionalism demands a point of comparison for the genre itself. Not least of all, breaking free of the usual suspects enables us to explore what we might call *boundary cases*. Some cases are unusually tricky, and also unusually informative, because they break the mold or push the boundaries of the field. These novel, extreme, or otherwise unorthodox cases require us to apply, test, and reformulate familiar concepts, devices, and strategies in unfamiliar ways.

In one domain after another, venturing off the beaten path adds to our understanding of even the most basic and familiar of concepts and topics. For instance, China is largely absent from the field of comparative constitutional law, in part because two of the core concepts that regulate the scope of the field—namely, "constitution" and "constitutionalism"—have traditionally been understood in ways that exclude the study of nondemocratic and illiberal states. Precisely because it breaks the expectations of liberal constitutionalism, however, China is an excellent vehicle for exploring the permutations and limits of these concepts: it effectively has two written constitutions—one for the state and one for the ruling party—and its combination of one-party rule and socialist ideology renders efforts to construct a normatively appealing and coherent "constitutionalism with Chinese characteristics"[52] no small challenge.

Underexplored jurisdictions and boundary cases yield fresh insights into traditional questions of structure and rights as well. For example, constitutional arrangements that provide for some measure of subnational autonomy are the subject of an extensive literature centered on federalism. But the constitutional rubric of "One Country, Two Systems" under which Hong Kong rejoined China takes the idea to new extremes. Can two diametrically opposed and wildly imbalanced constitutional systems—one a socialist and authoritarian behemoth of 1.4 billion people, the other a capitalist and liberal city of 8 million people—coexist indefinitely within the same country, and if so, how? Or consider affirmative action

[51] See the sources cited in parts 2 and 3 of Roznai, 'Constitutional Transformation: Hungary' (n 49).
[52] Ibid at section 3.2.

and racial discrimination, both mainstays of the vast literature on rights. In the case of Brazil, these topics come with a provocative and illuminating twist.[53] What is to be done about systemic racial inequality rooted in centuries of slavery if elites deny the very existence of racial distinctions on account of an equally long history of racial mixing? What are the prospects for affirmative action if the identity of the nation rests on an ideological denial of not only the reality of racism, but also the concept of race itself?

It is not just illiberal regimes, or nondemocratic states, or the Global South, that tend to be overlooked at considerable cost to our understanding of constitutionalism. Even Western liberal democracies may slip through the cracks if they do not play to the preoccupations of the field. The Netherlands is a case in point. For decades, countries have rushed to adopt judicial review—and the study of comparative constitutional law has focused on judicial review[54]—on the understanding that judicial enforcement of constitutional constraints on state actors is instrumental to the protection of democracy and human rights.[55] In *Constitutionalism in Context*, the Netherlands represents a category of countries that do not fit this narrative and are usually left out of the conversation as a result—namely, thriving liberal constitutional democracies that lack judicial review altogether.[56] This omission is self-evidently problematic. How can we understand the role of judicial review in protecting constitutional democracy or human rights if we ignore the cases that cast doubt on its role? What could be more essential to a comparative perspective on judicial review than a point of comparison that has no judicial review?

Each chapter gives life in some way to the core claim of the representation model: there are fundamental and revealing lessons to be had, for novices and experts alike, in every corner of the world. The road less taken is often where the most valuable insights and thought-provoking problems are to be found—from the strategies of rights activists in authoritarian societies,[57] to the implementation of unitary abstractions like "citizenship" and "nationality" in binational and divided states,[58] to the globalization-driven rise of transnational private regulation as a shadow body of public law in the developing world,[59] to the inherent tension in traditional societies between the dual imperatives of respect for international law and respect for constitutional autochthony,[60] to the paradoxes inherent in a constitutional system that doubles as an instrument of pragmatic governance and an institutional embodiment of divine law,[61] to the sheer abundance and variety of hybrid political-legal arrangements that

[53] Adilson José Moreira, 'Affirmative Action: Brazil', in Law (ed.), *Constitutionalism in Context* (n 1), at part 4.
[54] See Ginsburg, 'The State of the Field' (n 1) at part 2.
[55] See e.g. David S. Law and Mila Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87 *NYU Law Review* 762 at 793–96; Stone Sweet, 'Constitutions and Judicial Power' (n 40) at 156–58.
[56] De Visser, 'Nonjudicial Constitutional Interpretation: The Netherlands', in Law (ed.), *Constitutionalism in Context* (n 1).
[57] Lynette J. Chua, 'LGBTQ Rights: Singapore', in Law (ed.), *Constitutionalism in Context* (n 1).
[58] Achilles Emilianides and Christos Papastylianos, 'Citizenship and Nationality: Cyprus', in Law (ed.), *Constitutionalism in Context* (n 1).
[59] Victor V. Ramraj and Thininant Tengaumnuay, 'Privatization of Constitutional Law: Thailand', in Law (ed.), *Constitutionalism in Context* (n 1).
[60] Malagodi, 'Constitutional History and Constitutional Migration: Nepal' (n 48).
[61] Künkler and Law, 'Islamic Constitutionalism: Iran' (n 41).

render the distinction between constitutions, treaties, and peace agreements increasingly indistinct,[62] and so on, throughout the volume. Cases like these, drawn from the frontiers of the field, simultaneously introduce and problematize standard concepts and received wisdom. In doing so, they equip students from the outset with a critical perspective on the field itself.

4. Conclusion: The Need for Pedagogical Pluralism

There are countless ways that the representation model can be implemented in book form. That is as it should be. It is a premise, not a flaw, of the representation model that there is no single correct way to represent constitutional diversity. The representation model is pluralistic not only in its understanding of what constitutionalism is, but also in its understanding of what aspects of constitutionalism must be taught. It thrives when multiple scholars sample the world in different ways, pursue different understandings of what counts as diversity and what calls for representation, and highlight dimensions of variation that others have yet to explore. The complexity of the subject supports and indeed demands different takes on the subject. A pluralistic understanding of constitutionalism calls for a pluralistic approach to the study of constitutionalism. Likewise, a diversity of attempts to represent the diversity of constitutionalism is the apotheosis of the representation model. Thus, for example, the curation of *Constitutionalism in Context* is intended not to replace an older, less diverse canon with a newer, more diverse canon, but rather to offer an alternative to the very idea of relying on canon. It seeks to model an approach to selecting content, rather than a specific body of content.

Methodological pluralism is all the rage in the social sciences these days, and for good reason.[63] There is obvious wisdom not only in selecting the right tool for the job, but also in recognizing that the same job may lend itself to a variety of tools, and in testing whether different tools lead to the same result. But the case for pedagogical pluralism is as compelling as the case for methodological pluralism, especially in the field of comparative constitutional studies. Given the diversity of both the subject matter and the audience, it is hard to imagine how any pedagogical model could be strictly superior to all others, all the time. Even if the representation model happens to be compatible with an especially broad range of pedagogical settings and objectives, that does not mean it will be the most suitable option in every case.

What counts as an appropriate model will depend on the resources at hand, the needs of the audience, and the goals of the instructor. Pedagogy, like methodology, cannot be reduced to

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[62] See Böckenförde, 'International Law and Constitution-Making: Sudan' (n 50); Emilianides and Papastylianos, 'Citizenship and Nationality: Cyprus' (n 58); Lombardi and Pasarlay, 'Constitution-Making for Divided Societies' (n 47); Cora Chan, 'Subnational Constitutionalism: Hong Kong'; Elaine Mak and David S. Law, 'Transnational Judicial Dialogue: The European Union', in Law (ed.), *Constitutionalism in Context* (n 1); and Matthew S.R. Palmer, 'Indigenous Rights: New Zealand', in Law (ed.), *Constitutionalism in Context* (n 1).
[62] Lynette J. Chua, 'LGBTQ Rights: Singapore', in this volume.
[63] On methodological pluralism, see the introduction and part 1 of Ran Hirschl, 'Methodology and Research Design', in Law (ed.), *Constitutionalism in Context* (n 1).

a single correct approach. What both pedagogy and methodology demand instead is mindful choice, informed by an understanding of the available options. The risk is that we fail to choose at all—that we sleepwalk into a particular model by default or habit without any awareness, much less explanation, of what choice has been made and why. On a pluralistic view of pedagogy, what matters most is not what we choose, but how we choose it.

There are good arguments to be made for targeting the best-known aspects of constitutionalism, or the most celebrated aspects, or taking a deep dive into a particular place, or seeking a bird's eye view of the whole. In a world where unexpected treasures and revealing twists lie behind any number of doors, however, there is also much to be said for opening as many doors as we can.