

METHODOLOGICAL PLURALISM AND THE METHODS OF COMPARATIVE CONSTITUTIONAL LAW

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This article defends comparative constitutional law's status as a genuine academic discipline capable of producing knowledge. In so doing, it argues that common claims about the necessary conditions for

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being an academic discipline are false: a field does not need a unique method or set of methods to be an academic discipline. Comparative constitutional law requires multiple methods to produce the valuable knowledge that makes the product of comparative constitutional law research unique, but it remains a discipline. It is not the only example of an academic discipline that does not fulfill the claimed methodological conditions on disciplinarily. A discipline with multiple methods must nonetheless ensure that its practitioners pair methods with purposes that the methods can fulfill. This article thus also provides a new taxonomy of legitimate comparative constitutional law purposes and methods and explains which methods can fulfill which purposes. The taxonomy is itself a contribution to the literature: no other short methodological reference work is currently available.

I. INTRODUCTION

Comparative constitutional law's use and legitimation of multiple methodologies ("methodological pluralism") could be a problem for its status as an independent and self-sustaining academic discipline. As detailed below, many scholars argue that a field requires a unique methodology or set of methodologies to be an academic discipline. No current methodological practice is unique to comparative constitutional law alone and no one method can fulfill all comparative constitutional law's purposes. Proposed conditions on disciplinary status are thus potential objections to comparative constitutional law's disciplinary status: even if comparative constitutional law can produce knowledge, comparative constitutional law cannot produce knowledge that fits into a recognizable whole distinguishable from other disciplines. Purported comparative constitutional law activities may produce knowledge, the objection grants, but the field does not produce a body of knowledge that should be organized under the same disciplinary heading.

This work defends comparative constitutional law's methodological pluralism. First, I explain the potential problem of methodological pluralism. Second, I outline and defend multiple legitimate purposes of comparative constitutional law research. Third, I taxonomize existing comparative constitutional law methods and explain that none fulfill all legitimate comparative constitutional law purposes, but each fulfills some, bolstering pluralism. Regardless of whether my larger argument for methodological pluralism succeeds, this taxonomy should be a standalone contribution to the literature on comparative constitutional law and comparative constitutional law methodologies. I then, fourth,

provide further reasons to accept comparative constitutional law's methodological pluralism and defend comparative constitutional law scholars' unique contribution to the pursuit of knowledge. After addressing objections, a conclusion follows.¹

II. APPROACH

An account of comparative constitutional law methods should be descriptively and normatively adequate. All else being equal, the project of identifying and taxonomizing comparative constitutional law's methods should not only describe what ought to be done to ensure one conforms to the highest standards of disciplinary rigor, but also what *is* done today. An approach that accounts for current practice takes seriously the idea that there is a body of work that appropriately falls under the label of "comparative constitutional law" and explains intuitions about what constitutes that body of work. Critical reflection may warrant removal of items from a collection of great comparative constitutional law works, but an account that explains intuitions about why the field is valuable, what works are exemplars of excellence in it, and why those works are considered excellent is better than one that ignores considered opinion on the nature of the subject being studied. An account that explains practice also avoids unduly discrediting what could be valuable works of scholarship *ex ante*. Yet a field that assumes that all projects that fulfill existing purposes of the field are epistemically rigorous is too permissive. Such a field may be less of a discipline and more of a collection of disparate research programs. Another standard for disciplinarily acceptance and excellence is then necessary. To avoid too many theoretical commitments, I stipulate here that a discipline should create genuine knowledge related by common factors that warrants placing the knowledge under one label.²

¹ The taxonomy should help scholars/students understand comparative constitutional law's methodological possibilities and thus also serve as a reference work. Where grants are necessary for the continued success of comparative constitutional law, academic study is funded in competitions and this serves as a reference guide for reviewers unfamiliar with comparative constitutional law, the work can also contribute to continued comparative constitutional law study. This is the first *short(er)* outline and analysis of comparative constitutional law's methods that explains modern research and provides guidance on how to improve it by matching comparative constitutional law methods with purposes they are best suited to fulfill. If, however, existing works fulfill that role, my analysis of the methods' merits still contributes to a larger discussion.

² Where knowledge requires an "anti-luck" condition (and the search for the anti-luck condition is a central philosophical task see post-Edmund Gettier, *Is Justified True Belief Knowledge?* 23 *ANALYSIS* 121 (1963)), I assume that a discipline must have at least one method. Whether it must have a unique method or set thereof is a further concern.

To understand why methodological pluralism appears to be, but is not, a problem for comparative constitutional law and recognition of comparative constitutional law as an independent academic discipline, recall three facts. First, comparative constitutional law is now considered a self-sustaining discipline.³ It no longer depends on historical changes or the whims of idiosyncratic professors to raise interest.⁴ Scholarship and practice (at, for example, the Supreme Court of Israel or the Constitutional Court of South Africa) continue in the absence of triggering events (for example, World War II or the Arab Spring) that demand comparative study. For brevity's sake, call the claim that comparative constitutional law is a self-standing academic discipline (i). Second, some scholars think that disciplines require their own unique methods. Call the claim that a discipline must have its own unique methods (ii). Comparative law scholars commonly raise the concern that their field fails the criterion in (ii).⁵ Similar concerns that the field lacks a methodology altogether could plague comparative constitutional law.⁶ There is reason to think that comparative constitutional law too fails to meet the criteria in (ii) even if it is distinct from comparative law. Comparative constitutional law scholars use many methods and many, if not all, of them are also used by other legal and non-legal scholars.⁷ If (ii) is true, this is a potential problem for comparative constitutional law. Third, many scholars similarly claim that a discipline should provide a single unique method, which will be labeled (iii). Many comparative law scholars subscribe to (iii) and worry that comparative law fails to fulfill it.⁸ Comparative constitutional law's ability to fulfill the demands of (iii)

³ See MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 1, 117 (2014).

⁴ *Id.*

⁵ See, e.g., Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26(2) HARV. INT'L L.J. 411, 416 (1985); Mathias M. Siems, *The End of Comparative Law*, 2 J. COMP. L. 133 (2007).

⁶ Comparative constitutional law is sometimes understood as a species of comparative law and they share purposes. See, e.g., JAAKO HUSA, *A NEW INTRODUCTION TO COMPARATIVE LAW* 14 (2015). It is thus natural to extend the criticisms to comparative constitutional law. This concern generalizes to other disciplines. Recall, for example, Anglo-American philosophy's commitment to conceptual analysis as the unique philosophical method prior to the publication of WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960). This demonstrates the persistence of the general problem and suggests that my argument has broader implications.

⁷ See Part III below.

⁸ See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 10-13 (2d ed. 1974); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 689 (2002); Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713 (2004); Catherine Valcke & Matthew Grellette, *Three Functions of Function in*

can be challenged for the same reasons comparative constitutional law appears inconsistent with (ii). Some comparative constitutional law scholars thus worry about (ii) and (iii).⁹

The problem of methodological pluralism addressed here is that the practice of comparative constitutional law, combined with (ii) and (iii), arguably undermine (i). Many comparative constitutional law methods are also used by scholars from other disciplines. Historical scholarship is primarily the work of historians, economists and social scientists conduct so-called “functionalist” studies, and philosophers and political theorists do normative work on constitutions.¹⁰ (i) should not be true if (ii) or (iii) is true. Yet comparative constitutional law’s inability to develop a unique method or set of methods has not stopped (i) from being true. Comparative constitutional law developed without much attention to methodology. Calls for more precise methods in comparative constitutional law date back at least as far as 1900.¹¹ While they were often seen as necessary precursors to the development of the field, comparative constitutional law developed absent wide agreement on which method or sets of methods count as “precise” or “acceptable.” Arguments about proper comparative constitutional law methods of comparative constitutional law research are more recent. The lack of considered agreement thereon is thus unsurprising. Important comparative constitutional law works forgo discussion, let alone defense, of methodology.¹²

Comparative Legal Studies, in *THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE* 99 (Maurice Adams & Dirk Heirbaut eds., 2014). Most forcefully, perhaps, John C. Reitz, *How to Do Comparative Law*, 46 *AM. J. COMP. L.* 617 (1998), seeks consensus on “the” comparative method. Notably, (i)/(ii) concerns also arise in international law. See Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996). The discussion below should thus be of wider interest.

⁹ See Katharine G. Young, *On What Matters in Comparative Constitutional Law: A Comment on Hirschl*, 96 *BOSTON U. L. REV.* 1375 (2016) (though Young arguably ultimately supports a version of pluralism).

¹⁰ See Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 54, 55 (Michel Rosenfeld & András Sajó eds., 2012); For similar categories, see Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 *DUKE J. COMP. & INT’L. L.* 301 (2004); Francesca Bignami, *Formal versus Functional Method in Comparative Constitutional Law*, 53 *OSGOODE HALL L. J.* 442 (2016).

¹¹ RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 5, 195 (2014).

¹² See, e.g., TUSHNET, *supra* note 3; Jackson, *supra* note 10; NORMAN DORSEN, MICHEL ROSENELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006); *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (Mathias Reimann &

A justification-based variation of the problem of methodological pluralism nevertheless lingers. While comparative constitutional law can, as a sociological fact, continue as a standalone discipline, fulfilling (i), these facts suggest that comparative constitutional law cannot fulfill (ii) and (iii) and thus cannot conform to the demands of a *genuine* discipline, undermining the justification for (i). If warranted, the motivating worries could undermine comparative constitutional law's independence and sustenance. The lack of a unique method in comparative law led scholars in that discipline to identify its "malaise."¹³ The malaise led to theoretical questions about whether the field deserved the title of an academic discipline and practical concerns about whether it could continue to produce valuable knowledge distinctive of an academic discipline that would warrant further study and institutional support in universities. Thus, (i) could be normatively undesirable and, eventually, factually inaccurate if comparative constitutional law requires methodological pluralism and (ii) and/or (iii) are true.

In the following, I thus provide reason to reject (iii) and argue that (ii) is too strong. I show that disciplines can and do create genuine knowledge despite not fulfilling (ii) and (iii). Rejecting (ii) and (iii) may even be *necessary* for scholars to fulfill various related purposes that can and should be properly labelled as part of the same discipline. This does not make comparative constitutional law unique. Even philosophy uses multiple methods, from conceptual analysis to surveys to experiments, used by scholars in other disciplines.¹⁴ I further demonstrate that pluralism is necessary to *explain* comparative constitutional law. I then provide further reason to accept (i) even if, counterfactually, it conflicts with (ii) and (iii).

III. LEGITIMATE COMPARATIVE CONSTITUTIONAL LAW PURPOSES

One should acknowledge the legitimacy of multiple comparative constitutional law purposes to (A) further creation of intrinsically valuable knowledge (*viz.*, true belief that is not the product of luck)¹⁵ and (B) explain actual comparative constitutional law practices. I demonstrate

Richard Zimmermann eds., 2008); COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg & Rosalind Dixon eds., 2011).

¹³ William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?* 143 U. PA L. Rev. 1889, 1961 (1995).

¹⁴ See THE CAMBRIDGE COMPANION TO PHILOSOPHICAL METHODOLOGY (Giuseppina D'Oro & Soren Overgaard eds., 2017).

¹⁵ See *supra* note 2. Knowledge is an intrinsic (non-instrumental) good. See, e.g., W.D. ROSS, THE RIGHT AND THE GOOD 138-141 (rev. ed. 2002). *Contra*, e.g., G.E. MOORE, PRINCIPIA ETHICA 199 (repr. 1959).

below that each legitimate purpose of comparative constitutional law as currently practiced can produce the intrinsic good of knowledge and is thus valuable.¹⁶ Making room for all the purposes is also explanatory as all appear in practice. Comparative constitutional law has many stakeholders, each of whom has a distinct role to play in the discipline and the larger legal arena. These stakeholders fulfill different purposes (especially when performing different parts of their roles).¹⁷ I provide examples of works trying to fulfill each purpose in references below.

This study requires something that we can at least provisionally identify as “comparative constitutional law.” All justifiable comparative constitutional law purposes are linked by common pursuit of knowledge about a shared subject matter: constitutional phenomena, potentially (non-exhaustively) including constitutional rules, processes, decisions, and institutions. A view that accounts for the practice of well-regarded persons is, *ceteris paribus*, preferable to alternatives. All academic disciplines produce knowledge about related subject matter and include people who are socially linked in some way (if only in recognition of others as being engaged in similar projects) and desire to be part of *an* academic discipline (if not the one of which they are commonly viewed as being a part, as in the case where one seeks to be a philosopher and is viewed as a legitimate practitioner of legal theory). Comparative constitutional law generally has these characteristics, which entail that a purpose whose fulfillment does not produce genuine knowledge is illegitimate. I assume that people engaged in comparative constitutional law want to be recognized as being part of a standalone discipline and recognize themselves as being engaged in the same sort of projects as

¹⁶ Further instrumental value would make a piece or set of knowledge and any purpose that can create it more valuable. But requiring that legal knowledge be instrumentally valuable at the time it is created is too strong of a condition on purpose legitimacy to capture the full value of knowledge as such or the long-term value of legal research. It is difficult to determine in advance what type of knowledge will be action-guiding on a large scale in the long term. Particularly where law and policy deal with largescale issues and aim to solve problems over time, a condition on knowledge that its action-guiding potential be immediately determinable is too strong. Knowledge’s intrinsic value sufficiently grounds that of methodologies producing it.

¹⁷ For example, judges may need to use quantitative methods and methods that identify nations’ or constitutions’ underlying values/norms to decide cases. Where such analyses are strictly interpretive, they need not introduce odd ontological posits such as an actual spirit of the nation, though judges sometimes refer to national spirits in obiter and comparative constitutional law research can be useful for making those claims seem plausible too. See GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* (1993). But note skepticism in, e.g., Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1230 (1999). Different methods still may be necessary when they write speeches or articles.

others.¹⁸ I do not seek to set further necessary and sufficient conditions for disciplinarity. I seek to show that (ii) and (iii) are not necessary conditions.

Existing legitimate comparative constitutional law purposes include: (1) curiosity; (2) legal tool identification and understanding; (3) understanding legal tool selection; (4) mapping the history of ideas; (5) theory building; (6) norm identification; (7) taxonomy; and (8) determining cases.¹⁹ Each is also put towards functional ends such that theories, for example, about legal harmonization are often put in the service of trying to bring about harmonization.²⁰ Most of my purposes thus have functionalist variants. There is admittedly some overlap between my purposes. For instance, many of the purposes could be re-described as forms of curiosity and methods of fulfilling variants of several purposes could also be methods for winning cases in some nations. Yet I do not think that they can be collapsed into a single comparative constitutional law purpose on any plausible understanding. There are different kinds of curiosity achieved by the different purposes and many seek to do more than just sate curiosity. Many purposes are also legitimate even when not used to decide specific cases. Notwithstanding overlap, the purposes accurately describe those of comparative constitutional law practice.²¹

A. Curiosity

Curiosity played an important role in the development of comparative constitutional law.²² Curiosity is missing in many current

¹⁸ Disciplines can also arise organically. See, e.g., Koh, *supra* note 8; LOUIS MENAND, THE METAPHYSICAL CLUB (2001).

¹⁹ Some purposes are often described as comparative law purposes but can be and are comparative constitutional law purposes even if there are discontinuities between comparative law and comparative constitutional law. The fact that the fields share purposes and no method can produce them suggests that comparative law too may be unable to fulfill (ii) and (iii). Whether this means there is a discontinuity between comparative constitutional law and comparative law (such that for example, comparative lawyers should stop following some purposes that comparative constitutional law tries to fulfill so it can maintain its status as a discipline consistent with (ii) and (iii) or should stop worrying about (ii) and (iii) is interesting. Future scholars should address this.

²⁰ For a work critical of harmonization that also provides a good overview of its claims and practices, see Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699 (1991).

²¹ A more detailed and thus more accurate description may be possible. But these purposes suffice for our purposes. More fine-grained purposes may make (ii) and (iii) *harder* to prove.

²² Scholars often raise this point to note that it is the *sole* purpose of comparative constitutional law. see Monica Claes, *Constitutional Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 223 (Jan M. Smits ed., 2nd ed. 2012).

accounts of comparative constitutional law purposes,²³ but it inspires many projects and entry into the field. Sating curiosity can produce intrinsically valuable knowledge.²⁴ Instrumentally valuable findings are beside the point, but intrinsically valuable knowledge can be instrumentally valuable long-term. Outputs of curiosity-based comparison can have sociological and moral implications, but one may simply wish to understand commonalities and differences between states.²⁵

B. Legal Tool Identification and Understanding

One may wish to identify and understand legal tools in different jurisdictions. This purpose takes multiple forms. Law reform/state-building was *the* traditional purpose of comparative law.²⁶ Legal tool identification describes traditional comparative constitutional law research conducted to identify the policies and/or legal tools one can use in one's own jurisdiction.²⁷ Projects with this purpose attempt to answer questions such as, "what features of constitutional law do other countries use to try to improve access to healthcare for vulnerable populations?"²⁸ Most try to answer the further (functionalist) domestic question, "can we use them here?" Countries without constitutions or considering new ones may look to the broader form of foreign constitutions to see if they should be adopted. Constitution-making is a traditional comparative constitutional law purpose.²⁹ Constitutions can be legal tools.

²³ See, e.g., Jackson, *supra* note 10.

²⁴ See, e.g., Tom Ginsburg, *Studying Japanese Law Because It's There*, 58 AM. J. COMP. L. 15 (2010).

²⁵ Compare KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (*Tony Weir trans.*, 1977) with Pierre Legrand, *The Same and The Different*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 250 (Pierre Legrand & Roderick Munday eds., 2003) (for a discussion on similarity and difference).

²⁶ Maurice Adams & Dirk Heirbaut, *Prolegomena to the Method and Culture of Comparative Law*, in THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE 1, 10 (Maurice Adams & Dirk Heirbaut eds., 2014); cf. H. Patrick Glenn, *Against Method?*, in THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE 177 (Maurice Adams & Dirk Heirbaut eds., 2014).

²⁷ Frankenberg, *supra* note 5, at 412 (lists reform as an "ultimate" aim of all comparative law).

²⁸ See, e.g., COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008); SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2008). In the health rights jurisprudence literature, see LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? (Alicia E. Yamin & Siri Gloppen eds., 2011).

²⁹ Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 10, at 419.

Just knowing what options exist elsewhere does not answer the question of whether one *should* use the legal tools one has identified in one's own jurisdiction. Consequently, one may conduct comparative constitutional law to understand how the policies and/or legal constructs in another jurisdiction work. One can answer questions like "How do health rights work in South Africa" where "How do they work?" is shorthand for "What are their mechanics of operation?"³⁰ When used for the end of importing legal tools into a new jurisdiction, comparison is necessary to understand if a tool could work the same way there: answering questions about whether one should adopt legal tools from elsewhere *requires* that one understand the effects of policy options and/or the introduction of legal constructs elsewhere. This requires understanding the *effects* of foreign legal tools. A research project in this vein tries to answer questions like "What happened when South Africa introduced a right to healthcare services?"³¹ Alternatively, rather than focusing on a nation's legal tools, one may focus on a more common legal tool. One who seeks to understand the effects of legal constructs may ask questions like "What do constitutions do?" and "How do constitutions change countries?"³² Both understanding projects are primarily functionalist in nature but may have historical import. They could also be used for conceptual purposes, undermining claims about the nature of law. Empirically-focused comparative constitutional law scholarship focused on law and society often takes this approach.

Understanding is epistemically valuable. It may be more valuable than knowledge. Regardless of whether this is true, it is often viewed as a form of knowledge, so it is easy to see how fulfilling the variety of understanding-based purposes here can produce genuinely epistemically valuable products, likely including knowledge.³³ Knowledge of what

³⁰ See, e.g., Carole Cooper, *South Africa: Human Rights Litigation: Cautious Constitutionalism*, in LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? 190 (Alicia E. Yamin & Siri Gloppen eds., 2011).

³¹ See generally Lisa Forman, *Justice and Justiciability: Evaluating Right to Health Jurisprudence in South Africa*, 27 J. MED. & L. 661 (2008); Lisa Forman & Jerome Amir Singh, *The Role of Rights and Litigation in Assuring More Equitable Access to Health Care in South Africa*, in THE RIGHT TO HEALTH AT THE PUBLIC-PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY 288 (Colleen M. Flood & Aeyal Gross eds., 2014). This is a form of the question "How do health rights work in South Africa?" in which "How do they work?" is shorthand for "How do they result in certain outcomes (if they do)?"

³² See Frederick Schauer, *Comparative Constitutional Compliance: Notes Towards a Research Agenda*, in PRACTICE AND THEORY IN COMPARATIVE LAW 212, 213, 217, 222-223 (Maurice Adams & Jacco Bomhoff eds., 2012).

³³ See Stephen R. Grimm, *Understanding*, in THE ROUTLEDGE COMPANION TO EPISTEMOLOGY 84 (Sven Berneker & Duncan Pritchard eds., 2010).

tools are available is valuable. It could be instrumentally valuable when paired with understanding.

C. Understanding Legal Tool Selection

One may wish to understand how and why legal tools are created. Rather than tracing the history of the idea of a right to healthcare services and how it got to South Africa, one may ask “What underlying causal factors led to South Africa’s adoption of a right to healthcare services that are not featured in its official account of that process?” This could include attention to wider phenomena like “Are there common features of nations who recognize health rights?”

Answering these questions too produces understanding, which is epistemically valuable. It has the same benefits as the purposes in (B) and is closely related to, but severable from, that purpose. This purpose too can be put to functionalist ends by identifying whether the reasons for decisions in other countries were justified and/or justify similar changes in one’s own nation.

D. Mapping the History of Ideas

One can also map the history of ideas. One may conduct comparative constitutional law research to trace the history of a concept and/or its movement across jurisdictions. Traditional comparative law attempts to answer questions like “Where did the idea of efficient breach originate?” and “How did it make it to system Y?” Comparative constitutional law scholars ask similar questions about ideas like judicial review, originalist interpretation, and the right to healthcare. This is the quintessential historical project.³⁴ Yet comparative constitutional law scholars in this vein, perhaps unlike their traditional comparative law counterparts focusing on, for example, legal transplants,³⁵ often go on to make normative claims about the implications of these historical findings.³⁶ Comparative constitutional law scholars are not only interested in how legal ideas or tool develop over time, but are also interested in how they could be developed and/or how they could solve

³⁴ Jackson, *supra* note 10, at 58-60. One famous project is THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006).

³⁵ See WATSON, *supra* note 8.

³⁶ See, e.g., Oren Gross, ‘Control Systems’ and the Migration of Constitutional Anomalies, in THE MIGRATION OF CONSTITUTIONAL IDEAS 430 (Sujit Choudhry ed., 2006).

modern problems in nations with similar constitutional structures.³⁷ Relatedly, they may seek to explain the conditions under which an idea will move from one jurisdiction to another and/or taxonomize the types of movements of ideas.³⁸

Fulfilling this purpose produces historical knowledge. This knowledge must be intrinsically valuable if we are to accept history's status as a standalone discipline in a way that accounts for its practice. Scholars who apply this knowledge demonstrate its further instrumental value.³⁹

E. Theory Building

One can conduct comparative research to build theories about the nature of law, constitutions, the relationships between legal concepts, and a variety of other theoretical posits. For example, Stephen Gardbaum seeks to identify a new model of constitutionalism in the English commonwealth.⁴⁰ Gardbaum's project is largely descriptive, but also contains a normative element, analyzing whether the model is normatively desirable in the abstract⁴¹ and whether it meets its stated goals in practice.⁴² The result is a theory of the nature of modern constitutionalism and the reasons for it. Building a theory that explains modern practice requires that one fulfill the descriptive purposes of comparative constitutional law research. Building a normative theory then requires attentiveness to the norms of modern constitutionalism. Gary Jeffrey Jacobsohn thus spends a whole comparative constitutional law book clarifying and elaborating "the concept of constitutional identity."⁴³ Such projects are primarily classificatory but can be put towards normative ends.

³⁷ See e.g., Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

³⁸ Tushnet, *supra* note 17, at 1282 (noting that comparative constitutional law can be used to show how functional differences between nations should bar transplant).

³⁹ *Id.*

⁴⁰ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001) [hereinafter Gardbaum, *New Commonwealth*]; Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167 (2010) [hereinafter Gardbaum, *Reassessing*]; STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013) [hereinafter GARDBAUM, *THEORY AND PRACTICE*].

⁴¹ See, e.g., GARDBAUM, *THEORY AND PRACTICE*, *supra* note 40, at 47-76.

⁴² See *id.* at 16.

⁴³ GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 33 (2010).

Theory building not only produces theoretical knowledge but can have practical consequences and produce practical theories. For example, Mattias Wendel's account of comparative constitutional law research use in the narrow context of European Union (EU)-related decisions by European constitutional courts notes that "an EU-related decision of a national court can be perceived not only as a judgment on national constitutional law, but also as a proposition of common constitutional standards."⁴⁴ Some theories even *try* to bring about certain ends – recall the point about harmonization above.⁴⁵

F. Norm Identification

One may attempt to identify or debunk purported norms. This can take at least two forms. One may seek to identify common/universal norms or undermine that project. Call this universal (or transcendent) norm identification. The legal formalist, for one, seeks to understand the essential features of legal constructs. S/he seeks to identify features common to all constitutions by examining world constitutions. Answering basic questions like "What is a constitution?" merges historical and normative "approaches" to comparative constitutional law research.⁴⁶ Alternatively, one may examine world constitutions to make a universal moral point. A positive answer to "Do all world constitutions aim to protect human dignity?" would support the use of dignity as a moral ground-norm.

Comparative constitutional law can also undermine the idea that there is an essential feature or core of a concept through counterexample.⁴⁷ One counterexample can show that a norm is transcendent, rather than universal. Many counterexamples would question whether the purported norm is transcendent or local. These projects seek to undermine normative-historical projects by showing that contextual analysis negates those projects' key claims.

⁴⁴ Mattias Wendel, *Comparative Reasoning and the Making of a Common Constitutional Law: EU-related Decisions of National Constitutional Courts in a Transnational Perspective*, 11 INT'L J. CONST. L. 981, 995 (2013).

⁴⁵ See *supra* note 20 and accompanying text.

⁴⁶ Jackson, *supra*, note 10.

⁴⁷ Rodolfo Sacco champions this in comparative law. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (I)*, 39 AM. J. COMP. L. 1 (1991). In comparative constitutional law, see, e.g., JACCO BOMHOFF, *BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE* (2013) (undermines the claim that "balancing" has a unique meaning across constitutional jurisdictions and can serve as the shared basis for a global, post-World War II constitutional model).

One may also be interested in ideas that operate in particular nations. Rather than looking at ideas conceptually or as transnational historical phenomena, one may examine a nation's commitments. If constitutions are normative documents, comparative constitutional law can help identify and explain a country's (explicit and/or implicit) norms and help one understand how they work in action.⁴⁸ Such projects seek to answer questions like, "How does Israel's foundational constitutional commitment to human dignity work in action?" and, "How do Israeli legal actors understand human dignity?" Answering these questions requires an "internal" approach, taking on the perspective of local legal actors.⁴⁹ One can alternatively apply "external" standards, built on perspectives of non-Israeli legal actors, to answer questions like, "What are the fundamental values of the Israeli legal system?" Both internal and external approaches can answer questions like, "What does that say about Israel?" Knowledge could also be gained about one's own system through contrast. Identifying differences between one's legal systems and that of another jurisdiction can elucidate the underlying norms of one's system.⁵⁰

Norm identification produces theoretical knowledge, which can have practical consequences. Fulfilling this purpose can also provide insight into some causal relationships. For example, Marxism influenced Soviet law. But not all relevant comparative constitutional law-related phenomena that comparative constitutional law scholars do and should be interested in studying can be explained by ideas made flesh alone.

G. Taxonomy

Taxonomy is a valuable comparative constitutional law purpose. Work fulfilling other purposes may presuppose a taxonomy. For example, an understanding of what counts as property law is necessary for comparing British and Chinese property law. A taxonomy of relevant similarities and differences for comparative analysis may also be necessary to determine whether such a comparison has any value beyond

⁴⁸ Both can fall under the heading national norm identification, though the bifurcated nature of this purpose may mean that projects seeking to fulfill it will take a wider variety of forms than other purposes.

⁴⁹ On internal approaches, see e.g., Catherine Valcke, *Reflections on Comparative Law Methodology: Getting Inside Contract Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW 22 (Maurice Adams & Jacco Bomhoff eds., 2012).

⁵⁰ See Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737 (1999) (arguing that comparative law helps nations self-construct their identities, but can be used to deconstruct self-identifications); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (attempting to create self-understanding in this vein).

sating curiosity. One may taxonomize (non-exclusively) legal concepts, tools, or systems. Taxonomy moves outside functionalism and into the classificatory domain.

Classification can be useful for functionalist ends. One who answers, “What is the common law world?” could then examine whether common law nations are more likely to (constitutionally) recognize social rights.⁵¹ Alternatively, taxonomic projects can aid conceptual analysis. Theories are often built on the backs of a taxonomy. Gardbaum again provides a good example.⁵² His commonwealth model of constitutionalism is built on analysis of Canada, New Zealand, the United Kingdom, and two Australian states; the examples were selected due to their similar constitutional reforms by left-of-center governments and their shared “legal family.”⁵³

Knowledge of how legal concepts, ideas, and decisions relate to one another is knowledge. It can be instrumentally valuable for a variety of other ends, including other comparative constitutional law purposes. The connection between taxonomy, which doubles as a method, and other methods also suggests a connection between methods that should count in favor of pluralism. The relationship between constitutional taxonomy and other methods is not unidirectional. Taxonomies risk assuming the conclusion of their analysis *ex ante* by assuming that the set of distinguishing features that they “map” reflect reality. Recognizing that other methods exist helps negate this risk. Constitutional taxonomy must be open to the results of other studies and revise its results accordingly to be properly scientific. This could be revision based on other taxonomies but is more likely to be revision based on the application of other methods.

H. Determining Cases

Finally, one may seek to understand how legal reasoning works in a jurisdiction. Some general comparative lawyers answer questions like, “How do French legal actors argue for particular results when trying to win particular cases?”⁵⁴ This highlights general, primary purposes that motivate many others: deciding cases, which is a task for judges, and

⁵¹ Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043 (2014).

⁵² See generally GARDBAUM, THEORY AND PRACTICE, *supra* note 40.

⁵³ *Id.* at 1, 7-9, 13.

⁵⁴ This is the approach of Catherine Valcke to private law. See, e.g., Valcke, *supra* note 8, at 740; Catherine Valcke, “Precedent” and “Legal System” in *Comparative Law: A Canadian Perspective*, in PRECEDENT AND THE LAW 85 (Ewoud Hondius ed., 2007).

winning cases, which is a task for other stakeholders. Judges use many methods to decide cases.⁵⁵

Understanding the internal view that judges use when deciding cases is supposed to help stakeholders win cases by giving them an understanding of what makes for a successful legal argument in the jurisdiction. Yet one may seek to understand how legal reasoning works in a jurisdiction for other purposes. Academics are interested in questions like “How does France think about law, legal argumentation, and/or an area of law?” Some comparative lawyers think that these questions are best answered by looking at patterns of legal reasoning.⁵⁶ This comparative law purpose could be a comparative constitutional law purpose. Determining cases is clearly valuable. It is arguably the primary purpose of law.

IV. COMPARATIVE CONSTITUTIONAL LAW METHODS AND THE INABILITY OF EACH TO FULFILL ALL COMPARATIVE CONSTITUTIONAL LAW PURPOSES

No method can fulfill all legitimate comparative constitutional law purposes, but several fulfill one (or more) well. This provides support for methodological pluralism as a fact of comparative constitutional law practice. Where comparative constitutional law operates as a self-sustaining discipline that produces genuine knowledge, it also challenges (ii) and (iii).

To make this clear, I now identify the legitimate methods of comparative constitutional law research, providing a new taxonomy of comparative constitutional law methods, and briefly explain which purposes each can fulfill. Other taxonomies of comparative constitutional law methods exist, but I adopt my own here. Part of the reason for this is pedagogical and practical. Existing taxonomies of comparative constitutional law and comparative law methods do not all use uniform language. Translating the terms from these different works should make it easier to understand the relationships between the terms, limiting the barriers to entry for new scholars in the field. Another, more substantial part of the reason for adopting a new taxonomy is that few scholars even attempt to identify and classify all the methods of comparative constitutional law. Many taxonomies of methods used in comparative constitutional law are offered as taxonomies of comparative law in

⁵⁵ See Annus, *supra* note 10, at 343 (explaining comparative reasoning as one method of judicial interpretation); see also Tushnet, *supra* note 17, at 1236-37.

⁵⁶ See, e.g., Valcke, *supra* note 8; Valcke, *supra* note 54.

general.⁵⁷ More is needed to establish their relevance for comparative constitutional law. I demonstrate the methods that are used in comparative constitutional law and how they can be used in that field without adopting a substantive view on how comparative constitutional law and comparative law relate to one another. Even among these taxonomies, many do not claim to be exhaustive.⁵⁸ Vicki C. Jackson and Ran Hirschl notwithstanding,⁵⁹ existing taxonomies of comparative constitutional law research are few and potentially incomplete.⁶⁰ My new taxonomy nonetheless synthesizes, translates, and builds on a literature on the methods of comparative law and comparative constitutional law. This work thus continues a tradition of methodological research. It identifies the methods used in comparative constitutional law and critically engages with them to determine which ones properly fulfill comparative constitutional law purposes and are properly identified as legitimate comparative constitutional law methods. This project would not be possible without other excellent works as an analytical starting point.⁶¹

In developing this taxonomy, I make a case against (ii) and (iii). The fact that comparative constitutional law developed without sustained

⁵⁷ See, e.g., WATSON, *supra* note 8, at 3; Frankenberg, *supra* note 5, at 427-28; Legrand, *supra* note 25; JAAKKO HUSA, *Research Designs of Comparative Law – Methodology or Heuristics?*, in THE METHOD AND CULTURE OF COMPARATIVE LAW, *supra* note 8, at 53, 60; GEOFFREY SAMUEL, AN INTRODUCTION TO COMPARATIVE LAW THEORY AND METHOD (2014).

⁵⁸ See, e.g., Tushnet, *supra* note 17, at 1227 n.7, 1238.

⁵⁹ Jackson, *supra* note 10; HIRSCHL, *supra* note 11.

⁶⁰ Annus, *supra* note 10, at 303, 309 (promises to “systematically” distinguish “uses of comparative law”); see *id.* at 304-306 (identifies five “areas” or “strands” of comparative constitutional law research, the fifth of which is not a category of comparative constitutional law research proper, but a kind of meta-analysis of which the present article is one example); see *id.* at 308-09 (provides a list of ways of classifying the uses of comparative constitutional law). However, Annus does not extensively describe them or systematize them. His description of comparative constitutional law methods does not pair types of research with methods or explain which methods are appropriate to each. I develop key insights in Annus’s work below. For a taxonomy of uses of comparative constitutional law in judicial interpretation, see JEFFREY GOLDSWORTHY, *Conclusions*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 321, 323-324 (2006).

⁶¹ Even an uncharitable reader who does not view the new taxonomy as necessary and/or original should note that the pairing of purposes and methodologies is new and that the discussion of methodological pluralism here is relevant for establishing comparative constitutional law’s inability to fulfill (ii) and (iii), which is relevant to the broader theoretical questions concerning the criteria for being an academic discipline and relationships between comparative constitutional law and comparative law. All studies must make some comparisons to qualify as comparative constitutional law by definition. Works can shift from foreign law research to comparative constitutional law research based on context. One of the best collections on comparative constitutional interpretation, the Goldsworthy book in *id.*, is structured as a series of country-specific analyses that feature little comparative analysis. The introduction and conclusion draw relevant comparisons and turn the work into excellent comparative constitutional law.

analysis of methods counts against the necessity of (ii) or (iii) on its own. Further demonstrating that the legitimate comparative constitutional law purposes can only be fulfilled by a variety of methods further undermines (iii). It is difficult to see the product of fulfilling those purposes as less than a body of knowledge connected by the same subject matter. If a valuable connected body of knowledge does not count as an academic discipline, that is a problem with (iii), not the body of knowledge. Yet, if the following is true, the body of knowledge can only be produced by numerous methods. The fact that many are not unique to comparative constitutional law undermines (ii).

I will ultimately examine (A) Constitutional Taxonomy, (B) Simple Data Collection, (C) Quantitative Constitutional Comparison, (D) Legal Concept History, and (E) Comparative Jurisprudence.⁶² Some categories are coarse-grained and include variations that could be standalone methods. I am open to an alternative taxonomy that treats these variations as separate methods. I place them together here when they share common features, benefits, and drawbacks. While the categories may overlap, the list is accurate and suffices for present purposes.

A. Constitutional Taxonomy

Taxonomy is a comparative constitutional law purpose *and* a comparative constitutional law method.⁶³ Constitutional taxonomy as method is the classification of constitutional phenomena into groups

⁶² Other methodologies in development are not yet established in comparative constitutional law's mainstream. See David S. Law, *Constitutions*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 376, 390-395 (Peter Cane & Herbert M. Kritzer eds., 2010) (suggests that computer simulations could be a fruitful method for future research). Accounting for comparative constitutional law's best practices does not yet require analysis of computer simulations. Law also promotes the use of experiments; they are not likely to be practically feasible for reasons discussed in the main text. I will not address self-consciously setting out to do a project in statistics, behavioral economics, anthropology, or another discipline that takes the law as its subject here. Some traditional comparative constitutional law projects, from studies comparing how people react to certain legal phenomena to large-N studies on the effects of constitutions, could be conducted in other disciplines and adopt methods from those fields. There is bound to be some overlap between this group of methods and others outlined below. There are times when a comparative constitutional law scholar must consult the methods of another discipline to complete her project. Most other fields have short reference works that can serve this function. Yet even if external methods can fulfill many comparative constitutional law purposes, examining methods that are commonly employed by those who self-identify as doing comparative constitutional law research remains worthwhile. When frequently employed by comparative constitutional law scholars for comparative constitutional law purposes, these methods can become part of comparative constitutional law and double as comparative constitutional law methods.

⁶³ This section discusses taxonomy as a method. For discussion of taxonomy as a purpose, see II(g) above.

based on shared features. It has system-, rule- and process-based variants. Classifications take place along a variety of axes, including family (civil/common law, written/unwritten constitutions), area (Western/non-Western constitutions), or temporal (modern/classical constitutions) axes.⁶⁴ Categories may mix.⁶⁵

Applying the taxonomic method is necessary to fulfill the taxonomic purpose, which is required to fulfill other purposes. Other methods presuppose prior use of the taxonomic method.⁶⁶ It is thus necessary to fulfill purposes that can only be fulfilled by those methods. Taxonomy can also provide some insight into norms by classifying their commitments. A complete taxonomy across time and space, while practically infeasible, could map the history of ideas.

Constitutional taxonomy cannot, however, fulfill many functionalist purposes on its own. It tells us very little about how things operate and whether we should adopt them. Likewise, even knowing that, for example, other Communist nations decide a case in a certain way is not (or should not be) determinative of whether a Communist court should decide a case in the same way. Taxonomy produces a great deal of knowledge, but it may produce little understanding and other methods will often be required to produce knowledge that is valuable for functional purposes. Furthermore, while valuable for comparative constitutional law purposes, taxonomy is not unique to comparative constitutional law. It can be conducted by those outside legal arenas, including social and political scientists.

B. Simple Data Collection

Simple data collection comes in three main forms: case study analysis, surveys, and fact pattern solutions.⁶⁷ None can fulfill all comparative constitutional law purposes. None are unique to comparative constitutional law. Case study analysis is the comparison of representative approaches to an issue to identify similarities and differences. This may require a normative (and perhaps causal) account of the similarities and differences to produce knowledge.⁶⁸ Yet many

⁶⁴ Jackson, *supra* note 10, at 55-57.

⁶⁵ For an examination of a legal family over time, see, e.g., GARDBAUM, *Reassessing, supra* note 40.

⁶⁶ *Id.*

⁶⁷ They are simple insofar as they do not require advanced quantitative analysis. They can be valuable.

⁶⁸ See David Kennedy, *The Methods and the Politics*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 345 (Pierre Legrand & Roderick Munday eds., 2003) (offering a

comparisons can help fulfill the normative purposes above and demonstrate the universality of or counterexamples to a norm.

Case studies do not fulfill the demands of (ii) and (iii). They probably cannot sate curiosity about causation. As Hirschl makes clear, the sample sizes involved in case study analyses do not allow for complete causal stories.⁶⁹ Case study analysis thus cannot provide complete understanding of how legal tools will impact society. This may limit the extent to which case studies provide information about what legal tools we should adopt and how we should determine cases. Case studies can provide some minimal theoretical insights in national and universal norms. Some will require assessing national commitments, and case studies can provide counterexamples to, if not proofs of, claims to universalism. But it is unlikely that case studies can map the history of ideas. Lawyers' unique knowledge of the laws of different nations place them well to conduct case studies, but the method is not unique to law.

Surveys are the collection of legal materials on a topic from different jurisdictions to understand possible solutions to issues in a jurisdiction.⁷⁰ Further knowledge about the effects of these surveys is necessary for the functionalist to complete her task. But surveys are not descriptively inadequate if their causal stories are incomplete. If one wants to understand the formal mechanisms available in constitutional law and does not want to understand how they may impact a problem, surveys may be sufficient for such legal tool identification. Surveys can sate curiosity and/or demonstrate the ubiquity of, for instance, judicial review among modern constitutions or provide counterexamples thereto, helping with norm identification.

Fact patterns solutions are closely related. They are the creation of factual scenarios that are representative of legal problems that may arise in any jurisdiction and of jurisdiction-by-jurisdiction analyses of how the problem would be resolved in different localities. One may structure

four-part approach that attempts to solve this problem and a general method for all comparative methods.).

⁶⁹ See HIRSCHL, *supra* note 11, at 193.

⁷⁰ I adopt the language of 'surveys' common in the scientific community (and thus discussed in *e.g.*, Ann Bowling, *RESEARCH METHODS IN HEALTH: INVESTIGATING HEALTH AND HEALTH SERVICES* (2d ed. 2007) at 358 for my own ends here. The use of 'survey' language in comparative law has a long pedigree. See *e.g.*, F.C. Auld, *Methods of Comparative Jurisprudence* 8(1) UNIV. OF TORONTO L. J. 83, 84 (1949) (discussing the Society for Comparative Legislation's annual 'survey' of commonwealth and American laws in the context of an article that explains that comparison is needed to solve public law issues through law reform). The language is admittedly not only used to describe attempts to solve potential problems. It is sometimes instead used to refer to the collection of materials generally. However, I take it that the intended output is a set of constitutional forms in any instance.

one's chapters around the fact pattern⁷¹ or use a set problem-based template for each chapter that will focus on a particular nation.⁷² Such works often make law reform recommendations without complete causal stories.

Simple data collection is an imperfect way of getting causal data, but even proponents of quantitative "large-N studies" as the best comparative constitutional law method grant that it is problematic if "inevitably imperfect or flawed empirical investigation is taken to be inferior to the intuitions and hunches of law professors. The best can be the enemy of the good in research on law as much as anywhere else."⁷³ Having insufficient data to make causal claims does not mean having incomplete data to make any claims. More modestly, fact pattern solutions can be used for universal norm identification. It is the dominant method used by scholars who attempt to demonstrate the harmonization of approaches to a topic and those who seek to undermine it.⁷⁴

Simple data collection can easily identify legal tools and allows for in-depth study thereof, providing insight into how they work and their implications. The level of nuance allowed in case studies and surveys makes simple data collection ideal for nuance-dependent purposes. Where legal reasoning is context-sensitive, these methods can also be helpful for understanding how legal reasoning works in contexts. More basic forms of comparison allow for greater depth of study and are better suited to ends that cannot afford to elide details.

Simple data collection cannot fulfill all purposes. It draws inferences, but not all inferences therefrom are epistemically warranted. It is particularly difficult to draw strong causal conclusions from simple data collection, limiting its value for fulfilling other functionalist purposes. Simple data collection is often criticized for being unable to overcome the causal complexity. To determine whether it is wise to use a given legal tool from a given jurisdiction or decide a case based on how it operated elsewhere, one must first draw causal conclusions about how it operated elsewhere and whether the factors that led to the foreign

71 For an example from comparative private law, see *THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW* (James Gordley ed., 2007). Final examinations in comparative constitutional law classes (and some casebooks used therein) also use generic fact patterns to explore differences between jurisdictions.

72 For example, each chapter in *THE RIGHT TO HEALTH AT THE PUBLIC-PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY*, *supra* note 31, includes a discussion of whether the nations include constitutional health rights.

73 Schauer, *supra* note 32, at 229; *see also* Law, *supra* note 62, at 394-95.

74 *Compare* Sacco, *supra* note 47, *with* *THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW*, *supra* note 71. *See also* Boodman, *supra* note 20.

outcome apply in the jurisdiction. Even the best cases may not allow one to tell a reasonably complete causal story. Any causal story that one wishes to tell will require similarity or difference along many taxonomic lines. It is difficult to identify the relevant similarities and/or differences between jurisdictions. Similarity or difference along multiple taxonomic axes thus appears necessary for causal confidence. Researchers may find it hard to construct this large dataset and control for variables, creating a tendency for researchers “to find what they were looking for.”⁷⁵ Focus on a few nations makes it difficult to make causal claims, which is problematic where many comparative constitutional law purposes seem to address causal concerns.⁷⁶ The many variables in any causal story suggest that case studies and other forms of quantitative analysis may not be able to tell a complete story.⁷⁷ Researchers may “cherry-pick” examples and draw conclusions too quickly.⁷⁸

Despite these worries, case studies, surveys, and fact pattern solutions provide *some* evidence of how certain phenomena fair. If one takes the view that one can act on an incomplete evidence set, people may be able to act on data collected in this way for functionalist purposes. Epistemic norms for action may require less than statistical certainty. Where non-scholars need to act quickly, this data may license action. Less controversially, cherry-picking may be appropriate for certain purposes. One can still identify and understand the workings of legal tools through most well-designed simple data collections. Case studies, at least, can also serve as foundations for theories. Lorraine Weinrib’s post-World War II model of constitutions characterized by bills of rights is instructive; she builds (and tests) her model through case studies.⁷⁹

Simple data selection is valuable for normative comparative constitutional law purposes. A single comparison with a counterexample can negate claimed universal norm identification. Positive results require a global (or at least representative) survey of nations. This result may seem to be best achieved through large-N studies, but that approach cannot solve the problem of identifying whether a legal phenomenon exists in another nation. Many internalist case studies may be required to produce a positive result. If so, case study analysis and surveys may best fulfill the positive conceptual purposes of comparative constitutional

⁷⁵ Schauer, *supra* note 32, at 228.

⁷⁶ HIRSCHL, *supra* note 11, at 193-94.

⁷⁷ Schauer, *supra* note 32, at 228.

⁷⁸ HIRSCHL, *supra* note 11, at 187.

⁷⁹ Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84 (Sujit Choudhry ed., 2006).

law.⁸⁰ No one can conduct such an analysis in full.⁸¹ Simple data collection-focused comparative constitutional law will be a necessarily collaborative field. Case studies and surveys are still legitimate, if non-ideal, methods for some normative ends. Simple data collection may also be used to understand how the tools works. These methods, combined with reasonable assumptions about possible outcomes, may be all that policymakers, including legislators, require to make decisions on how to reform constitutional law. Yet more work is needed to understand the effects of these tools. Repeated case study analysis may provide some causal data on the effects of legal tools, but may not produce evidence required to make causal claims. It can also support conceptual claims like those in universal norm identification.⁸² Case studies focused on legal reasoning can also help one understand how legal reasoning works in a jurisdiction.

Fact pattern solutions in particular are relevant to many comparative constitutional law purposes. They are the dominant method for identifying or negating claims that there are universal or transcendent norms. They are also useful for identifying legal tools, though their use for many functionalist ends that usually follow identifying legal tools is constrained by many of the same factors as other forms of simple data collection. Fact pattern solutions can help one understand legal reasoning in a jurisdiction. By outlining the solutions to problems and explanations of the reasoning used to reach them, fact pattern solutions present data that is applicable for deciding or winning cases. To win a case, one must establish that the court will accept the other nation's solution as an apt comparison and that it uses legal reasoning in a manner similar to your own jurisdiction. Fact pattern solutions' focus on particular situations may elide some nuances about legal reasoning in a jurisdiction. Yet many fact pattern solutions can indirectly provide information on how legal reasoning generally operates in the jurisdiction. Fact pattern solutions are not taxonomic but provide data for taxonomies.

⁸⁰ See HIRSCHL, *supra* note 11, at 226. Even Hirschl grants that this traditional approach is good for concept formation.

⁸¹ This does not exhaust the problems one may face when designing a comparative constitutional law project. For example, one should not study the "usual suspects" that have already been studied and compared with one another in-depth unless one has a unique take on them. *See id.* at 267. Yet the problems above sufficiently identify the strengths and weaknesses of different methods.

⁸² This appears to be the aim of "conceptual functionalism," a variant discussed by Jackson, *supra* note 10, at 63-64. Conceptual functionalism may bring the underlying values of the comparator nations to light, fulfilling the aims of national norm identification. Some question how easy it will be to identify them. *See, e.g.,* Annus, *supra* note 10, at 336.

Yet one may question whether comparative constitutional law scholars (let alone readers) draw proper conclusions from case study analysis, surveys, and fact pattern solutions. Many challenge simple data collection's ability to fulfill all comparative constitutional law purposes. Comparative constitutional law is often said to be unable to address causal complexity in the field. The issue stems from the difficulty of identifying "all of the variables that are relevant to . . . [for instance] respect for human rights, much less to determine what importance to assign to each of them. The underlying causal mechanisms and chains of causation are also difficult to parse."⁸³ Where several comparative constitutional law purposes require study of the effects of constitutional interventions or predictions about the effects of potential interventions, it would be problematic if comparative constitutional law was unable to overcome the complex causality concern. Focus on case studies is thus "not entirely healthy" for the discipline.⁸⁴ Surveys and fact pattern solutions too seem unable to address causation concerns.

The concerns and limitations above suggest that simple data collection cannot be the sole method of comparative constitutional law. This provides reason to recognize other methods and to use this method less. It does not undermine the case for properly-used simple data collection as a source of genuine knowledge.

C. Quantitative Constitutional Comparison

Quantitative constitutional comparison is specifically designed to address causal concerns. Anne Meuwese and Mila Versteeg define it as "the systematic comparison of constitutional materials through the use of statistical methods."⁸⁵ This approach requires translation of legal materials into quantitative data.⁸⁶ Statistical tools, such as regressions, account for many variables that are present in any study. The most common form of quantitative study that is championed in the comparative constitutional law literature is the "large-N study." Studies with a larger

⁸³ Law, *supra* note 62, at 387. Law adds that path dependence and bidirectional causation/endogeneity makes this issue acute. *See id.* at 388.

⁸⁴ *Id.* at 389. Law's concern also stems from his sense that case studies are not meeting their potential as they are not properly constructed to fulfill their stated purposes. *See id.* I address this concern here.

⁸⁵ Anne Meuwese & Mila Versteeg, *Quantitative Methods for Comparative Constitutional Law*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE* 230 (Maurice Adams & Dirk Heirbaut eds., 2014).

⁸⁶ It is also called "numerical comparative law." *See* Siems, *supra* note 5, at 148.

number of subjects, “N” can use quantitative tools to produce more sophisticated statistical models.⁸⁷

Quantitative constitutional comparison is the top candidate for comparative constitutional law’s response to (ii) and (iii), yet those who promote it acknowledge that it may not leave a unique role for the lawyer and do not fully subscribe to (i). Hirschl, for one, champions comparative constitutional studies as an *alternative* to comparative constitutional law.⁸⁸ Yet quantitative constitutional comparison cannot fulfill (ii) and (iii) in a normatively and descriptively adequate fashion and that there is no need to deny (i) to account for quantitative constitutional comparison’s seeming inability to fulfill (ii) and (iii). Quantitative constitutional comparison is best understood as one valuable method among others under the larger comparative constitutional law disciplinary tent.

A large-N study, the most common form of quantitative constitutional comparison, can be defined as the repeated comparison of many jurisdictions over many variables in an attempt to eliminate irrelevant variables and make causal claims. It is helpful but imperfect. The difficulties of identifying a unique functionalist method are well-documented.⁸⁹ Where functionalism aims to account for all causal factors that could impact an outcome, large-N studies’ use of multiple regressions is well-suited to this end.⁹⁰ Others suggest these studies are uniquely positioned to explain “when and why constitutions matter”⁹¹ and, more practically, are useful because they can avail themselves of existing datasets.⁹² Yet even proponents of large-N studies admit that they favor breadth over depth and may elide important details.⁹³ Proponents also inadequately explain what methods fall under this broad category. While all my categories are coarse-grained, the issue is particularly acute here. One may be left applying external methods to law. Her trip outside comparative constitutional law may then lead her to find

⁸⁷ For a nuanced discussion of these studies in the CCL context, see HIRSCHL, *supra* note 11 at 267-277.

⁸⁸ *Id.*

⁸⁹ See, e.g., James Gordley, *The Functional Method*, in *METHODS OF COMPARATIVE LAW* 107, 107 (Pier Giuseppe Monateri ed., 2012) (notes that it is hard to identify the theoretical underpinning of functionalism or its methodological contribution, “[y]et many comparative lawyers accept some form of the functional method,” perhaps due to its ability to reach good results).

⁹⁰ ZWEIGERT & KÖTZ, *supra* note 25.

⁹¹ Meuwese & Versteeg, *supra* note 85, at 230.

⁹² *Id.* at 237. A broad enough definition of “large-N study” allows for the theoretical existence of qualitative large-N studies, but qualitative studies require nuanced interactions that are practically nearly impossible on a largescale, so actual large-N studies are best described as a species of quantitative (here constitutional) comparison.

⁹³ *Id.* at 239.

that references to “large-N studies” as a class of methods are simplifications. The scientific literature recognizes that the “N” number needed to make a certain claim varies based on one’s objectives and a higher “N” may be needed for a strong causal claim. Yet most scientific methods can be used in small-N *and* large-N studies. Social science-oriented comparative constitutional law scholars use “large-N studies” as a catchall for a variety of methods with a sufficiently large-number of subjects to make a statistically significant claim. More detail is needed on what would be “caught” before assessing their value. They could be a catchall for the rigorous and non-rigorous.

The statistical sciences provide a good starting point for identifying types of large-N studies, but also demonstrate that that large-N studies cannot fulfill all comparative constitutional law purposes. Scientists commonly use two method-types to collect evidence for causal claims.⁹⁴ First, there are interventional studies, analyses in which investigators introduce a variable (the intervention) into a state of affairs with the purpose of securing a certain outcome and testing the impact of that variable on the outcome.⁹⁵ These include randomized control studies (giving the intervention to a population and not to a “control group” population and seeing how the two populations fare with respect to an outcome).⁹⁶ Second, there are observational studies, analyses of a set of subjects without the use of an intervention.⁹⁷ These include cross-sectional and cohort surveys (descriptive data collection from a representative sample of potentially affected entities or a specific subset of those entities) and case control studies (comparisons of a case group with a control group with respect to a given characteristic).⁹⁸ Again, the number of subjects, not the methods themselves, makes them “large-N.” Methods can be combined in mixed methods studies that can minimize others’ weaknesses, including the possibility of failing to account for a variable.

Although randomized control trials are specifically designed for the generation of causal claims, only observational studies are possible in comparative constitutional law. Randomized control studies in comparative constitutional law are unlikely. Comparative constitutional law scholars lack the power to make the requisite intervention. We cannot

⁹⁴ These types of studies are described in the methods sections of most scientific and social scientific textbooks. *See, e.g.*, BOWLING, *supra* note 70.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

change constitutions to test theories. It is unlikely that such a study would meet the standards of research ethics even if it was otherwise well-designed. Radically altering the lives of existing persons for the sake of comparative constitutional law research alone will not reasonably balance the demands of individual rights and producing general knowledge for the greater good. Scientific literature suggests that making causal inferences from observational studies is difficult.⁹⁹ Multiple observational studies are likely needed before making causal claims.¹⁰⁰ This suggests that a single large-N study may not provide the causal information that its proponents promote. Yet even if large-N studies cannot provide this strict causality, they can provide strong, quantifiable evidence for inferences.¹⁰¹

Large-N studies produce highly probative support for causal stories, even if they cannot “prove” causation, but this does not support their use as *the* comparative constitutional law method. Other methods can also produce the evidence needed to make decisions in law and public policy. Just as one does not need a full randomized control trial to see that physicians washing their hands will improve patients’ health outcomes, one may not need a large-N study to see that constitutional judicial review will, *ceteris paribus*, constrain executives and legislators.¹⁰² Large-N studies provide more data for analysis and can thus sift out more potentially irrelevant factors. They may be able to better identify “causal links” between constitutional phenomena and outcomes, even if they cannot establish strict causation.¹⁰³ They are not a panacea. Quantitative methods may also be unable to capture all the relevant data in a comparative constitutional law analysis. Multiple tests could eliminate each variable and provide a reasonably complete set of causal factors that account for the nuances of a setting. Yet those nuances are more easily

⁹⁹ W.G. Cochran & S. Paul Chambers, *The Planning of Observational Studies of Human Populations*, 128 J. ROYAL STAT. SOC’Y 234 (1965) (providing a classic statement of the issue but does not state that such causal claims are impossible).

¹⁰⁰ See, e.g., Paul R. Rosenbaum, *From Association to Causation in Observational Studies: The Role of Tests of Strongly Ignorable Treatment Assignment*, 79 J. AM. STAT. ASS’N 41 (1984).

¹⁰¹ Cochran & Chambers, *supra* note 99.

¹⁰² John Worrall, *What Evidence in Evidence-Based Medicine?* 69 BRIT. J. PHIL. SCI. S316 (2002). The example provided in my note stems from an analogy provided by John Worrall’s work. See John Worrall, *Why There’s No Cause to Randomize*, 58 BRIT. J. PHIL. SCI. 451 (2007).

¹⁰³ John Worrall, *What Evidence in Evidence-Based Medicine?* 69 BRIT. J. PHIL. SCI. S316 (2002). The example provided in my note stems from an analogy provided by John Worrall’s work. See John Worrall, *Why There’s No Cause to Randomize*, 58 BRIT. J. PHIL. SCI. 451 (2007). Hirsch sometimes uses this more precise language of “causal links.” See, e.g., HIRSCHL *supra* note 11, at 269.

captured by a simple case study. The case study is a more direct method and more manageable for collections of mortal scholars.

Claims that large-N studies are the best method for comparative constitutional law research, then, are overstated. While quantitative constitutional comparison can provide causal data that is necessary for functionalist ends, it may not be uniquely capable of doing so. Quantitative constitutional comparison is also valuable, but not uniquely so, for other purposes. Large-N studies, with their multiple regressions, are supposed to better account for easily modelled potential similarities and differences. Yet even large-N studies may need to choose representative states; so many large-N studies may not be able to tell complete stories either. Fortunately, less complete stories can help fulfill taxonomic purposes. Small-N quantitative studies may help taxonomic endeavors too: we can distinguish between a small number of cases to identify types of constitutional phenomena.¹⁰⁴ Quantitative constitutional comparison, then, can make contributions to comparative constitutional law even in small-N studies. But these contributions are not unique to quantitative constitutional comparison either. Indeed, Andrew Arato claims that social science-based studies may not give us anything “sophisticated practitioners” do not already know.”¹⁰⁵ Moreover, comparative constitutional law must be attentive to the difference between “de jure, written, codified, or formal constitutions (“large-c” constitutions), on the one hand, and de facto, unwritten, uncoded, or informal constitutions (“small-c” constitutions), on the other.”¹⁰⁶ Much of contemporary comparative constitutional law research focuses on law and society topics that are not easily quantified.

Quantitative constitutional comparison can only overcome the problem of commensurating between conceptual schemes by introducing new problems that limits its use. Large-N studies attempt to avoid the commensurability concern by using a common background as a basis for translation: all legal data is translated into quantifiable numbers.¹⁰⁷ But the worry that important distinctions will be missed in translation is acute there. Translating text into data, as required by all quantitative analyses,¹⁰⁸ on a largescale, as required by large-N studies, can be helpful.

¹⁰⁴ See e.g. GARDBAUM, *supra* note 40.

¹⁰⁵ ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY 142-57 (2016).

¹⁰⁶ Law, *supra* note 62, at 377; see also Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 405, 405 (Dawn Oliver & Carlo Fusaro eds., 2011).

¹⁰⁷ Meuwese & Versteeg, *supra* note 85, at 255.

¹⁰⁸ *Id.* at 241.

Quantitative constitutional comparison is better placed to put all legal materials on a common scale than alternatives. Once the materials are on that common scale, it is less likely that the comparatist will fall victim to the temptation to treat dissimilar legal phenomena as equivalent. Yet this process also offers opportunities not only to elide details but to fundamentally misrepresent phenomena.

While large-N studies seem well-suited to identifying the effects of interventions, they may not be well-suited to understanding how those tools work in different jurisdictions and accordingly may not provide a complete list of reform options. Paradigmatic examples of quantitative constitutional comparison are thus ill-suited to comparative constitutional law purposes that require nuance. National norm identification purposes provide a particularly good example. It is difficult to understand the underlying norms of a nation from statistical data. Taxonomic and normative methods are better suited for that task. Any analysis of small-c constitutions also seems to require nuance that is difficult to attain quantitatively.¹⁰⁹

Large-N studies, then, are useful but cannot fulfill all comparative constitutional law purposes and may not uniquely fulfill any of them.¹¹⁰ Even if large-N studies were adopted as a primary, rather than exclusive, method for comparative constitutional law research, there are questions about which large-N study methods are most helpful for a given topic.¹¹¹ Emphasis on causality leads too many scholars to think that they alone should be the unique comparative constitutional law method that can fulfill (ii) and (iii).

Other quantitative methods present unique problems. Where quantitative constitutional analysis cannot fulfill all comparative constitutional law purposes, even its proponents suggest that exclusive use of this method would turn comparative constitutional law into another

¹⁰⁹ Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 775 (1997) (stating that applying statistical data to even large-C constitutions was impossible). The problem is more acute when dealing with small-C constitutions. There is little reason to omit small-C constitutional studies from comparative constitutional law just to make it easier to adopt a single method as uniquely suited to comparative constitutional law, particularly when that method also belongs to other disciplines.

¹¹⁰ It is thus unsurprising that Jackson, *supra* note 10, at 63-64, promotes two other functionalist methodologies, but both arguably collapse into existing methods on closer examination.

¹¹¹ Quantitative analysis may even fail to fill the anti-luck condition on knowledge given replication problems in quantitative analyses in other disciplines, and the fact that any study of comparative constitutional law will likely be “noisy” (viz., subject to other confounding variables), reducing the causal data that can be found anyway. See Alexander A. Aarts et al., *Estimating the Reproducibility of Psychological Science*, 349 SCIENCE 943, 943 (2015). Quantitative methodologies are sufficiently reliable to produce knowledge despite these complications.

discipline of comparative constitutional studies, and this method is used by persons in other disciplines, adopting quantitative constitutional analysis as *the* comparative constitutional law method will not allow comparative constitutional law to fulfill (ii) and/or (iii).

D. Legal Concept History

Legal concept history is designed to map the history of ideas. Commonly called “legal families” research in comparative law,¹¹² it is the process of studying the relationships between legal systems and their components to analyze how, when, and why concepts developed. This can be rule-based, idea-based, or process-based.¹¹³ Legal concept history cannot tell us how a tool operates in given settings and whether it would work in a new one. It can map the history of ideas (and does so better than alternatives) and provide insight into other normative comparative constitutional law purposes.

Legal concept history avoids some pressing issues facing small-N and large-N research studies. Consider case selection. Scholars who believe that there must be some genealogical relationship between nations for them to serve as proper comparators (rather than mere analogies between them¹¹⁴), such as Alan Watson,¹¹⁵ avoid the brunt of that concern.¹¹⁶ This may favor legal concept history, which is necessarily concerned with historical links between nations. These projects also help avoid the so-called “internalist challenge” that one cannot know another system without being immersed in it. Taking the challenge too seriously would limit many scholars’ choices for comparison. Few have time to master multiple legal worlds, so few case studies will be possible on the internalist view. Legal concept history avoids this concern by focusing only on legal phenomena that clearly moved from one jurisdiction to another. It directly responds to the purpose of mapping the history of ideas and sets its own limit on which aspects of history are relevant.

But legal concept history faces its own problems. Comparative constitutional law as legal concept history misrepresents the state of comparative constitutional scholarship and cannot address all norm

¹¹² See WATSON, *supra* note 8.

¹¹³ See Frankenberg, *supra* note 5, at 427 (referring to this as “comparative historical reconstruction”). Frankenberg adds that the method should find an ideal in history (and merges legal concept history and surveys). *See id.*

¹¹⁴ See SAMUEL, *supra* note 57, at 57-58.

¹¹⁵ WATSON, *supra* note 8, at 7-9.

¹¹⁶ Commonwealth courts appeal to such genealogical linkages in their legal reasoning. *See Annus, supra* note 10, at 327.

identification purposes. Comparative constitutional law scholars do a lot more than trace the history of ideas and knowing how an idea developed in the past does not necessarily help us understand the norms that currently exist in a nation or provide a clear understanding of the nature of norms (except to show that their legal recognition in certain jurisdictions took place at given times). Further, legal concept history is not unique in its ability to respond to the internalist challenge. Legal concept history avoids the brunt of the challenge by focusing on phenomena that cut across jurisdictions, but comparative jurisprudence (below) does so more easily. Finally, legal concept history focused on actual historical relationships between jurisdictions may misrepresent the movement of ideas. Mark Tushnet's work on bricolage, "the assembly of something new from whatever materials" a drafter or interpreter had on hand, shows that legal concepts may move independently from other historical markers.¹¹⁷ A genealogical approach to legal concept history assumes a history of movement that the wider empirical record does not support in the case of constitutional ideas. Adopting the genealogical approach solves a problem while creating another.¹¹⁸

Legal concept history is thus a useful, but imperfect, method for normative ends. It does not easily fulfill ends and creates its own problems. It thus cannot be the unique comparative constitutional law method.

E. Comparative Jurisprudence

Finally, William Ewald's comparative jurisprudence is "the comparative study of the intellectual conceptions that underlie the

¹¹⁷ Tushnet, *supra* note 17.

¹¹⁸ Legal concept history is further subject to the challenge that concepts change when they move. *See, e.g.*, Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EURO. & COMP. L. 111 (1997). This concern, which is also raised to discredit other methods, is overblown. Even if full "internalism" is not required for comparison, it is difficult to identify whether a legal phenomenon exists in another nation in either a legal or non-legal form. Comparative lawyers should worry that one may misapply labels from her own system to the other system and thereby distort the object of study. *See* Maurice Adams, *Controlled Comparison and the Language of Description*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW*, *supra* note 8, at 87; Valcke & Grellette, *supra* note 8. Some concepts may be incommensurable. Even if a god could commensurate them, humans may always be tied to a perspective and consequently unable to understand how concepts exist in another perspective. Yet this concern ignores an important fact: translation of legal concepts takes place all the time. *See, e.g.*, James Q. Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra* note 25, at 312. The worry that a lack of shared background assumptions, including language, can lead to misunderstandings is apt, but misunderstandings happen all the time.

principal institutions of one or more foreign legal systems.”¹¹⁹ It is concerned with mapping the history of ideas,¹²⁰ and is designed to fulfill normative comparative law purposes. It appears to be better at fulfilling them than alternatives.

Comparative jurisprudence was originally used to compare how legal actors in different systems view the philosophical underpinnings of their respective systems.¹²¹ Subsequent literature acknowledged that actors within the system can err in their identification of their underlying norms.¹²² Comparative jurisprudence could be used by someone outside the system. S/he could study the intellectual history of different systems and identify their underlying philosophies. Since comparative jurisprudence is concerned with explaining and comparing philosophical presuppositions, it (unlike legal concept history) can be used to compare nations with no genealogical history. For example, understanding the differing strains of legal positivism, a once-dominant philosophical position in Germany and Brazil, could help explain similarities and rifts in the structures and jurisdictions of the German and Brazilian Constitutional Courts that predate post-World War II overlap in German and Brazilian academia. While it allows some analysis by external actors, comparative jurisprudence is designed to meet the internalist challenge and meets it head on by requiring an internal perspective. Successful use of the method should help various norm identification exercises. Norm identification is a necessary step in the completion of this method. Comparative jurisprudence thus produces more normative information than legal concept history and is the best method for normative comparative constitutional law purposes along some axes.

Yet comparative jurisprudence cannot fulfill (ii) and (iii) in a descriptively or normatively adequate fashion. It resembles work by philosophers and historians of ideas and says very little about what legal tools exist in given jurisdictions, how they work, and whether we should adopt them if we want to fulfill functional, rather than normative, ends.

¹¹⁹ Ewald, *supra* note 13, at 2114; *see also* Valcke, *supra* note 8.

¹²⁰ Idea-based legal concept history is partially explanatory of comparative jurisprudence, but comparative jurisprudence not only traces the movement of ideas across nations but also examines differences between the native philosophical positions underlying countries' laws. I thus treat comparative jurisprudence as a standalone method, but the final two methods could be bundled like simple data collection. An Alan Watson-edited series examines the “spirit” of different legal systems. *See* Whitman, *supra* note 50, at 317-23. Each text is devoted to a country, but the series provides a source for comparative jurisprudence focused more on native philosophical positions than the movement of ideas.

¹²¹ Ewald, *supra* note 13.

¹²² Whitman, *supra* note 50, at 334-36.

V. (OTHER) REASONS TO ACCEPT METHODOLOGICAL PLURALISM

Methodological pluralism, then, accounts for comparative constitutional law practice while ensuring that comparative constitutional law fulfills its legitimate purposes.¹²³ There are at least six other reasons to recognize methodological pluralism as legitimate. First, the fact that all the methods face the same additional explanatory burdens suggests that there is something that they share. This commonality among comparative constitutional law methods provides further evidence that the methods are not an ad hoc collection but part of a genuine research regime that can and should be called an academic discipline. Correctly matching a method to a purpose is not enough to make a project worthwhile. To produce genuine knowledge, further conditions must be satisfied. One must fulfill the same conditions for any comparative constitutional law method, suggesting relationships between them. For example, all research projects need to determine which parts of the law to compare (rules, institutions, legal cultures, modes, forms of legal reasoning, etc.).¹²⁴ Scholars must then determine *who* to compare. All small-N studies and any large-N study that do not include all cases must select cases using a relevant principle.¹²⁵ Finally, all projects must outline and defend the appropriate period of study. This demand is warranted since facts change over time. Each of the burden-producing questions here and multiple answers thereto have merits. A project must provide robust and justifiable answers to each to produce genuine knowledge. All comparative constitutional law research projects share these burdens. Insofar as the subjects of study for all of them are limited to the same parts of the law, at least one common burdens uniquely applies to legal studies. The further requirement of comparison means that all the methods share a commitment to the comparative study of the same small set of parts of law. These common burdens would not, on their own, ground a claim that the methods jointly provide tools for a standalone academic discipline. Scholars in other disciplines must answer these questions and some focus on the same parts of law. The fact that the

¹²³ Pluralism may be necessary to fulfill individual comparative constitutional law purposes too. *See, e.g.,* Law, *supra* note 62, at 390.

¹²⁴ Compare Ariel L. Bendor & Michael Sachs, *The Constitutional Status of Human Dignity in Germany and Israel*, 44 *ISR. L. REV.* 25 (2011), with HIRSCHL, *supra* note 11, and THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW, *supra* note 71, and COMPARATIVE CONSTITUTIONAL DESIGN (Tom Ginsburg ed., 2012), and Valcke, *supra* note 8.

¹²⁵ HIRSCHL, *supra* note 11, at 244, 267. These pages list five commonly used distinctions for small N studies. *See id.* Scholars commonly compare the “most similar,” “most different,” “most difficult,” “prototypical,” or “outlier” cases. *See id.* Large-N studies often focus on “representative” cases. *See id.* All these distinctions presuppose minimal taxonomic comparisons. *See id.*

methods are all, also, related in their ability to fulfill comparative constitutional law's purposes establishes comparative constitutional law's disciplinary status on its own. The further commonality of the shared burdens provide *further* evidence.¹²⁶

Second, comparative constitutional law's methodological pluralism is consistent with pluralism elsewhere in our understanding of law and with value pluralism elsewhere in morality. Domestic and international laws are committed to multiple goods. Dignity, equality, civil and political rights and freedoms, social rights, and other *prima facie* incommensurable goods and values appear throughout domestic and international laws and different laws try to further differentiate normative ends (with some prioritizing the worse off in society and others trying to achieve complete equality).¹²⁷ The goods themselves are then often realized in law in a way that acknowledges that norms, like non-discrimination, are themselves multi-faceted and pluralistic in their aims.¹²⁸ In both cases, the law's recognition of a variety of goods is consistent with a common position in ethics. Many scholars believe that there are several important values/goods.¹²⁹ Some believe that not all values can be realized by any scheme, but each is independently valuable and worth pursuing.¹³⁰ While that view is controversial, the fact that we commonly acknowledge pluralism in law and ethics provides some evidence for the view that the form of pluralism I adopt here, which is grounded in a pluralist view of the different types of valuable knowledge, is not necessarily problematic.

¹²⁶ The fact that different methodologies responds better to different parts of these burdens also counts in favor of methodological pluralism. For example, regarding the question of which parts of the law to compare, fact pattern solutions that only include legal responses and rule-based legal concept history only account for legal rules and case study analysis focused on rules or legal decisions faces similar problems. Insofar as these burdens raise any comparative constitutional law research project, fulfilling all the comparative constitutional law projects in a satisfactory way will again require pluralism.

¹²⁷ The international human rights law claim is clear from the text of canonical documents like G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. The widespread recognition of civil and political rights and freedoms in domestic constitutions requires no citation. The widespread recognition of social rights is established in, for example, Jung, Hirschl & Rosevear, *supra* note 51.

¹²⁸ See, e.g., Sophia R. Moreau, *The Wrongs of Unequal Treatment*, 54 *U. TORONTO L.J.* 291 (2004).

¹²⁹ See, e.g., Elinor Mason, *Value Pluralism*, STAN. ENCYCLOPEDIA OF PHIL. (2018), <https://plato.stanford.edu/entries/value-pluralism>.

¹³⁰ I thereby commit to the kind of value pluralism discussed by Mason, *id.* and championed by ROSS, *supra* note 15, among many others

Third, pluralism is not only explanatory of comparative constitutional law practice, but of excellence in comparative constitutional law research. Different great works of comparative constitutional law scholarship use different methods. This is not a problem if methodological pluralism is acceptable. Gardbaum and Jacobsohn primarily use case studies.¹³¹ Sujit Choudhry's classic work on the migration of constitutional ideas largely employs legal concept history.¹³² Gardbaum, Jacobsohn, and Choudhry are all acknowledged examples of excellence in comparative constitutional law. Pluralism also has the benefit of explaining why many great individual works employ a variety of methods. Arato's recent book on constitutional ideas thus attempts to fulfill multiple kinds of purposes and uses a variety of methods to do so. The structure of his book demonstrated his acknowledgment that multiple methods were necessary to fulfill multiple purposes.¹³³ Part 1 addresses historical and theoretical issues.¹³⁴ Part 2 presents a series of case studies.¹³⁵ Part 3 turns to the political stakes of differing "paradigms of constitutional change," adopting multiple methods in a single section.¹³⁶

The pluralist account explains contemporary comparative constitutional law research, general intuitions about what counts as comparative constitutional law research, *and* intuitions about what constitutes excellence in the field. An approach that can account for practice and considered intuitions about excellence therein is, all else being equal, preferable to one that cannot. This counts in favor of the pluralist account. Where singular works have multiple purposes, each purpose may require multiple methods to be solved, and great works employ multiple methods to fulfill those purposes, methodological pluralism may be necessary for the discipline to sustain its current pace of output and status as a self-sustaining academic discipline capable of producing genuine knowledge.

A critic could charge that the use of a variety of methods in single works does not count in favor of pluralism. A critical analysis of the methods should not assume that existing works are methodologically sound. Appealing to existing methods to explain risks begging the question of whether existing works meet proper standards of rigor.

131 See JACOBSON, *supra* note 17; GARDBAUM, *supra* note 40; JACOBSON, *supra* note 43.

132 See THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 34.

133 ARATO, *supra* note 105.

134 *Id.*

135 *Id.*

136 *Id.*

Relatedly, one may argue, existing works misuse existing methods. One may argue that existing works use a variety of methods, but do not do so with sufficient rigor and/or draw unwarranted conclusions from that variety, mixing together methods to draw conclusions greater than their parts in an epistemically illicit manner. I doubt that anyone would allege that classic works in the field are advertent works of trickery, but they could constitute bricolage and bricolage fails the anti-luck condition on knowledge.

These charges do not undermine my view. Saying that a theory's ability to explain current practice counts in its favor does not beg the question of whether that practice is desirable. Saying that the theory also explains intuitions about why certain works are valuable does not beg the question of whether the works are valuable. It explains why intelligent people working in the field value them. Further, even if existing works do not meet all the demands for quality research, that fact does not mean that the works are epistemically worthless. Assuming good faith on the part of existing comparative constitutional law researchers is warranted absent contrary evidence. Their work may not achieve everything that they profess that it achieves, but this does not mean that their outputs lack *any* evidential value. All else being equal, a theory that can explain why we thought those works were good is preferable to one that cannot explain them. The pluralist approach explains why we thought those works were valuable. It can also explain why some of the evidence retains its value and why others do not meet modern standards for success.

Full analyses of each work would be necessary to determine whether the theories explain intuitions about the value of inferences in a classic. It suffices for now to note that pluralists can explain why certain inferences are valid and remain compelling while others no longer seem relevant: some inferences accurately pair methods and purposes while others do not. Relatedly, the preceding criticism relies on an implausibly ahistorical approach to reading comparative constitutional law. Even if past works were insufficiently rigorous by modern standards, we should not wholly discount the good ones simply because they fail to meet standards that did not exist at their time of creation. Explaining the value of these works remains useful where we recognize that they may suffer from defects that were not apparent under the terms of then-dominant approaches to research.

Methodological pluralism should also be accepted because, fourth, it is consistent with increased emphasis on the interdisciplinary study of law. Interdisciplinarity is widely recognized as important and epistemically and sociologically valuable insofar as it promotes collaboration that fill knowledge gaps. It is practically valuable insofar as

it lessens the cost of research. Allowing lawyers to adopt a variety of methods makes it easier for them to engage in interdisciplinary work. Law schools thus commonly partner with other faculties to provide joint degrees and hire cross-appointed faculty. One may argue that pluralism is a barrier to interdisciplinary research as (ii) and (iii) would leave lawyers unable to provide a *unique* contribution to interdisciplinary work. But lawyers would retain and contribute unique subject matter knowledge in any well-constituted interdisciplinary team. The development of law and economics and legal theory as standalone academic disciplines housed in law schools did not render lawyers superfluous in the study of law's economic or philosophical components and implications.

Fifth, methodological pluralism makes sense of and helps support American and Canadian legal education and the value of double majoring in other countries. If there is no unique method for comparative constitutional law, it is legitimate to question why comparative constitutional law should be a standalone discipline. This issue is particularly acute if there is no unique set of scholars who are trained to apply those methods. This issue may not arise for judicial practice. Judges are uniquely trained to decide cases and can be trained to apply these methods in a way that accounts for the specific role they play in deciding cases and the mix of formal legal methods and comparative constitutional law methods therein is unique. Trying to account for academic practice, by contrast, requires acknowledging the contributions of, for example, political scientists to comparative constitutional law. Political scientists, including some without legal training, conduct excellent comparative constitutional law research.¹³⁷ If the methods of comparative constitutional law already belong to political science and political scientists produce great works that fulfill comparative constitutional law purposes, political science could make comparative constitutional law redundant: Why do this work in a law school? Is it just subject matter expertise? Does one need training in another discipline's methods to contribute?

One could avoid these questions by suggesting that certain purposes that can only be performed by certain methods are not part of comparative constitutional law proper. Saying that my work should not account for the work of political scientists in comparative constitutional law would more easily avoid this concern than recognizing that at least lawyers need to learn about political science methods. However, this would radically alter our understanding of what counts as comparative constitutional law or

¹³⁷ While Hirschl is legally trained, consider Jacobsohn. Historians (like Arato), philosophers (like Ewald), and others.

excellence therein. I prefer to alter legal education if necessary. But any purportedly necessary changes in legal education here support the North American approach to legal education in which one must develop a unique set of skills before beginning one's legal studies. Existing schools elsewhere that allow and preferably support double majoring would not need drastic changes either. Where political scientists are not the only people who use methods that can be fruitfully applied in law, many different pre-law school majors and/or concurrent double majors would be valuable.

It can be difficult to explain why comparative constitutional law should be a standalone discipline in a law school once one acknowledges that some comparative constitutional law methods require formal training that is usually provided by other departments and scholars in those departments produce some of the best work under the comparative constitutional law label. It may be particularly difficult to convince grant evaluators that a comparative lawyer is best suited to address a question if the lawyer lacks training in a discipline uniquely suited to the purpose at hand, particularly where lawyers may not have the skillsets necessary to apply some of these methods and non-lawyers may lack the legal knowledge to properly understand these distinctions. This could make recruiting to the law school difficult, which would undermine comparative constitutional law's self-sustenance. If recognizing various methods makes the continued existence of comparative constitutional law as a standalone discipline infeasible, this would be problematic. Even (i) would be unfulfilled.

This concern can be better avoided by paying attention to the unique expertise of legal educators and consequent unique subject matter training of lawyers. Lawyers' analytical training makes them well-suited to adopt methods which take law as their subject. Their knowledge of specific details of law may then make them less likely to commit some methodological errors. For example, a lawyer's knowledge of the details of social rights jurisprudence may help her more easily notice the functional difference between aspirational and entrenched social rights and not treat them as equivalent. Lawyers may need to learn methods from outside law to conduct comparative legal research. This will not unduly shrink the pool of comparative constitutionalists. One need not master a set of methods for it to produce functionally valuable information.¹³⁸ Graduate education may not be necessary for competence:¹³⁹ indeed, Meuwese and Versteeg suggest that comparative

¹³⁸ Meuwese & Versteeg, *supra* note 85, at 231-32.

¹³⁹ *Id.*

lawyers merely need to take statistics to improve their work.¹⁴⁰ This is a piece of wise advice for any scholar. If greater mastery is needed, this could support the North American legal education model. Comparative lawyers there can develop skills before law schools. Law schools could then provide the knowledge of legal content necessary to apply her methodological skills. Great works of comparative constitutional law can be completed without formal legal training. Yet the unique expertise of legal educators makes the law school the best place for comparative constitutional law researchers to learn the basic legal subject matter that all comparative constitutional law researchers need to study. This may provide reason for schools that do not teach comparative constitutional law alone to begin doing so.¹⁴¹ At minimum, it supports learning law *and* another discipline. Where law is an undergraduate discipline, it supports increased access to double majors, method courses, and/or standalone comparative constitutional law courses.

Finally, methodological pluralism should be accepted because it can retain a unique place for comparative constitutional law scholars in the academy. Methodological pluralism allows comparative constitutional law to have the benefits above without eliminating the lawyer's unique contribution to law. On the model offered here, lawyers still play a central role in comparative constitutional law research, which helps explain why comparative constitutional law is not only a unique academic discipline, but one that is often conducted in faculties of law. In short, comparative constitutional law remains a primarily legal discipline because (A) lawyers retain their unique knowledge of the subject matter and (B) doctrinal analysis, a central method of legal scholarship, still plays a central role.

VI. OBJECTIONS/REPLIES

The most forceful lingering objections do not undermine my case for methodological pluralism in comparative constitutional law and comparative constitutional law's status as an academic discipline. First,

¹⁴⁰ *Id.*

¹⁴¹ For example, few Latin American law schools have standalone comparative constitutional law courses. Where comparative constitutional law is open to pluralism, comparative law is not, and comparative constitutional law has purposes that do not perfectly overlap with comparative law purposes, a standalone course in comparative constitutional law may be better tailored to exploiting students' substantive knowledge of comparative constitutional law than a general comparative law course. Some institutions already attempt to exploit this substantive legal knowledge with their courses. The Centre for Comparative Constitutional Studies is a hub for such research. Participants in the Centre for Transnational Legal Studies also teach comparative constitutional law on its own.

one may argue that (ii) and (iii) are true, so the forgoing simply proved that comparative constitutional law is not a real academic discipline. This critique fails and does not undermine my project. I did not depend on the falsity of (ii) or (iii) to establish my claims above. I gave ample reasons to question them. Many academic disciplines, including paradigm cases like philosophy, do not fulfill (ii) and (iii).¹⁴² (ii) and (iii) thus not only fail to explain the fact that comparative constitutional law continues to thrive without fulfilling its demands, but also fails to explain why we accept other fields as genuine disciplines. Further, I demonstrated that accepting (ii) and (iii) in the comparative constitutional law context makes the pursuit of many valuable pieces of knowledge (and understanding) seemingly impossible for legal scholars. I demonstrated that multiple methods do produce knowledge that is linked in important ways. If that is not enough to constitute an academic discipline, I am not sure what the value of the phrase “academic discipline” is and would be happy to jettison it. It would not undermine the value of comparative constitutional law as a pluralist enterprise. These are just three of the several *reasons* I gave above to reject (ii) and (iii) as conditions for comparative constitutional law’s status as an academic discipline. Choosing between (i) and (ii) or (iii) is thus not just a matter of choosing one’s favorite interpretation of the data.

Second, one may argue that some methods above do not uniquely fulfill a purpose, and this raises issues about their value from a strictly normative perspective. If something produces knowledge, but it is not the only way of producing that knowledge and other ways produce knowledge better, this provides reason to question why one should use it. I could give up on a method above if it can be shown that it only produces knowledge that is also produced by others and is not appreciably better than others at doing so. It is presently better to recognize that they all produce knowledge and acknowledging them as legitimate parts of comparative constitutional law is more explanatory than alternative accounts, avoiding accusing scholars of subpar work.

Third, this account could make it difficult to determine “counts” as comparative constitutional law research. If comparative constitutional law lacks a unique method or set thereof, it is hard to distinguish it from other disciplines that use the same methods and take law as their object. What makes comparative work on law from a sociologist different from the same study by a comparative constitutional law scholar? Practically, this distinction partly depends on self-identity. Past training and institutional commitments will distinguish works. Part of it will depend

¹⁴² See D’Oro & Overgaard, *supra* note 14, at 1.

on how it is viewed by others. Conference attendance helps set borders. In each case, part of the distinction will be sociological. I grant this much. Another distinction focuses on my above description of lawyers' unique contribution. A comparative constitutional law project will often include legal insights distinctive of legal training. However, the key to responding to this concern is to note that some blurring between disciplines is permissible. No area of law has perfect boundaries with other disciplines.¹⁴³ Likewise, the borders between philosophy and history blur in history of philosophy or philosophy of history. Sticklers argue over what constitutes "real history" or "real philosophy." No one thinks porous borders undermines either discipline's independent existence.

Finally, one may argue that my commitment to explaining practice stacks the deck against methodological monism. My recognition of a variety of comparative constitutional law purposes that are unlikely to be fulfilled by a single method raises the challenge that I will *necessarily* fail to identify a unique comparative constitutional law method. Yet while I see the appeal of (iii) and it is tempting to argue for one method's supremacy, the project of identifying the best method(s) in comparative constitutional law can take several forms and searching for a unique best method is likely quixotic.¹⁴⁴ The way that shrinking the number of appropriate purposes for comparative constitutional law research and thus one can identify a single method appropriate to them all will result in removal of fruitful research projects from the discipline. A "one-size-fits-all" approach to comparative constitutional law fails to account for contemporary practice and the relative strengths and weaknesses of methods for set tasks. Adopting (iii), then, is independently problematic. This provides reason to accept pluralism.

¹⁴³ Even doctrinal legal analysis, a possibly uniquely legal approach, is still committed to logical truths.

¹⁴⁴ See e.g., Maurice Adams & Dirk Heirbaut, *Preface*, in Adams & Heirbaut, *supra* note 8, at v; Glenn, *supra* note 26; Jaap Hage, *Comparative Law as Method and the Method of Comparative Law*, in Adams & Heirbaut, *supra* note 8 at 44, 50-51. Less strongly, Hirschl promotes large-N studies as the appropriate method for comparative constitutional law but states that the search for an "official" method for the field is unwise. See HIRSCHL, *supra* note 11, at 18. Even Pier Giuseppe Monateri promotes legal formants as the best approach to comparative law. See Pier Giuseppe Monateri, *Methods in Comparative Law: An Intellectual Overview*, in *METHODS OF COMPARATIVE LAW* 7, 7 (Pier Giuseppe Monateri, ed., 2012). He recognizes that "the renovation of Comparative Law [as "an autonomous discipline"] feeds upon the pliable, fluid and multidimensional nature of the voices that embody it" and this requires attending to the variety of methods practiced under the banner. *Id.* at 1. But recall, for just one of several examples above. See Reitz, *supra* note 8, at 621.

VII. CONCLUSION

Methodological pluralism is ultimately not a problem for comparative constitutional law's sustenance as a self-standing academic discipline capable of producing genuine knowledge. Pluralism is *necessary* for comparative constitutional law to fulfill all its purposes. Pluralism is not only consistent with comparative constitutional law's independence but contributes to and helps explain its independence and knowledge production. Methodological pluralism is thus not a barrier to justifiable recognition as an academic discipline. However, pluralist disciplines must ensure that methods are paired with purposes that they can fulfill. I accordingly provide an account of proper comparative constitutional law method-comparative constitutional law purpose pairs above. This taxonomy and explanation is a contribution to comparative constitutional law studies even if my argument for methodological pluralism fails.

If correct, my case for methodological pluralism above is also a standalone contribution to comparative constitutional law studies. It demonstrates that comparative constitutional law's methodological pluralism is not a problem. Comparative constitutional law produces genuine knowledge despite failing to fulfill (ii) and (iii) and deserves the title of an academic discipline. Where (iii) is a central tenant of comparative law theory, accepting my picture seems to create a discontinuity between comparative law and comparative constitutional law. If the normative and descriptive case for methodological pluralism's consistency, contribution to, and explanation of (i) succeeds, this either challenges a natural view that comparative constitutional law is a subspecies of comparative law or suggests that central tenants of comparative law should be dropped. If there is a genuine split, this arguably further makes the case for comparative constitutional law's autonomy from other areas of law and non-legal scholarship. Exploring these implications should be a direction for future research. For now, I hope scholars ensure that they properly pair comparative constitutional law methods and purposes.