

Noted Publications

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This section introduces recent publications — predominantly books or articles — deemed worthy of note by comparatists-at-law. It deliberately ranges widely. Readers are invited to bring suggestions for inclusion to the attention of the editor. Presentation of a text here does not pre-empt a fully-fledged review elsewhere in the journal.

Hirschl, Ran. *Comparative Matters*. Oxford, Oxford University Press, 2014. 304 pp. ISBN 978-0-19-871451-4.

‘[C]omparative constitutional studies rides on a fuzzy and rather incoherent epistemological and methodological matrix’. It is plagued by ‘considerable confusion about its aims and purposes, and even about its subject’. Indeed, ‘self-professed “comparativism” sometimes amounts to little more than a passing reference to the constitution of a country other than the scholar’s own’. Given the fact that ‘[s]election biases abound’, it soon emerges that ‘purportedly universal insights are based on a handful of frequently studied and not always representative settings or cases’. Unsurprisingly, because of ‘the prevalence of “armchair” constitutional research carried out with little or no fieldwork or systematic data collection’, ‘the outcome is a loose and under-defined epistemic and methodological framework that seems to be held together by a rather thin intellectual thread: interest of some sort or another in the constitutional law of [a] polity or polities other than the observer’s own’. Yes, seven times yes. To its great intellectual credit, the book under review aims to contribute a more sophisticated theorization of comparative constitutionalism than what has been on offer thus far.

The first part of the text identifies three justifications for engagement with other constitutional laws. According to the author, an interest in foreign constitutions may thus arise out of *necessity* — the word being accorded a rather generous semantic extension since the term more readily connotes, say, the imperative to maintain a minimal body temperature in order to survive. But the author claims that ‘[s]urvival instincts may push minority communities to develop a matrix for selective engagement with the laws of others in order to maintain their identity in the face of powerful convergence pressures’. Another motivation for addressing the foreign involves *inquisitiveness*. Thus, ‘[i]ntellectual curiosity may drive scholars to investigate new constitutional settings and develop novel concepts, arguments, and ideas with respect to the constitutional universe’. And then, there is *politics*: ‘Comparative engagement may also be — indeed, often is — driven by a desire to advance a concrete political agenda or an ideological outlook’. For the author, this third explanation accounting for strategic constitutional self-positioning is ‘crucial’. He forcefully argues — convincingly, in my view — that ‘comparative constitutional inquiries are as much a political enterprise as they are a scholarly or a jurisprudential one’. Indeed,

he observes that ‘the specific scope and nature of engagement with the constitutive laws of others in a given polity at a given time cannot be meaningfully understood independent of the concrete sociopolitical struggles, ideological agendas, and “culture wars” shaping that polity at that time’. In this regard, the work of the Supreme Court of Israel, which the book under review explores at some length, offers a compelling illustration of the significance of ‘the sociopolitical context within which constitutional courts and judges operate’ — an ‘infrequently acknowledged feature, a background setting that may seem to be invisible unless it is brought to the fore’.

Regrettably, the fifty pages or so addressing these three justifications for the relevance of foreign law read at times like (cursory) statistical reports featuring a not insubstantial collection of (snippety) inscriptions of numbers and percentages. Is the quantitative preoccupation responsible for the kind of misunderstanding that prompts the author to refer to the ‘citation of 41 Belgian decisions by the French Cour de cassation’ between 2000 and 2007? As students of French adjudication can readily confirm, this simply cannot be the case as the French *Cour de cassation* never refers to foreign law in its judgments. Admittedly, the author is deriving his conclusions from other published scholarship that he appears willing to trust without having undertaken to ascertain the situation for himself — a standard example of how comparatists are prepared to satisfice. To be sure, the very long list of countries the author chooses to feature in his argument makes this brand of intellectual dependence well-nigh unavoidable. A concomitant issue has indeed to do with the large collection of references that, to say the very least, do not err on the side of over-selectivity. It seems that every single published (and unpublished) text was always already entitled to appear in the author’s notes (which can hardly withstand being designated a *critical apparatus*). Perhaps there was another approach to be had instead of, over barely two pages, devoting two lines and one unpublished reference to Russia; three lines and one reference to Romania; seven lines and one reference to Japan; three lines and one reference to Mexico; ten lines and two references to Singapore; and fourteen lines and two references, one unpublished, to Taiwan. Unfortunately, the author appears to betray two of the epistemic obsessions that continue to plague the field of comparative law: one, a long-standing fixation, involves the writing of almanac-like compilations profoundly inspired by a totalizing aspiration (which is no doubt why Hong Kong, Slovakia, Uganda and Sri Lanka, to name but these four jurisdictions, also play cameo parts in the book under review); the other, a more recent infatuation, implies the ascription of signifying value to numbers despite their crudity (can it mean the same thing for a court whose opinions are decidedly formulaic and for another court whose judgments are obstinately ratiocinative to feature references to foreign law in, say, 26% of their 2009 decisions? Does one 26% signify in the same way as the other 26%? And what if one supreme court rendered 30,000 decisions in 2009 and the other 125? Again, is 26% 26%?).

The author’s elaborate case study on the practice of the Supreme Court of Israel is worth especial attention (though it occasionally reads, irritatingly, like a hagiography of one Israeli judge in particular, ‘one of the most prominent jurists in Israel’s history, a leading intellectual in the comparative constitutional world, and a member of honor in the emerging global epistemic community of judges’, also ‘the author of a masterful treatise’ — not that this illustration of hagiographical writing is the only one in the book under review, a point I address below). Why, then, do leading Israeli judges refer to foreign judicial decisions and scholarly commentary? Importantly, the author remarks that these mentions of other laws are highly selective. Though India shares with Israel ‘a similar

experience of deep identity and ethnic-religious rifts', it is absent from Israeli Supreme Court opinions. And while countries like Pakistan, Turkey or Malaysia feature 'tensions between secularism and religiosity [... which] resemble tensions embedded in Israel's self-definition as a "Jewish and democratic" state', they do not appear in judgments of the Supreme Court of Israel either. These omissions can be explained by what the author styles 'the "identity" dimension' pertaining to comparative constitutionalism. In effect, references to foreign law partake of an 'attempt to define who "we" are as a political community, and to articulate in a public way what "our image" or "our place" in the world is or should be'. The fact that Israeli Supreme Court judges prefer to turn to jurisdictions like the United States, Canada or the United Kingdom asserts a 'desire to be included in the liberal-democratic club of nations'. Incidentally, this same resolve explains why 'Israeli secular judges (who make up the vast majority of those appointed to the bench) hardly ever treat Jewish law as a relevant source of comparative insight'. (Fascinatingly, this is the case even though, pursuant to a 1980 Israeli statute, Jewish law is 'actually the sole source to which the law refers judges when they encounter a lacuna'.) In sum, '[v]oluntary reference to foreign precedents is at least as much a political phenomenon as it is a juridical one'.

Beyond this detailed illustration, Jewish law features prominently in the author's historical survey, which occupies fully one-quarter of this monograph. The book under review indeed suggests — perspicuously, in my opinion — that both the idea of 'acknowledg[ing] [...] the legitimacy and integrity of the constitutive laws of others' and the political impulse to incorporate other laws into one's own law boast a longer ancestry than is usually recognized. Hence, the focus on Jewish law, which '[b]ecause of its near-permanent "diasporic" state' has fashioned 'a complex relationship with its legal surroundings, oscillating between principled estrangement and pragmatic engagement'. Likewise, '[p]re-modern canon and Shari'a law also grappled with aspects of engagement with the outer legal universe, leading to rifts between inward-looking, "originalist", "textualist", or otherwise strict interpretive approaches on the one hand and more cosmopolitan or adaptive interpretive schools on the other'. In sum, the author's claim (which confirms his deep interest in the interface between law and religion and specifically in the matter of theocratic governance: Hirschl, R [2010] *Constitutional Theocracy* Harvard University Press) is that 'the history of engagement with the constitutive laws of others is much longer and thicker than that of the current trend of constitutional convergence'. I agree, though I would dispute the view that there can be ascertained a contemporary movement towards 'constitutional convergence'. But I return to this objection below. Still on the subject of the author's historical panorama, the text embraces figures ranging from Bodin to Bolívar. The survey also showcases an examination of the Canadian model which, as the author notes, 'entered the 20th century as a living exemplar of deferential, British-style constitutional tradition [and] emerged out of that century with a very different constitutional culture, featuring active judicial review, an acclaimed constitutional bill of rights (the Charter of Rights and Freedoms), a pervasive rights discourse, and one of the most frequently cited peak courts in the world'. The author closes his historical conspectus with a treatment of the 'vehement debate about the status of comparative constitutional law' occupying the legal, political and intellectual scenes in the United States, 'a polity that sees its own constitution as one of its most revered markers of collective identity'.

Whether the prominence accorded Israeli and Canadian constitutionalisms is ultimately warranted otherwise than by reference to the author's personal and professional identity

remains debatable — although one might argue that one's itinerary provides justification enough, any treatment of foreign law or any comparative exercise featuring, in the final analysis, as projection of the self. (It is not, of course, that the comparatist ever finds himself being fully replicated beyond himself in the foreign law that he is addressing. Rather, it is that the foreign law one fashions is to be understood as an extensibility of oneself in the sense that the comparison featuring foreign law follows an epistemic circle that starts with the self and ends with the self. Accordingly, there is an inevitable complicity between the shaping of foreign law or the delineation of comparison-at-law and autobiography. In Beckett's words, 'it is always yourself that you choose': Beckett, S [2009] [1940] in *The Letters of Samuel Beckett* Fehsenfeld, MD and Overbeck, LM [eds] vol I Cambridge University Press at 684.)

Still in terms of the proposed historical account, I want to address one more difficulty, which the author's treatment of Montesquieu exemplifies. One can only be delighted that Montesquieu should feature in the book under review, and one can only be pleased to see that, at nearly eight pages of text, this French comparatist *avant la lettre* should be faring particularly well. Alas, the notes reveal references to four commentators only: two writers are from the United States, whose texts on Montesquieu were released in 1973 and 1987 respectively (these authors earn one reference each); another discussant is Durkheim (who also gets one citation); and yet another expositor of Montesquieu's thought is an acknowledged specialist in anthropological theory teaching at a leading US university, boasting first-hand experience of the Francophone world and presumably enjoying the linguistic proficiency that competent fieldwork assumes (these credentials no doubt explaining why this author's 2001 text merits three references out of the six on offer to various commentators). I discern two major problems.

First, the citations are on the whole sketchy and dated. As I make this point, I do not mean to fall for the quantitative bias that I deplore above. All the same, one cannot help but think that the author is not doing the interpretive literature on Montesquieu justice. Why a reference to Pangle, TL (1973) *Montesquieu's Philosophy of Liberalism* University of Chicago Press but not to Pangle, TL (2010) *The Theological Basis of Liberal Modernity in Montesquieu's Spirit of the Laws* University of Chicago Press? And where are, say, Rahe, PA (2009) *Montesquieu and the Logic of Liberty* Yale University Press or Singer, PCJ (2013) *Montesquieu and the Discovery of the Social* Palgrave Macmillan, not to mention Vale, M (2012) 'Custom, Combat, and the Comparative Study of Laws: Montesquieu Revisited' in Dresch, P and Skoda, H (eds) *Legalism: Anthropology and History* Oxford University Press? Secondly, there is not a single reference to French publications (if one excepts Durkheim-in-translation). As can easily be imagined, Montesquieu has attracted substantial critical attention from leading French anthropologists, sociologists and politists. Even leaving to one side (but why do so?) the 'classical' commentaries associated with such eminent interpreters as Starobinski, Althusser and Goyard-Fabre, it seems hard to defend a creditable treatment of Montesquieu that does not make any mention whatsoever of such detailed and illuminating studies as, say, Spector, C (2006) *Montesquieu et l'émergence de l'économie politique* H Champion; Pereira, J (2008) *Montesquieu et la Chine* L'Harmattan; Barrera, G (2009) *Les Lois du monde: enquête sur le dessein politique de Montesquieu* Gallimard; Casabianca, D de (2008) *Montesquieu: de l'étude des sciences à l'esprit des lois* H Champion; Volpilhac-Auger C (2003) (ed) *Montesquieu* Presses Universitaires Paris-Sorbonne; and Binoche, B (1998) *Introduction à De l'esprit des lois de Montesquieu* Presses Universitaires de France.

Again, I am not seeking to address the matter of quantity. To be sure, citations are easy to amass, and the accumulation of them can hardly be a badge of intellectual acumen. But there comes a point, I suggest, where the *lack* of references suggests a brand of research willing to sacrifice depth to what is perhaps most charitably described as an urge to favour breadth of coverage, on one hand, and a further urge to secure early publication, on the other. With respect to the treatment of Montesquieu in the book under review, which again I use in exemplary fashion, this point may well have been reached. Needless to add, I am fully aware of the linguistic challenges bearing on the practice of comparative legal studies, and I just as fully appreciate the fact that one cannot reasonably expect comparatists to be proficient in any number of languages. And then, there is the issue of access to foreign materials. But the danger concerning the scantiness that marks and mars the author's account of Montesquieu is that, before one knows it, one is starting to look like a comparatist who would write on Chinese law without any reading proficiency in Mandarin, on Islamic law without being able to make sense of Arabic, on Japanese law without access to Japanese primary materials, on Jewish law without any competence in Hebrew, on Russian law without being in a position to decipher Russian texts (and all in the same book, if you please). In effect, I wish to sound a cautionary note regarding, let us say, minimum assertional thresholds, a matter which concerns the field of comparative law as a whole and thus goes well beyond the author's text. Indeed, the author himself aptly remarks on more than occasion in the book under review that comparatists must resist the temptation of cursoriness.

As captivating as the first part of the text on judicial referencing of foreign law and on the history of engagement with constitutional otherness proves to be, it is, in my view, the second half of the author's discussion that makes for particularly compelling reading. Here, the argument focuses on salient theoretical issues. In this regard, the author raises three specific concerns: the formalization of comparative constitutional studies (that he bemoans); the universalizability of constitutional law (that he appears to want to promote); and the design of comparative inquiry (that he would scientize). The text's detailed treatment of these three questions warrants that I should address them in turn.

The author's lament concerning the matter of the excessively formal character of comparative constitutionalism is legitimate, and I wholeheartedly support his call for a more eminent approach to the practice of comparison. The book under review is right to chastise the fact that '[t]wo dozen court rulings from South Africa, Germany, Canada, and the European Court of Human Rights alongside a more traditional set of landmark rulings from the United States and Britain and an occasional tribute to India or Australia, now form an unofficial canon of "global constitutionalism" that informs comparative constitutional law syllabi throughout much of the English-speaking world'. Such a 'court-centric focus' ignores the fact that 'constitutions neither originate nor operate in a vacuum'. Indeed, '[a]ny attempt to portray the constitutional domain as predominantly legal, rather than imbued in the social or political arena, is destined to yield thin, ahistorical, and overly doctrinal or formalistic accounts of the origins, nature, and consequences of constitutional law'. Interestingly, the author reminds his readership that comparative constitutional law's 'disciplinary identity' (to use Armin von Bogdandy's formulation, which the text features in a note) was not always understood so narrowly. Indeed, 'the epistemological difference between the comparative constitutionalism of the early 20th century and that of the 21st century is substantial'. The author reports that even Dicey's brand of comparativism addressed, in Dicey's own words, 'the conceptions or ideas which

underlie political arrangements'. Although it is hard to envisage a topic that would not be beneficially informed by the tracing of the constitutional law-text to its constitutive cultural elements (political, ideological, sociological and otherwise), the need for such archeological or genealogical work can prove particularly pertinent in situations where there is a strong discrepancy between the official law-text and local practices, for instance, when constitutions in countries like India, Turkey and the United States defend the idea of a secular polity in the face of an ascertainably strong popular commitment to religiosity. In effect, under such circumstances the tracing process discloses the expression of a political will at variance with popular sentiment and raises the issue of what can perhaps economically be called a 'constitutional democratic deficit'.

Still on the subject of the urgent need for comparative constitutional scholarship to decluster itself, the author offers five particular reasons to underwrite his general call to action. The last of these arguments concerns what the book under review styles comparative constitutionalism's 'amorphous methodological matrix'. In effect, this claim connects with the third facet of the author's theoretical argument which, as I indicate above, enters a plea for increased scientificization. Suffice it to say at this juncture that I can understand how someone who believes in method (as the author does and as I do not) would subscribe to 'causality-oriented exercise[s]' in search of 'valid inferences'. But how the book under review can link the idea of method with the practice of a 'hermeneutic [comparative constitutional inquiry]', as it expressly does, baffles me. If Gadamer has taught us anything, it is precisely that 'a naive faith in scientific method' can entail no less than 'actual deformation of knowledge': Gadamer, H-G (2004) [1986] *Truth and Method* (2nd rev Eng ed) Weinsheimer, J and Marshall, DG (trans) Continuum at 300. I return to the issue of scientificization below. Meanwhile, I deplore the text's unwillingness to engage philosophical hermeneutics at any length. To be sure, the book under review makes a fleeting allusion to Heidegger's 'fore-structure of understanding' — which is so rapid, in fact, that it is not even sourced. But the desultory character of this reference cannot even begin to do justice to what is arguably, at least if one is willing to follow Heidegger's insight in its various ramifications, the key intuition purporting to inform post-Kantian philosophy and, specifically, the most important argument claiming to make sense of the matter of interpretation.

As regards the question of universalism understood in its diverse declensions, I do not read the author as questioning either the idea or the value of the universal. In other words, there is little in the author's claims, as far as I am able to tell, that could persuasively identify him as a critic of 'universalism' or of the view that constitutional processes (or the comparatist's interpretation thereof) ought to be striving towards universalization. Indeed, the book under review defends the contention that comparative constitutional law has not been universal *enough*. As long as comparatists continue to focus practically exclusively on what the author styles the 'global north' and persist in excluding more or less reflexively the 'global south' or the 'constitutional south', this monograph holds that any argument that comparative constitutionalism might advance for universalism would be greatly exaggerated. The author's preoccupation concerns the fact that the selection of laws under comparative examination is insufficiently broad to warrant a persuasive claim in favour of universalism. As far as the book under review is concerned, then, the problem at stake is first and foremost one of representativity: comparative constitutional law as it has been unfolding remains discordant in terms of the extant variety of polities all over the world. It is not that there is something wrong with universalism, but that

comparative constitutional law must be prevented from making any claim to universalism as long as it remains epistemically mired in its septentrionic ways. In other words, the author's argument is that it is problematic to pretend to universalism on the basis of scant information. As I understand the author, then, he would very much want comparative constitutionalism to re-organize itself and to engage on an epistemic course of action that would allow it, credibly, to reach conclusions that could legitimately brand themselves as universal.

Now, the book under review's assumption that universalism is at once achievable and desirable, if only comparative constitutional law can broaden its geographical reach, strikes me as being eminently problematic. Part of the difficulty is that, at least in the way the author deploys it in this monograph, the argument for universalism remains under-theorized. For present purposes, I wish to offer a few reactions, which I want to keep brief (after all, it is the author's text rather than my own work that is the primary focus of this review). My threshold objection concerns the superficiality of the author's pronouncements on universalism, which are not without reminding me of the kind of enunciations that one finds oneself reading as one peruses one's 'free' copy of *The Economist* on Eurostar (I mention this magazine because it features as authority in one of the notes collected in the text). For instance, the author writes, in the most general terms, that '[d]espite striking differences in socioeconomic conditions and cultural particularities, modern states paradoxically adopt similar policies and institutions. For instance, in many countries that do not share common characteristics, national constitutions outlaw ethnic and racial discrimination, embrace similar understandings of rights, and call for largely similar commitments to justice and equality'.

To focus on just a few of these words, there would exist across polities 'similar understandings of rights' and 'largely similar commitments to justice and equality'. Why, then, does the Canadian Supreme Court, in a 2006 unanimous decision, allow a 12-year old Sikh boy to wear his ceremonial metal dagger at school while a 2004 French statute, having garnered the support of 93% of parliamentarians in each of France's two legislative houses, prohibits any school dress conspicuously attesting to a religious affiliation? And why is the French constitution so much easier to amend than the US Constitution? And why is the Australian courts' interpretation of the word 'commerce' as regards the Trade and Commerce Power in the Australian constitution so different from the US courts' interpretation of the word 'commerce' pursuant to the Commerce Clause in the US Constitution? Is 'commerce' not 'commerce'? The difficulty with the author's argument in favour of 'similar understandings of rights' and 'largely similar commitments to justice and equality' — elsewhere in the book under review, he refers to 'copious similarity' — is that the three examples I adduce are, well, exemplary. In other words, these three illustrations offer but three typical manifestations of what is the case, that is, of *differential* constitutionalism. Meanwhile, a seemingly infinite number of instances could in fact be mobilized to press the descriptive case against universalism. For the author to claim how '[i]t is undisputed that a considerable convergence of constitutional structures, institutions, texts, and interpretive methods has taken place over the past few decades' (incidentally without adducing any supporting case study) simply cannot be satisfactory. Not only is the claim about 'considerable convergence' disputed, but it is readily disputable. The 'copious similarity' that the author purports to identify, which he attributes in significant part to the willingness of an elite caste of academics (the author calls them 'constitutional "engineers"') to be 'ready to hop on a plane to any of the four corners of the world to provide

expert advice as to how to draft a constitution', is not established. Nor can it be (which is perhaps why, elsewhere in this monograph, the author contests 'the sweeping global convergence claim' and argues that 'because [...] divergence [with respect to economic and social rights] reflects lasting determinants such as legal tradition and region, it is likely to persist'). Frenetic plane-hopping (and earnest air-miles collecting) notwithstanding, the fact is that such constitutional iterations as are ascertainable across polities can most aptly be envisaged as instances of 'glocalization' rather than as illustrations of globalization. Allow me to sustain my contention by reference to judicial review, a topic that the defenders of the convergence thesis within comparative constitutional law are prone to harness in support of their position, though dispensing with detailed argumentation (eg Jackson, VC [2010] *Constitutional Engagement in a Transnational Era* Oxford University Press at 1).

In 2010, France introduced 'fully-fledged' judicial review. It had had a form of judicial review before, but the previous model had not allowed the constitutionality of a statute to be impugned after it had come into force. Since the 2010 reform, such *ex post* review has become possible. Some scholars of comparative constitutional law promptly seized on the French reform to point to a further example of transnational constitutionalism or of transnational convergence of constitutional laws. My reply has been to the effect that this conclusion is not doing justice to the singularity of the French model. The demonstrable fact of the matter is that French judicial review remains at variance with, say, the US institution in a number of highly significant ways. The list of salient differences is indeed a long one (which I will spare the readers of this note). Suffice it to say that '[f]or better or for worse, the reform does not erase French exceptionalism or "anomalies"', that '[t]he reform in fact follows neither [the US or the German] models of *ex post* constitutional review': Hunter-Hénin, M (2011) 'Constitutional Developments and Human Rights in France: One Step Forward, Two Steps Back' (60) *International and Comparative Law Quarterly* 167 at 172 [emphasis original]. In terms of comparative constitutional law, the difficulty arising here, as so often, is that 'the comparati[st] presumes similarities between different jurisdictions in the very act of searching for them' (Vining, J [1986] *The Authoritative and the Authoritarian* University of Chicago Press at 65), that there takes place yet another attempt to fit the square peg of similarity into the round hole of singularity on account of (repressive) institutional forces imposing restrictive and determinate forms on comparative modes of thinking and imagining. In effect, however, one would want a comparatist-at-law to behave in precisely the opposite way, showing recognition and respect for the singularity of local legal knowledge (a claim that has nothing to do with an essentialist understanding of legal identity and a strategy that does not in the least call into question the merits of comparative inquiry since, as the author of the book under review appositely underlines, 'even the most in-depth, single-case-study works may, and in fact often do, carry theoretical insights that travel well beyond the specific setting studied').

Despite the ascertainable migration, circulation and dissemination of legal ideas (this diffusion being arguably more prevalent than was the case, say, one hundred years ago at a time when national laws were not nearly as porous as some of them have become), difference across constitutional laws holds. No matter how organizational forms or rhetorical idioms have been spreading worldwide, each constitutional situation inevitably features adaptation to local knowledge, which takes the form of an assemblage with indigeneity. Specifically, despite the French reform, French judicial review remains different in important respects from other models of judicial review. To return to the concept of 'glocalization', what the discerning comparatist can see happening in France

is a singular arrangement bringing together in a singular configuration, at the minimum, what is in all likelihood an idea emerging from the United States, on one hand, with French 'local knowledge', on the other (no doubt the enmeshment of the constitutive parts of the assemblage — its texture — is in effect even more complicated). To reframe the matter more philosophically, what the discerning comparatist can see happening in France is the French self-in-the-law re-signifying itself through the incorporation into its 'body legal' of an infusion of 'otherness-in-the-law'. The self thus becomes a revised self on account of the other. But though it is now affected by the other, it is still a self, it is still its self — which is to say that it continues as itself, and that it has emphatically not become the other. In sum, the outcome remains a French constitutional self, which it would be profoundly reductionist to dilute into a universal configuration called (in English!) 'judicial review' that would now obtain everywhere, if with slight variations promptly to be deemed immaterial. There is not convergence around a single, originally Western (US?) pattern of institutions and cultural understanding thereof, but an irreducible multiplicity of irreducibly singular institutional patterns and cultural models — some of which actually stand as expressions of resistance to uniformization processes (a fact the author perfunctorily concedes in a note). What there is, there, is not universalism, but something like *diversalism*. And if I may indulge an additional philosophical thought, ultimately this result ought not to prove surprising if one reminds oneself of Leibniz's 'Law', which I would rephrase thus: if there is more than one, there is difference.

As I read the author, I confess that I am uncomfortably reminded of other epistemic theses which, quite apart from being indefensible on account of their uncreditable claims, (also) betray more than a little science envy. I have in mind the ideas of 'generic law' and of a 'global constitutional gene pool' (Law, DS [2005] 'Generic Constitutional Law' [89] *Minnesota Law Review* 652; Saunders, C [2009] 'Towards a Global Constitutional Gene Pool' [4/3] *National Taiwan University Law Review* 1, respectively). At best, these expressions pertain to wishful thinking. At worst, they disclose a misunderstanding of the agonistic processes that have been unfolding before our eyes. Admittedly operating from a different angle, the idiosyncratic vantage point of autopoietic theory (a uniquely formalistico-mechanistic, abstracto-speculative and rigidly analytico-categorical perspective), Gunther Teubner (whom the author does not mention in the book under review) cogently maintains that '[i]f one wishes to conceive at all of a "global constitution", the only possible blueprint is that of particular constitutions for each of these global fragments — nations, transnational regimes, regional cultures — connected to each other in a constitutional conflict of laws': Teubner, G (2012) *Constitutional Fragments* Oxford University Press at 14.

But the misconceptions I discuss regarding genericism and geneticism have to be added to others. When the book under review argues that 'there is not much sense in comparing things that are perfectly identical', the fact of the matter is that if there are 'things' (that is, more than one thing), there cannot be 'perfect[ly] ident[ity]'. Again, such is the point of Leibniz's crucial philosophical insight. In effect, the author's formulation displays an oxymoron. Either there are 'things' or there is 'perfect[ly] ident[ity]'. And then, there is the author's further observation to the effect that, well, in the end there is not much to distinguish the advocates of universalism from those who deny its existence: we all exaggerate, do we not? Thus: 'Proponents of universalism tend to overemphasize cross-national similarities, while advocates of contextualism tend to over-emphasize differences'. And, also, 'comparability requires unity and plurality'. I argue that these parallels or amalgams are misleading.

The fact is that in order to compare there has to be more than one, which means that there has to be difference (Derrida, J [1993] *La Vérité en peinture* Flammarion at 429). And the further fact is that difference is irreducible (Derrida, J [1990] *Limited Inc* Galilée at 253). As long as there is more than one — say, more than one polity, more than one law, more than one constitution — *the differend is what is the case*. Any purported similarity, meanwhile, is the result of the comparatist's own input. It is the outcome of what I call a process of 'similarization', of making-look-similar. In other words, an alleged similarity is the product of the comparatist's construction, which will have been undertaken to further some political agenda or other. And this is why the book under review is mistaken as it asserts that '[c]learly, an old water well and the concept of infidelity are hardly comparable'. Strictly speaking, it is not that the well and infidelity are not comparable, for they are. The challenge is not the act of comparison in and of itself, but the fact that the comparison that would be deployed must contend with incommensurability. Now, incommensurability does not prevent the comparatist from inventing a commonality, that is, from designing an interface allowing for the comparison. It is not, then, that incommensurability constitutes an unsurmountable obstacle to comparison. Incommensurability can be framed.

Consider the old well and the concept of infidelity. Could a common measure between these two entities not consist in the notion of 'tangibility'? Through a comparison around the notion of 'tangibility', the old well would be shown to be more tangible than the concept of infidelity, and the concept of infidelity to be less tangible than the old well. Note that it is very much the comparatist himself who is constructing the commonality that allows him to 'commensurate' the old well and the concept of infidelity. If you will, 'tangibility' remains the speculative outcome of the comparatist's own translations/transactions. It is, then, the comparatist himself — and only him — who is forcing the old well and the concept of infidelity to talk to each other, to engage in a *negotiation* within the structure — tangibility — he himself is articulating. At the outset, it might have appeared that the old well and the concept of infidelity had nothing to say to each other lest each entity rehearse its own story in a language that the other could only imagine itself understanding. Crucially, the comparatist can change this situation through his intervention. However, it is key to observe that irrespective of what a word like 'tangibility' may suggest on a superficial reading, the 'negotiation of incommensurable differences' (Bhabha, HK [1994] *The Location of Culture* Routledge at 218) that intervenes in the space of the interface, the third space, a 'negoti[ation] with the non-negotiable' (Derrida, J [2000] *Etats d'âme de la psychanalyse* Galilée at 83), must ultimately fail to engender an economy of the same.

The invented commonality is but a semblance of similarity that fails to efface the differend. Ultimately, what the two entities '[have] in common [is] that [they] have nothing in common' (the word 'nothing' referring to the spacing of the separation, where the incommensurability is to be found until the comparatist intervenes): Derrida, J and Ferraris, M (1997) "*Il gusto del segreto*" Laterza at 52. When the author suggests that an old well and the concept of infidelity are 'hardly comparable', I take him not to mean literally, then, that no comparison can be had, for one *can* compare, but that a comparison featuring these two entities will not afford the kind of interpretive yield warranting the comparative trouble, so to speak. The matter is not therefore so much a question of comparability as it is one of interpretive yield. The fact is that to compare an old well and the concept of infidelity in terms of their tangibility will in all likelihood simply not generate an interesting interpretive output. Indeed, later in the same paragraph, as the author moves from the

old well and the concept of infidelity to 'broccoli' and a 'manual transmission gearbox', he himself emphasizes that the key issue is a matter of 'the analytical or theoretical yield'.

As I indicate above, the author's theoretical statement in the second part of the book under review involves a third instalment on the design of comparative constitutional research. In the fifty pages or so pertaining to the insights that comparative constitutionalism could helpfully derive from social-science studies, the author engages in a typology of the different '[m]odes of comparative inquiry' that can be conducted: 'single-country stud[ies]'; investigations 'geared toward self-reflection or betterment through analogy, distinction, and contrast'; research 'emphasizing the broad similarity of constitutional challenges and functions across many relatively open, rule-of-law polities'; and analyses that 'ai[m] to engage in theory-testing and explanation through causal inference'. In line with his wish to favour the scientificization of comparative constitutional law — the words 'scientific inquiry' appear more than once throughout this part of the book and are expressly linked at least twice to the notion of 'intellectual integrity' — the author emphasizes what he styles 'inference-oriented' comparative studies out of a concern for 'clearly articulated methodological principles'. He thus identifies comparative research being variously structured around the idea of '[t]he "most similar cases" principle'; '[t]he "most different cases" principle'; or '[t]he "prototypical cases" principle' — all 'small-N' studies, that is, all instances of research examining a small number of cases. And then, there are 'large-N' projects, 'analyses of large sets of observations' that would involve, in the case of comparative constitutionalism, all the constitutions of the world (what the author calls — surprisingly, to my mind — 'a manageable number' of instances). In terms of 'large-N' research, the governing idea is to 'go beyond the clichés, heuristics, and biases that emanate from the decades-long over-study of a handful of cases to actually test some of the canonical insights of constitutional theory or shed new light on causal links within the constitutional universe'.

The author's emphasis on analytics, on causality, on method — his insistence on science — is not without reminding one, alas, of the preposterous epistemic tenets defended by Hein Kötz. Those familiar with Kötz's work are well aware, of course, that since the late 1960s his leading text has been expressly advocating the scientificization of comparative law, not least through his insistence on analytics and method. Kötz thus praises 'a universal comparative legal science': Zweigert, K and Kötz, H (1998) [1996] *Introduction to Comparative Law* (3rd ed) Weir, T (trans) Oxford University Press at 46. And, being unabashedly in search of 'scientific exactitude' (Id at 45), Kötz does not hesitate to analogize comparative law to 'physics', 'microbiology' and 'geology' (Id at 15). (To its credit, the book under review favours methodological pluralism, thus distancing itself from Kötz's excessive claim in favour of methodological monism, indeed of 'pure' methodological monism: Id at 34 and 40.)

One would not tell from the author's treatment of comparative-law-as-science that this brand of comparativism is increasingly regarded as epistemically unsustainable (eg Teitel R [2004] 'Comparative Constitutional Law in a Global Age', [117] *Harvard Law Review* 2570). Indeed, how can the epistemic framework guiding a laboratory experiment in, say, microbiology, prove of any meaningful relevance as regards the protocols governing the interpretation of a foreign law-text? It is not as if interpretation of foreign law consisted of some technique that could be readily copied from one interpreter to the next. The transposition I critique involves an 'improper extension of [scientism] to domains of cultural activity to which it does not and cannot apply': Rodowick, DN (2015) *Philosophy's*

Artful Conversation Harvard University Press at 55. There takes place an ‘illicit’ projection: Hacker, PMS (2001) ‘Wittgenstein and the Autonomy of Humanistic Understanding’ in Allen, R and Turvey, M (eds) *Wittgenstein, Theory and the Arts* Routledge at 42. In any event, the territory of science is also a cultural space (eg Knorr-Cetina, K [1981] *The Manufacture of Knowledge: An Essay on the Constructivist and Contextual Nature of Science* Pergamon Press; Latour, B and Woolgar, S [1986] *Laboratory Life: The Construction of Scientific Facts* [2nd ed] Princeton University Press; Pickering, A [1984] *Constructing Quarks: A Sociological History of Particle Physics* University of Chicago Press). On the whole, one gets the sense of an argument for comparative-law-as-science that remains largely unexamined. Illustrations of the reigning confusion include the presence on at least one occasion of the expression ‘quasi-scientific’, not to mention the author’s treatment of ‘causal inference’ and ‘deep understanding’ as synonyms, the latter formulation being more spontaneously associated with humanistic ventures informed by a cultural sensibility like Clifford Geertz’s. As is well known, Geertz famously wrote of ‘thick understanding’ after Oxford philosopher Gilbert Ryle, but he also published a famous essay entitled ‘Deep Play: Notes on the Balinese Cockfight’: Geertz, C (1993) [1973] *The Interpretation of Cultures* Basic Books at 5-10 and 412-53, respectively. However, the detailed survey of comparative constitutional scholarship on offer as the book under review introduces the various voices within the field is also marred by a profound contradiction which, I suggest, undermines the text’s credibility.

The author’s panorama begins with critical reflections to the effect that law’s comparative constitutionalism ‘lacks theoretical elevation and coherence’, a theme which is very much the leitmotiv of the book under review. The author thus objects to ‘the field’s ambivalence, if not outright reluctance, with respect to theory-building through causal inference’. He adds that ‘comparative constitutional law often overlooks (or is unaware of) the methodological principles of controlled comparison, research design, and case selection deployed in the human sciences’. At the end of his investigation, some fifty-four pages later, the author formulates his principal critique again: ‘[C]omparative constitutional law, as a method and a project, remains under-theorized and blurry’. Indeed, ‘the field of comparative constitutional law remains quite eclectic, and continues to lack coherent methodological and epistemological foundations’. The fact is that ‘the scholarship produced by legal academics often overlooks (or is unaware of) basic methodological principles of controlled comparison, research design, and case selection’. (If this passage looks familiar, it is because I also quote it above. Indeed, it appears both at the beginning and at the end of the extended survey of comparative constitutional scholarship I discuss. I return to the theme of self-quotation *sans* quotation marks below.)

Given such damning preliminary and liminary comments, one would legitimately expect the author’s examination of comparative-law publications in matters constitutional, which includes the writings of two dozen scholars or so, to offer ready examples of the problematic work the book under review so insistently chastises. Instead, the author variously terms the texts he discusses ‘[g]reat’, ‘thoughtful’, ‘effective’, ‘detailed’, ‘seminal’, ‘careful[]’, ‘most valuable’, ‘meticulous’, ‘carefully crafted’ and ‘thorough’. One is said to offer a ‘good substantive illustration’. Others are ‘enrich[ing]’, ‘successfu[]’, ‘nuanced’, ‘high-quality’, ‘useful’, ‘ample’, ‘impressive’, ‘exemplar[y]’, ‘majestic’, ‘impressive’ (again), ‘most sophisticated’, ‘effective’, ‘effective’ (again), ‘effective’ (yet again), ‘innovativ[e]’, ‘effective’ (once more), ‘thorough’ (one more time), ‘detailed’ (*bis*), ‘successful’ (again), ‘methodologically astute’, ‘most influential’, ‘influential’, ‘most prominent’, ‘powerful’, ‘notable’ and ‘pioneering’. One text constitutes ‘a major development’, another is

'impressive' (once more) while yet another is 'open[ing] up entirely new possibilities'. Finally, two works are 'captivating' and, yes, 'effective'.

Who, then, are the mysterious comparatists attracting so much opprobrium throughout the book under review and coming under attack, specifically, both at the beginning and at the end of the author's fifty-four page discussion of comparative constitutional scholarship? Who are the comparatists whose work 'entails seemingly unsystematic — and at times scant and superficial — reference to foreign constitutional jurisprudence'? Once the long list of meritorious colleagues has been enumerated and once all the plaudits have been ascribed, who is left exactly? In my view, the litany of extolments on offer, as it appears in juxtaposition with the absence of any identification of a comparative text that the author finds lacking, makes the general critique sound hollow — the fact of its constant repetition over many pages notwithstanding. To be sure, it is easy to formulate broad condemnations without mentioning anyone in particular. And since seemingly every comparative constitutional scholar — at least every comparative constitutional scholar affiliated with a leading U.S. or Canadian law school — appears to be earning some praise along the way, the author can easily deflect any intimation that he may have had a particular individual in mind as he denounces comparative legal scholarship in the vehement terms he repeatedly uses. As I say, though, until the critique is correlated to specific authors, specific works and specific mistakes, it loses the impact it might otherwise have been expected to have and remains but a somewhat vacuous tirade.

As to why the author refuses to designate the targets of his objection, a sophisticated answer would have to involve an excursus into the sociology of academic knowledge. In advance of empirical study, let me suggest that the immunity conferred on fellow North-American comparatists must roughly tally with the list of individuals the author can reasonably expect to meet at the various conferences, symposia or colloquia he attends on the North-American circuit. And these are the colleagues whom the author can reasonably expect to be *hosting* the North-American meetings he joins, not to mention the fact that these persons would also be promoting invitations to visiting professorships or lecture series in the field of comparative constitutional law. If my hypothesis is sound, it is then the fear of antagonizing colleagues, in particular the apprehension of the ostracism that might well follow a critique of named constitutionalists and named works of comparative constitutional law, that prompts this monograph, most implausibly, to paint a picture of a field that has gone epistemically awry while every prominent player within the field is somehow to be congratulated on the quality of his or her scholarship.

I would be remiss if I did not say a few words about style (in the broadest sense), a matter I am in principle reluctant to critique lest I appear impertinent. While I found references to Hollywood actors and US professional sports distracting (not least on account of the way in which they 'Americanize' the author's work even as one of the book under review's stated aims is to de-'Americanize' comparative constitutional law), I propose to confine my brief observations to the issue of repetitions, which at times make the text look like a draft rather than the polished argument it ought to be. I found myself unwittingly compiling a long list of passages that can be located, for all intents and purposes, *verbatim et literatim* in more than one place within the book under review. However, two examples must be enough to give a sense of the prevalent lack of editorial circumspection I discuss — an editorial flaw, I hasten to add, which is also the publishers' responsibility. Consider the two sentences that follow.

‘The vast majority of high-quality comparative public law scholarship produced over the past several decades has contributed tremendously not only to the mapping and classification of the new world of constitutionalism, but also to the creation of conceptual frameworks for studying comparative law more generally’.

‘**[T]here is no doubt that the** high-quality comparative public law scholarship produced over the past **few** decades has contributed tremendously not only to the mapping and classification of the **world of new** constitutionalism, but also to the creation of conceptual frameworks for studying comparative law more generally’.

Basically, if one excepts the move from ‘the past several decades’ to ‘the past few decades’ and the further emendation from ‘the new world of constitutionalism’ to ‘the world of new constitutionalism’, the two passages, to be found but *two pages apart* in the book under review, fully duplicate each other. Again, though, the technique that consists in recycling sentences after they have been slightly tweaked this way or that is on display throughout the author’s text. Two more passages offer a second example illustrating my point (in this instance, the two quotations are separated by one-hundred-and-sixty pages):

‘A close look at the philosophical foundations of comparative social research and the gamut of pertinent social science methods and approaches could suggest a toolkit of methodological considerations essential to comparative constitutional inquiry. I would effectively support a spectrum of comparative constitutional studies, qualitative and quantitative, inference-oriented or hermeneutic’.

‘A **more in-depth** look at **social science methods** could suggest a toolkit of methodological considerations **that should be addressed in the conduct of** comparative constitutional inquiry, **thus** effectively supporting **various types** of comparative constitutional studies, qualitative and quantitative, inference-oriented or hermeneutic’.

Most curiously, the book under review is replete with such recurrences making the text verbose, irritating and, well, repetitious. One is moved to add that the era when publication at a leading academic press was a by-word for editorial rigour has definitely come to an end — a fact to which many critical comparatists, to speak of comparative-law scholarship only, have long been able to attest. Meanwhile, the author’s motivations for indulging the tediousness I address remain unclear.

Though I have dissented in a number of respects, I want to emphasize how edifying I find the author’s call for a turn from ‘comparative constitutional *law*’ to ‘comparative constitutional *studies*’. It behooves all comparatists, and not simply constitutionalists, to heed this bracing injunction. Presumably writing with ‘his’ law in mind but in terms that range further afield, French anthropologist Bruno Latour has observed the existence of a great divide between law’s insiders, who do only law and speak only law’s language and therefore cannot ultimately explain law except by reference to itself, and law’s outsiders, who are deemed (by jurists) not to be doing law at all (Latour, B [2012] *Enquête sur les modes d’existence* La Découverte at 359). Along with the book under review, I am prepared to accept, still, that the time of redress is not irretrievably past.