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Theorising Constitutions Comparatively

By *Rosalind Dixon*[*] and *Elisabeth Perham*[**]

Abstract: The relationship between constitutional theory and constitutional comparison is an area of evolving scholarly interest and concern. Constitutional theory has long engaged in dialogue with constitutional practice, but often that dialogue is more implicit than explicit. In part because of that, it can focus on a relatively narrow range of countries, or 'the usual suspects' in constitutional law, and where that happens, the theories developed will not be able to account for the global variety of constitutional experiences and practices.

This essay thus starts from the proposition that comparative engagement by constitutional theorists with constitutional practice in a wide range of jurisdictions is desirable, and should be actively encouraged. But it also cautions that scholars must be attentive to taking constitutional comparison seriously, and to engaging in it in a methodologically rigorous way. In order to assist with this task, the essay set out three archetypical modes in which constitutional theory can be informed by constitutional practice—inductive, illustrative and reflexive—and illustrates those modes in practice (including in their hybrid forms and the way they can interact with each other) by reference to a range of recent works of constitutional theory.

It then turns to the question of how to ensure that such comparative engagement is methodically rigorous. We suggest that rigorous forms of comparative constitutional theorising involve three key commitments: transparency in the jurisdictions relied on, symmetry between the countries chosen and the scope of theoretical claims made, and self-awareness or reflexivity on the part of scholars as part of this process. Work that adheres to these commitments is more likely to constructively contribute to what is ultimately a collaborative quest by scholars to advancing our collective understanding of constitutions.

* Anthony Mason and Scientia Professor, Faculty of Law & Justice, UNSW Sydney, Australia. Email: rosalind.dixon@unsw.edu.au.

** Lecturer, Faculty of Law & Justice, UNSW Sydney, Australia. Email: e.perham@unsw.edu.au.

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A. Introduction

Comparative constitutional scholarship takes a variety of forms. Some of it is doctrinal in focus and is aimed at uncovering commonalities and differences in doctrinal approaches across different constitutional systems.[1] Some of it is historical in orientation: it seeks to uncover the genealogy behind certain constitutional norms and ideas, how different constitutional traditions have influenced others, or how different historical institutional trajectories have shaped contemporary constitutional developments.[2] Another strand of scholarship is more empirical or socio-legal in nature. It seeks to draw on the insights of economics, statistics, sociology, anthropology and comparative politics to understand the causal origins and/or consequences of different constitutional design and doctrinal choices, or else to map and understand what is happening on the ground in various constitutional systems.[3] All these forms of constitutional scholarship involve their own logic of comparison and case selection.[4]

Another strand of constitutional scholarship, however, is more theoretical in nature. It explicitly engages with normative and conceptual debates—by seeking to develop a mix of 'concepts' and 'principles' either internal or external to existing constitutional systems.[5] This can include theories of constitutional interpretation,[6] but also broader theories of constitutional design and decision-making.

1 *Rosalind Dixon*, Comparative Constitutional Modalities: Towards a Rigorous but Realistic Comparative Constitutional Studies, Comparative Constitutional Studies 2 (2024), p. 60.

2 See, e.g., *William Partlett,* Historical Methods and Constitutional Research, in: Rosalind Dixon / David Law / Malcolm Langford (eds.), Comparative Constitutional Methods: An Introduction, Cheltenham (forthcoming); *Elizabeth Hicks*, "New Institutionalism" and Historical Institutionalist Analysis, in: Rosalind Dixon / David Law / Malcolm Langford (eds.), Comparative Constitutional Methods: An Introduction, Cheltenham (forthcoming).

3 See, e.g., *Dinesha Samararatne*, Comparative Constitutional Law from and within the Global South: challenges, prospects and hopes, World Comparative Law 57 (2024), p. 337.

4 *Dixon*, note 1; *Mark Tushnet,* The Possibilities of Comparative Constitutional Law, Yale Law Journal 108 (1999), p. 1225; *Ran Hirschl*, Comparative Matters: The Renaissance of Comparative Constitutional Law*,* Oxford 2014.

5 *Adrienne Stone / Lulu Weis*, Constitutional Theory in a Comparative Context, in: Gary Jacobsohn / Miguel Schor (eds.), Comparative Constitutional Theory, Cheltenham 2025.

6 *Erwin Chemerinsky*, The Inescapability of Constitutional Theory, University of Chicago Law Review 80 (2013), p. 935.

The relationship between constitutional theory and constitutional comparison is an area of evolving scholarly interest and concern.[7] Constitutional theory has long engaged in dialogue with constitutional practice, but often that dialogue is more implicit than explicit.[8] In part because of that, it can focus on a relatively narrow range of countries, or 'the usual suspects' in constitutional law.[9]

Recent scholarship challenges that pattern, calling for a more explicit engagement by constitutional theorists with actual constitutional practice,[10] and with a wide variety of constitutional systems. These calls stem partly from a concern to avoid compounding prior colonial and neo-colonial era power structures within the global constitutional academy.[11] But they also come from an awareness of the variety of constitutional experiences and practices, and the importance to constitutional theorising of sufficiently accounting for this varied practice.

This essay joins those calls; and explores three archetypical modes in which constitutional theory can be informed and enriched by broad comparative constitutional engagement. In some cases, constitutional practice may simply be an arena for the *application* of existing theoretic ideas. This kind of theory application is familiar in the social sciences[12] and serves an important purpose in constitutional law—in encouraging a more rigorous approach to questions of constitutional design and constructional choice. But it is one-way traffic from theory to practice, rather than a true engagement between the two—and our concern is with this form of true dialogue or engagement.

One mode of comparative engagement for constitutional theorists is *inductive* and draws on comparative experience to drive theory building or formation.[13] Theorising of this kind is generally aimed at generating archetypical or prototypical constitutional categories

7 See e.g., *Stone / Weis*, note 5; *Silvia Suteu*, The View from Nowhere in Constitutional Theory: A Methodological Inquiry, in: Dimitrios Kyritsis / Stuart Lakin (eds.), The Methodology of Constitutional Theory, Oxford 2022.

8 *Suteu*, note 7; *Theunis Roux*, In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case Against Judicial Review, in: Ron Levy / Hoi Kong, Graeme Orr / Jeff King (eds.), The Cambridge Handbook of Deliberative Constitutionalism, Cambridge 2018.

9 *Hirschl*, note 4, chapter 5.

10 *Stone / Weis*, note 5; *Aileen Kavanagh*, Keeping It Real in Constitutional Theory, Comparative Constitutional Studies 1 (2023), p. 244; *Suteu*, note 7.

11 *Philipp Dann / Michael Riegner / Maxim Bönnemann* (eds.), The Global South and Comparative Constitutional Law, Oxford 2020; *Philipp Dann*, Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies, Comparative Constitutional Studies 1 (2023), p. 174.

12 *Udo Kelle*, Mixed Methods and the Problems of Theory Building and Theory Testing in the Social Sciences, in: Sharlene Nagy Hesse-Biber / R. Burke Johnson (eds.), The Oxford Handbook of Multimethod and Mixed Methods Research Inquiry, Oxford 2015, pp. 596-598.

13 Compare the use of empirical data to drive theory building in the social sciences: *Barney Glaser / Anselm Strauss*, The Discovery of Grounded Theory: Strategies for Qualitative Research, Aldine 1967. See also discussion in *Kelle*, note 12, pp. 599-601.

– this is what Ran Hirschl calls 'concept formation through multiple description'.[14] But it does so with the further aim of identifying concepts or normative principles immanent within existing constitutional categories and practices.[15]

A second mode is *illustrative*: It involves theorists developing ideas from an analytic or *a priori* basis, and then illustrating either their plausibility, or real-world application, by reference to a range of comparative examples.[16] In this sense, it is closely related to existing social science ideas about theory testing.[17] But some variants are also connected to more critical theoretical traditions, in which existing critical theories are applied to constitutional studies, and the argument is then illustrated through certain comparative cases.[18]

And a third mode is *reflexive*. It takes existing constitutional theoretic ideas and seeks to refine them by testing their relevance and application in *new* constitutional settings beyond those in which the theories were first developed and refining them in light of those insights. In this sense, it is a hybrid of social science-based ideas of theory testing and formation and closely related to ideas about applied theory.[19]

Each of these modes represents an ideal type, and in practice, constitutional theory may be informed by a variety of different modes of comparison. For instance, theorists may begin by identifying archetypical categories through a process of *inductive* comparison, then seek to illustrate their broader relevance—before they or others seek to refine them—*reflexively*. Or a scholar may take an existing theory and engage with it *reflexively*, before *illustrating* the breadth of the empirical challenge to an existing theory as a reason to refine and adapt existing theoretical categories.

Even though the modes often operate as hybrids, there is still value to distinguishing them as a means of clarifying the value and appropriate scope of comparison by constitutional theorists. Inductive comparison, for example, can be broad or narrow. *Illustrative* comparison can likewise be broad or narrow. What matters, in each case, is that scholars match the breadth of comparison to the generality of their theoretical claims: if the claims made by a particular theory are general in application, then the examples needed to illustrate that must be similarly broad and diverse in scope. But if the theory is more particularised and contextual, then the number and range of cases used to illustrate it may be similarly confined.

14 *Hirschl*, note 4, chapter 6

15 *Kavanagh*, note 10.

16 *Dixon*, note 1.

17 *Kelle*, note 12, pp. 597-98.

18 On these approaches, see e.g., *Michele Krech / Marcela Prieto Rudolphy*, Feminism and Comparative Constitutional Law, in: Rosalind Dixon / David Law / Malcolm Langford (eds.), Comparative Constitutional Methods: An Introduction, Cheltenham (forthcoming).

19 On applied theory, see e.g., the idea of 'applied ethics' as discussed by *Jennifer Flynn*, Theory and Bioethics, in: Edward N. Zalta / Uri Nodelman (eds.), Stanford Encyclopedia of Philosophy, Stanford 2020.

Reflexive comparison, in turn, will often involve a single country or jurisdiction: what matters, for it be useful, is that it tests and applies a particular theory in a *new* context, not considered by those developing a particular theoretical account. Only by engaging with new jurisdictions and cases can comparison of this kind help confirm and challenge the existing assumptions behind a particular theory—about either the range of archetypical constitutional categories, or necessary preconditions for a particular constitutional theory to apply.

To illustrate this, we draw on our own work on the topics of external constitutional advising, and responsive forms of judicial review, but also a range of recent leading works of constitutional theory by a range of other scholars in the field, on topics such as democratic constitutionalism, the separation of powers, gender constitutionalism, and constituent power and constitution making.

A key aim of the essay is to clarify what it means for constitutional theory to take constitutional comparison seriously, and to engage in it in a methodologically rigorous way. Specifically, we suggest that rigorous forms of comparative constitutional theorising involve three key commitments: transparency in the jurisdictions relied on, symmetry between the countries chosen and the scope of theoretical claims made, and self-awareness or reflexivity on the part of scholars as part of this process.

The remainder of the essay is divided into four parts following this introduction. Part B briefly situates constitutional theoretical scholarship within the broader terrain of public law scholarship, and its many different variants. Part C outlines the three basic modes of comparative engagement, as well as hybrids and variants of each. It also illustrates these different modes by reference to concrete examples drawn from existing constitutional scholarship. Part D explores the implications of each mode for the scope and breadth of comparative engagement by constitutional theorists, individually and collectively, focusing on the requirements of transparency, symmetry and self-awareness. And Part E offers a brief conclusion.

B. Constitutional Theory and its Relatives

Constitutional scholarship takes a variety of forms. Some scholarship is *doctrinal* in nature; and focused on describing and analysing doctrinal developments. Scholarship of this kind is valuable in its own right.[20] It can help inform both legal practice and judicial decision-making. It is also crucial to other modes of constitutional scholarship, which aim to analyse constitutional phenomena from an empirical, normative, critical or constitutional theoretic perspective.[21]

20 *Stone / Weis*, note 5; *Kavanagh*, note 10; *Adrienne Stone*, Comparative Constitutional Studies: The Case for Detail, Description and Doctrine, Working Paper, May 2025 (on file with authors); *Jason N. E. Varuhas*, Mapping Doctrinal Methods, in: Paul Daly / Joe Tomlinson (eds.), Researching Public Law in Common Law Systems, Cheltenham 2023.

21 *Dinesha Samararatne*, note 3. See also *Stone / Weis*, note 5; *Kavanagh*, note 10.

Empirical constitutional scholarship aims to understand either the causes or consequences of certain formal constitutional design or doctrinal choices. Within this sub-field of constitutional scholarship are further sub-fields: 'functionalist' scholarship seeks to understand the likely effects of certain formal constitutional design or constructional choices, whereas other more 'explanatory' scholarship seeks to unpack the likely origins or driving forces behind those choices.[22] But in each case, the relevant scholarship relies on either large-n statistical techniques, or qualitative case studies that reflect principles of case selection developed in comparative politics and designed to uncover causal pathways.[23]

Another form of constitutional scholarship is more *normatively* focused. For instance, it may seek to evaluate existing formal constitutional design or doctrinal choices against a set of normative criteria, or to propose reforms to constitutional design or doctrine based on these same criteria. Scholarship of this kind could be viewed as normative-evaluative or normative-prescriptive in nature: normative-evaluative scholarship takes a given constitutional phenomenon and evaluates its strengths and weaknesses against a pre-defined constitutional theoretic yardstick (such as equality, justice, democracy or the rule of law). Normative-prescriptive scholarship starts with a substantive constitutional theoretic goal or commitment, then considers the degree to which existing constitutional norms or doctrinal choices achieve that goal, the consequences of any failure to do so and what, if anything, can be learnt from this failure—either in terms of the limits of formal constitutional design or doctrine, or certain constitutional models, or a potential agenda for constitutional reform.

Equally, constitutional scholarship may start with an existing *critical theoretical* perspective and seek to 'read' or 're-read' a given constitutional phenomenon through this lens: doing so can help demonstrate the value and importance of the relevant critical theory, as well as the shortcomings of more traditional, liberal accounts of democratic constitutionalism. Scholarship of this kind may involve engagement with feminist ideas, queer theory, critical race theory, critical legal studies, or post-colonial or Marxist theory, or some combination of these theories.[24] Whatever its precise focus, it could be viewed as a form of 'critical constitutional studies': scholarship that starts with theories developed in other domains, which are then applied to the constitutional domain as a means of generating new critical insights about existing constitutional theoretic arrangements and theoretical ideas.

Constitutional theory is yet another distinct sub-field of constitutional scholarship: one that involves the development of ideas about constitutions and constitutionalism based on a mix of 'concepts' and 'principles' either internal or external to existing democratic constitutional systems. Constitutional concepts, as Stone and Weis note, 'are used to classify

22 On functionalism, see e.g., *Mark Tushnet*, Taking the Constitution Away from the Courts, Princeton 1999.

23 *Dixon*, note 1.

24 See *Flynn,* note 19.

and organise objects in a domain of study'.[25] In that sense, they are often closely linked to constitutional doctrines. Constitutional principles, in contrast, 'are propositions about relationships that obtain between concepts within the domain of study and other concepts or criteria'.[26] They may be drawn from existing constitutional doctrines or structures, and hence be immanent within or 'internal to an existing constitutional order'.[27] Or they may derive from broader ideas about democracy, the state, and self-government, in ways that make them external to a particular constitutional order.[28]

Constitutional theory, in this sense, could thus be considered as a sub-branch of political theory.[29] Some forms of constitutional theory may be especially close to political theory, and involve forms of critique that fall outside this definition of theories based on concepts and principles. Critical legal studies approaches, for example, are theories that highlight the high degree of indeterminacy in legal norms and standards, and the role of politics and power in shaping how that indeterminacy is resolved.[30] These same ideas can also be applied to constitutions and constitutional studies, in ways that inform a project of critical constitutional theory.[31]

Some suggest that what ultimately separates constitutional from political theory is its engagement with actual constitutional practice.[32] But we suggest that engagement of this kind is desirable, rather than definitional, to constitutional theorising, and as we explore below, especially beneficial if it is sufficiently transparent and open to revision and refinement in light of the experiences of new constitutional systems.

25 *Stone / Weis*, note 5.

26 Ibid.

27 See, e.g., *Tarunabh Khaitan / Sandy Steel*, Areas of Law: Three Questions in Special Jurisprudence, Oxford Journal of Legal Studies 43 (2023), p. 76 (noting that the normative foundations of an area of law are often at least in part internal to it, or based on inquiry into its 'aims' and 'functions'); *David Strauss*, What is Constitutional Theory, California Law Review 87 (1999), pp. 581-582 (suggesting that the normative foundations of constitutional theory often lie in 'bases of agreement that exist within the legal culture').

28 See e.g., *Richard H. Fallon Jr.*, How to Choose a Constitutional Theory, California Law Review 87 (1999), p. 535.For discussion see *Stone / Weis*, note 5. See also *Rosalind Dixon / Theunis Roux* (eds.), Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence, Cambridge 2018.

29 *Stone / Weis*, note 5.

30 *Duncan Kennedy,* A Critique of Adjudication: fin de siècle, Harvard 1997.

31 See e.g., *Günter Frankenberg*, Comparative Constitutional Studies: Between Magic and Deceit, Cheltenham 2018.

32 *Martin Loughlin*, Constitutional Theory: A 25th Anniversary Essay, Oxford Journal of Legal Studies 25 (2005), p. 183.

C. Three Modes of Theorising Constitutions—Comparatively

Constitutional theory does not develop in a vacuum: its subject matter is constitutions, and constitutionalism. And hence, almost all constitutional theory has *some* form of empirical constitutional foundation.[33] At the same time, the degree to which constitutional theory is grounded in practice varies considerably. As Stone and Weis note, some theories are formulated at a high level of abstraction, with little explicit grounding in constitutional practice, whereas others are developed with close attention to existing constitutional practice. And there are a variety of ways in which constitutional theorists may choose to engage with constitutional practices. We are calling these 'modes' of engagement, though one might also think of them as 'approaches to theory generation'.[34]

I. Three Modes of Comparative Engagement (by Theorists)

One mode in which theorists can engage with practice is *inductive*: it involves an attempt to reconstruct constitutional concepts or principles from the 'bottom up', through deep engagement with the detailed practices of a particular constitutional system.[35] In this sense, it is similar to empirically-driven approaches to theory building in the social sciences: it starts with data or practice, and proceeds from there to develop relevant constitutional concepts or principles.[36]

Engagement of this kind involves a process of 'thick description' of existing constitutional practice.[37] It is thus a close relative of what is often called a process of 'concept formation through multiple description',[38] or in the case of single country studies, an 'idiographic' approach to constitutional studies.[39]

The key difference is that constitutional theory generally involves a mix of concepts and principles, whereas comparison alone may be purely conceptually-focused.[40] That is, inductive engagement with comparative practice is aimed at developing concepts and ideas with explanatory value.[41]

33 *Stone / Weis*, note 5; *Kavanagh*, note 10.

34 *Stone / Weis*, note 5.

35 *Oran Doyle*, Constitutional Theory in Comparative Constitutional Studies, in: Rosalind Dixon / David Law / Malcolm Langford (eds.), Comparative Constitutional Methods: An Introduction, Cheltenham (forthcoming).

36 *Glaser / Strauss*, note 13. See also discussion in *Kelle*, note 12, pp. 599-601.

37 *Dixon*, note 1.

38 *Hirschl*, note 4, chapter 5.

39 Ibid., p. 197.

40 *Stone / Weis*, note 5. See also *David Pozen*, Self-Help and the Separation of Powers, Yale Law Journal 124 (2014), p. 74; and *Kavanagh*, note 10.

41 *Nicholas Aroney*, Explanatory Power, Theory Formation and Constitutional Interpretation: Some Preliminaries, Australian Journal of Legal Philosophy 8 (2013), p. 1.

An approach of this kind is often focused on a single country, or case study.[42] In part this is because deep engagement with constitutional practices is complex and time-consuming, and it is difficult to do this to the same level across multiple constitutional contexts. But even still, there will often be comparative judgments built into work of this kind.[43] Inductive approaches can also be explicitly comparative. To achieve this, they must involve a similar form of deep engagement with multiple constitutional systems identified as having distinctive practices, capable of generating different bottom-up accounts of how constitutions can and should operate. But the depth of engagement of this kind can also vary, depending on the scope and requirements of the project.

A second mode of comparative engagement by constitutional theorists is *illustrative* in nature: it aims to demonstrate the real-world plausibility of theoretical ideas, or that they have some meaningful basis in existing empirical reality. Some constitutional theorists suggest that engagement of this is kind is a necessary part of constitutional theorising, as without it there is a risk of 'theories of a fiction'.[44] Others suggest that it is desirable in order to 'keep theory real'.[45]

Engagement of this kind is closely related to modes of comparison that are causally oriented rather than theoretical in nature. Both are empirical in nature. But the relevant form of empiricism, in this context, is much thinner: it is focused on the empirical existence or plausibility of certain constitutional patterns or concepts, rather than their causal origins or consequences. In this sense, illustrative comparison of this kind can be seen as a form of theory testing in the social sciences: that is, as helping evaluate theoretical concepts, and their real-world applicability.[46] Theory testing of this kind may not involve showing that constitutional concepts or principles are 'true' or 'false': this is generally not possible in the social sciences, and certainly not in constitutional discourse where there is such wide scope for reasonable disagreement on underlying constitutional principles.[47] But it does involve showing the attractiveness, or at least plausibility, of an idea in a given concrete constitutional setting. It could thus be seen as equivalent to a form of 'plausibility probe' in the social sciences.[48]

A third mode of engagement is more *reflexive*. It takes existing constitutional theoretic ideas and seeks to test and refine them in a new comparative constitutional context. Engagement of this kind is closely related to the application of existing constitutional

42 *Rosalind Dixon*, Single Country Constitutional Comparisons (draft—manuscript with author).

43 Ibid.. See also *Hirschl*, note 4, chapter 5.

44 *Robert Leckey*, Bills of Rights in the Common Law, Cambridge 2015. See also *Roberto Gargarella*, The Law as a Conversation Among Equals, Cambridge 2022.

45 *Kavanagh*, note 10, p. 245.

46 *Kelle*, note 12, pp. 597-598.

47 Ibid.

48 *Carol Lynne Fulton*, Plausibility, in: Albert J. Mills / Gabrielle Durepos / Elden Wiebe (eds.), Encyclopedia of Case Study Research, Thousand Oaks 2010.

theoretical ideas to a new national context. Inevitably, the application of existing ideas to new contexts requires reflection and adaptation.[49] But the focus of this exercise is on enriching our understanding of a particular constitutional system; it is not per se about constitutional theory formation itself. [50]

Reflexive constitutional comparison, in contrast, involves a process of testing existing theories in new contexts, with a view to critically reflecting back on the original theory. The aim of reflexive comparison of this kind is two-fold. The first aim is better to understand the necessary pre-conditions for a theory to operate, or have normative appeal. This is in effect also an exercise in narrowing or qualifying the scope of application of a given theory. The second aim is to reveal the applicability of a theory to new contexts, not contemplated by the original constitutional theory. This can also involve the broadening of the theory, or its adaptation to fit those new contexts—or what social scientists would call a process of theory formation or building.[51]

Often, engagement of this kind involves deep engagement with a single country, or small set of countries. But it is also implicitly comparative in the sense that it involves the application of theoretical ideas in their original and a new, as yet untested, context. Increasingly, it also often involves an explicit engagement with more than one constitutional system.

The insights derived from reflexive comparison will depend on the generality of the original constitutional theory: generality, as Stone and Weis note, is a key dimension in the formulation of any constitutional theory.[52] And the more general a theory, the more likely a process of reflexive comparison is to reveal additional limitations on, or preconditions for, the theory; whereas the more context-specific the theory is, the more likely it is that reflexive comparison will expand its sphere of potential application.

Reflexive comparison of this kind can also travel in multiple directions: it can start with a focus on theories developed in the Global North and then move to the Global South to test and refine those theories, with a view to deepening their ability to account for constitutionalism in both the Global South *and* North. This traffic in ideas between the Global North, and South, and back is what Philip Dann, Michael Riegner and Maxim Bönnemann call the 'double turn' in comparative constitutional studies.[53]

It may also start with a focus on theories developed within the Global South—take for instance the idea of 'transformative constitutionalism' or constitutional 'guarantor' institu-

49 See, e.g., *Rosalind Dixon / Amelia Loughland*, Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia, International Journal of Constitutional Law 19 (2021), p. 455.

50 *Frank I. Michelman*, Reflection, Texas Law Review 82 (2004), p. 1737.

51 *Kelle*, note 12, pp. 599-601.

52 *Stone / Weis*, note 5.

53 *Dann / Riegner / Bönnemann*, note 11.

tions, both of which developed in the Global South.[54] A reflexive approach to comparison would involve testing out the applicability of these theories to new cases and contexts within both the Global South and North. South-South comparison of this kind itself involves a form of post-colonial constitutionalism, focused on horizontal comparison and lessons for constitutional theory from within the Global South. South-North comparison, in turn, could be viewed as its own distinctive form of post-colonial scholarly project, or a kind of 'inverted' or anti-colonial turn in comparative constitutional theorising.[55]

Hence, the language of reflexive comparison offers a means of conceptualising the many different directions of travel for constitutional ideas, within a theoretic frame, including the 'double turn', but also forms of horizontal comparison and reverse anti-colonial turn within the field.[56]

II. The Three Modes in Practice

Each of these modes can be seen as underpinning leading constitutional theoretical works, though to varying degrees. One could illustrate this by turning to classic or canonical texts in the field of constitutional theory. For instance, Rodolfo Sacco's theory of 'legal formants' is one of the leading theoretical ideas in continental constitutional theory, originally developed and illustrated by Sacco through a close form of *inductive* engagement with Italian constitutional experience.[57] But over time, Sacco also engaged in scholarly dialogue and collaboration with scholars in Africa and Latin America, thereby engaging in a form of reflexive comparison and confirmation of his original ideas.[58]

Our focus, however, is on illustrating these ideas by reference to more recent works of constitutional theory, including by a range of junior scholars working in or on topics relating to the Global South. The examples we give are just that: examples. They could be replaced by any number of other works of the same kind. However, they are examples chosen for both their currency and variety, and as thus illustrating these modes of engagement in the work of senior and junior, and male and female, scholars on a variety of topics and

54 See e.g., Karl E Klare, Legal Culture and Transformative Constitutionalism, South African Journal of Human Rights 14 (1998), p. 146; *Tarun Khaitan*, Guarantor Institutions, Asian Journal of Comparative Law 16 (2021), p. 40.

55 For a description of this approach, and examples focused on the development of the Sri Lankan Constitutional Council as part of a synergistic approach to constitutionalism, see e.g., *Dinesha Samararatne*, Resilience Through Synergy? The Legal Complex in Sri Lanka's Constitutional Crisis, Asian Journal of Law and Society 9 (2022), p. 1, and *Samararatne*, note 3.

56 *Dann / Riegner / Bönnemann*, note 11.

57 *Elisabetta Grande / Rodrigo Míguez Núñez / Pier Giuseppe Monateri*, The Italian Theory of Constitutional Comparison, The Italian Review of International and Comparative Law 1 (2021), pp. 10-11; *Michele Graziadei*, Rodolfo Sacco: An Intellectual Portrait, The Italian Law Journal 8 (2022), pp. 13-14.

58 *Grande et al,* note 57, pp. 21-22; *Graziadei*, note 57, p. 14.

jurisdictions in the common law and civil law world and in the Global North and the Global South.

Inductive engagement lies at the heart of several recent theories of democratic constitutionalism and the separation of powers. Aileen Kavanagh, for instance, relies on thick engagement with the constitutional practices of the United Kingdom to construct a theoretical account of the constitutional separation of powers that emphasises notions of inter-dependence, respect, restraint and comity among courts, parliaments and executive actors. Kavanagh calls this the idea of the 'collaborative constitution'.[59] But it is, in effect, simply one version of democratic constitutionalism that tracks core features of the British constitutional model (at least pre-Brexit), and hence an embodiment of inductive theorising through engagement with a single country case study.

Inductive engagement likewise underpins Wojciech Sadurski's account of constitutional populism in *Poland's Constitutional Breakdown.* Sadurski focuses, in this context, on a single jurisdiction (Poland) in order to construct an account of populism that involves attention to both discourses and actions—including the ways in which populists 'work within the inherited institutional architecture and subvert it for their purposes', seek to control the media, build counter-coalitions in civil society (against democracy) and engage in large-scale, rapid constitutional amendment or replacement—but under the guise of 'ordinary' legislative change.[60] Drawing on this experience, he seeks to construct a general account of the idea of 'illiberal, anti-constitutional populism', which can serve as a key conceptual tool for normative critique and responses to these trends.

In his subsequent book, *A Pandemic of Populists*, Sadurski goes on to test the generality of this idea—by engaging in a process of reflexive comparison focused on a range of countries under democratic stress, including Hungary, Poland, Brazil, Venezuela, India and the Philippines. The result is both the confirmation, and refinement, of the idea of anti-constitutional populism developed in *Poland's Constitutional Breakdown*. For instance, Sadurski notes the ways in which in these various countries, authoritarian populists have sought to centralise power, and remove mechanisms for the dispersal of authority; the ways in which authoritarian populists have sought consistently to capture and re-deploy the work of a broad range of institutions, including electoral institutions, but also the ways in which authoritarian populists have sought to change the method of voting (for instance to paper only in Brazil) or of translating votes into electoral representation (Hungary); the attacks by the executive, in Brazil and the Philippines, on legislatures as well as independent institutions (in Poland, of course, Law and Justice controlled the legislature); and the comprehensive nature of the control over the media in Hungary, and to a lesser but meaningful extent in Brazil, Venezuela and India.[61] Sadurski thus both confirms, and refines his idea of

59 *Aileen Kavanagh*, The Collaborative Constitution, Cambridge 2023.

60 *Wojciech Sadurski,* Poland's Constitutional Breakdown, Oxford 2018.

61 *Wojciech Sadurski*, A Pandemic of Populists, Cambridge 2022, chapters 2–3.

populist authoritarianism as distinct from more passive notions of 'democratic backsliding' or 'erosion'.

In *Global Gender Constitutionalism and Women's Citizenship,* Ruth Rubio-Marín engages in a similarly wide-ranging form of comparison to inform the *inductive* construction of four broad archetypes of 'gender constitutionalism': 'exclusionary', 'inclusive', 'participatory' and 'transformative' gender constitutionalism. Exclusionary constitutionalism, Rubio-Marín argues, can be understood through the prism of early 20th century constitutional struggles in the US.[62] Inclusive constitutionalism is theorised through attention to the European constitutional model.[63] The idea of participatory gender constitutionalism draws on constitutional experiences in Canada (1982), Nicaragua (1987), Brazil (1987–1988), Colombia (1991) and South Africa (1994–1996).[64] Transformative gender constitutionalism draws on the constitutional text and jurisprudence of South Africa, Canada and Colombia, and particularly their jurisprudence challenging the public-private divide, and German ideas about the relationship between constitutions and motherhood.[65] But Rubio-Marín also draws on a wide array of jurisdictions to theorise other dimensions and variants of this transformative gender constitutional model.[66] Her account is also ultimately principled as well as conceptual: she seeks to argue for, and defend, a gender transformative model of constitutionalism—based on its capacity to advance 'women's empowerment' and a 'constitutional egalitarian ethos'.[67]

Illustrative comparison is likewise a feature of recent works on democracy and constitutionalism. In *The Law as a Conversation Among Equals,* Roberto Gargarella argues for a new egalitarian, participatory form of democratic politics—as the most normatively attractive model of constitutional government today, capable of meeting the 'dramas' of the current moment. Those dramas, Gargarella suggests, include both rising dissatisfaction with the democratic project, and authoritarianism, as well as broader conditions of economic marginalisation and inequality. Responding to these dramas, he argues, means involving citizens in the process of self-government, and ensuring that elite structures (such as courts and legislatures) do not prevent citizens from engaging in the kind of radical rethinking or redistribution necessary to achieve true substantive social and economic equality.

Gargarella largely constructs his ideal of democratic politics in dialogue with other more traditional liberal models of constitutionalism. Yet Gargarella is also a deeply knowledgeable comparative constitutional scholar. Hence, he seeks to illustrate the attractiveness of his account of democracy by reference to a range of real-world examples of participatory

62 *Ruth Rubio-Marín*, Global Gender Constitutionalism and Women's Citizenship, Cambridge 2022, pp. 46–47.

63 Ibid., p. 127.

64 Ibid., pp. 139–147.

65 Ibid., pp. 217–224.

66 This includes Ecuador, Brazil, Nepal, Malawi, Mexico, Paraguay and Taiwan, among others.

67 *Rubio-Marín*, note 62, pp. 14–15.

constitutional politics, and weak-form judicial review. These include constitutional assemblies in Iceland, Ireland, Australia, Canada (in both British Columbia and Ontario), Chile and the Netherlands.[68] They also include the various mechanisms by which constitutional systems make space for democratic 'dialogue' and disagreement with courts, including through formal legislative override of court decisions (as in Canada under s 33 of the *Charter of Rights and Freedoms,* the so-called 'notwithstanding clause') or weak-form judicial remedies, such as the form of declaratory or 'engagement' remedies employed by the Constitutional Court of South Africa.[69]

Similarly, *reflexive* comparison underpins a range of key works in the field on constitutions and constitution making. For instance, in *Making Constitutions in Deeply Divided Societies,* Hanna Lerner suggests that prior constitutional theory was dominated by two competing understandings or paradigms: an 'essentialist paradigm of the 'nation-state constitution… as [a] legal embodiment[t] of [a] pre-constitutional homogeneous' unity; and a 'procedural paradigm of the "liberal constitution"' based on the idea of constructing 'a political collectivity on the basis of shared democratic procedures'.[70] But Lerner engages in a process of reflexive comparison focused on constitution making in deeply divided societies, namely Ireland in 1922, India in 1947–50 and Israel in 1948–50. Based on this, she concludes that existing theories overstate the capacity for deeply divided societies to reach agreement on either a shared substantive vision of the nation state or liberal-democratic procedures. In other words, she uses reflexive comparison to reveal the limits to existing constitutional theory, and the need for alternative theories capable of accommodating the idea of constitution making even in the absence of agreement of this kind.

In his 2023 *International Journal of Constitutional Law* Foreword, 'Is it Time to Abandon The Theory of Constituent Power', Sergio Verdugo explores both whether traditional and modified versions of constituent power theory provide an accurate description of modern processes of constitution making, and—if so—whether it is one that is normatively appealing. He concludes that the answer is no: traditional theories tend to downplay social and political pluralism, and are highly susceptible to 'abusive' uses by would-be authoritarian actors.[71] Even reformed or modified theories also face a double-edged challenge: either they over-estimate the capacity for peaceful democratic protest and deliberation under conditions of conflict and polarisation or, where there is greater social stability and

68 *Gargarella*, note 44, pp. 290–297.

69 Ibid., pp. 247–252, 266–269. On weak-form remedies, and engagement remedies specifically, see *Rosalind Dixon / Po Jen Yap*, Responsive Judicial Remedies, Global Constitutionalism 12 (2025), p. 323; *Brian Ray*, Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave, Cambridge 2016; *Katharine G. Young*, Constituting Economic and Social Rights, Oxford 2012.

70 *Hanna Lerner*, Making Constitutions in Deeply Divided Societies, Cambridge 2011, p. 6.

71 *Sergio Verdugo*, Is It Time to Abandon the Theory of Constituent Power?, International Journal of Constitutional Law 21 (2023), pp. 14, 18, 21.

cohesion, contemplate too radical a form of change.[72] Instead, Verdugo suggests the value of more continuumised notions of political legitimacy within democratic constitution-making processes, and theories that embrace the idea of political compromise, and a mix of constitutional continuity and change. In reaching this conclusion, Verdugo also engages in what is implicitly a form of *reflexive* comparison focused on a range of Latin American constitutional systems: he considers recent processes of constitution making in Bolivia and Venezuela to highlight the potential for abuse inherent in traditional versions of constituent power theory.[73] He likewise considers various modified versions of constituent power theory in the context of recent constitution-making processes in Chile and Ecuador, suggesting that these experiences reveal the false dichotomy between continuity and change created by (even modified) constituent power theory.[74]

III. Hybrids and Variants

Of course, the modes of comparative engagement we sketch in Part C.I are ideal types and so none of them is completely distinct. In practice, they often overlap and inform each other. In part, this is because constitutional theorists often build their ideas iteratively, through multiple related works and projects, each of which employs a slightly different methodology. They also often will typically approach a research question from multiple directions.

For example, constitutional scholars may begin their engagement with comparative experience *inductively* but go on to test the broader plausibility of a theoretical account through a process of *reflexive* comparison, or to demonstrate its broader applicability, via a process of *illustrative* comparison. Or they may begin by identifying the need for research on a question through a process of *reflexive* comparison, which helps identify gaps or problems within an existing theory, but then go on to develop a new theory through a process of *inductive* constitutional comparison.

A good illustration is the work of Berihun Gebeye on African constitutional theory. In *A Theory of African Constitutionalism,* Gebeye develops a novel theory, in law, of 'legal syncretism', or 'the process and the result of [the] adoption, rejection, invention, and transformation of diverse and seemingly opposite legal rules, principles, and practices into a constitutional state with imperial or colonial legacies',[75] which he suggests provides a useful framework for understanding and reforming African constitutionalism in a post-colonial era.[76] One way to view this theory is that Gebeye develops it *inductively*, from a careful, contextual and bottom-up study of constitutional developments in Ethiopia,

72 Ibid., pp. 22, 67–69.

73 Ibid., pp. 18, 42–44.

74 Ibid., pp. 64–66.

75 *Berihun Adugna Gebeye*, A Theory of African Constitutionalism, Oxford 2021, p. 33.

76 Ibid., chapter 1, 7.

Nigeria and South Africa, pre and post-independence. But another perspective is that the theory is constructed *reflexively*, by taking existing theories in religion and anthropology, and applying and refining them in light of constitutional experiences in these countries, to create a distinctive version applicable to law.[77] Alternatively, one could see Gebeye's theory as a reflexive refinement of existing theories within law and political theory itself, namely: as arrived at through a process of applying, testing and refining rival ideas about 'legal centralism' and 'legal pluralism' in these African contexts.[78] Neither theory, Gebeye suggests, fully or adequately accounts for the complexities of African constitutionalism.[79] It is only by mixing and reconciling them, in distinctive and *syncretic* ways, that these theories start to have the potential adequately to describe, or prescribe changes to, African constitutionalism.

Our own work on constitutional theory provides useful examples. In a project on Modes of External Constitutional Advising, for example, one of us (Perham) proposes a typology of modes of advising adopted by external constitutional advisers involved in constitution-making processes.[80] The research question the typology was responding to asked what are the distinct modes in which external constitutional advisers provide advice, and the project approached this question from two different directions. From one direction, it began with a survey of external constitutional advising across constitution-making instances in a number of jurisdictions in one region (Oceania). Based on that survey, particular choices made by external constitutional advisers and those instructing them began to emerge—and the construction of the typology began to emerge *inductively* from that direction. A case study of the role of external constitutional advisers in the making of the 1979 Constitution of the Marshall Islands (one of the constitution-making instances in the broader survey) then provided an opportunity for *illustrative* comparison—moving from regional comparison to in-depth single jurisdiction research to demonstrate the purchase and plausibility of the inductively-developed theory in a particular instance.

At the same time, and moving in another direction, the typology was also informed and refined through engagement with existing constitutional theoretic ideas about constitutional borrowing that had been developed in other contexts and jurisdictions—for example, from Vicki Jackson's work on the borrowing of outside ideas from foreign courts by the US Supreme Court and other apex courts[81]—as well as existing part-theoretical, part-empirical work about international influences on constitution making written by academics who had served as advisers in other contexts.[82] Viewed from this direction, a *reflexive* mode of com-

77 Ibid., pp. 29-33.

78 Ibid., pp. 14-28.

79 Ibid., p. 22.

80 *Elisabeth Perham*, Modes of External Constitutional Advising, PhD Thesis UNSW, 2024.

81 *Vicki Jackson*, Constitutional Engagement in a Transnational Era, Oxford 2010.

82 See e.g., *Cheryl Saunders*, International Involvement in Constitution Making, in: Hanna Lerner / David Landau (eds,), Comparative Constitution Making, Cheltenham 2019; *Zaid Al-Ali*, Constitu-

parison was used to test existing ideas and understandings about the broader phenomenon of constitutional borrowing and international influences in constitution making, developed in other contexts, by reference to an understudied region (Oceania) and an understudied case of constitution making.

In *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age,* one of us (Dixon) proposes a theory of judicial representation-reinforcement styled as a response to similar, more US-centric ideas developed by John Hart Ely.[83] In *Democracy and Distrust,* Ely argued that the US Supreme Court should orient the process of judicial review to countering two broad risks to democracy: the risk of political incumbents seeking to self-entrench or block 'the channels of political change', and the risk of majoritarian processes infringing the rights of 'discrete and insular minorities'.[84] *Responsive Judicial Review* starts from a similar position, but suggests that defining the risks to democracies in these terms is potentially both under- and over-inclusive, given contemporary social science and comparative insights.

Hence, Dixon argues that judicial review should be oriented to responding to a somewhat different set of democratic pathologies or blockages in cases of constitutional indeterminacy: the risk of electoral or institutional monopoly power, democratic blind spots and burdens of inertia. Further, Dixon relies on a wide-ranging process of *illustrative* comparison to demonstrate the capacity of courts effectively to counter these risks to democracy, assuming at least three minimal pre-conditions are met: namely, a sufficient degree of judicial independence, legal and political support for judicial review, and remedial power for courts (whether express or implied).

Underneath these ideas, however, also sits both an explicit and implicit process of *reflexive* comparison. The book, for example, identifies potential weaknesses in Ely's ideas by applying them to a range of comparative contexts. It also develops the relevant preconditions for the theory of responsive judicial review by testing its plausibility in a range of contexts, where these conditions are, or are not, present.[85] Further, the concepts of *democratic burdens of inertia* and *democratic blind spots* derived both from a prior process of scholarly engagement with the ideas of other constitutional scholars such as Guido Calabresi, Bill Eskridge, Mark Graber and David Strauss,[86] and with the comparative

tional Drafting and External Influence, in: Rosalind Dixon / Tom Ginsburg (eds.), Comparative Constitutional Law, Cheltenham 2010.

83 *Rosalind Dixon*, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age, Oxford 2023.

84 *John Hart Ely*, Democracy and Distrust: A Theory of Judicial Review, Harvard 1980.

85 *Dixon*, note 83.

86 See e.g., *Guido Calabresi*, Foreword: The Supreme Court 1990 Term: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores), Harvard Law Review 105 (1991), pp. 80, 104; *William N. Eskridge Jr. / Philip P. Frickey,* The Supreme Court, 1993 Term —Foreword: Law as Equilibrium, Harvard Law Review 108 (1994), p. 4; *Mark A. Graber*, The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary, Studies in American Political

experiences of a range of jurisdictions with, and without, broad and strong forms of judicial review (for example, Canada, New Zealand and Australia).[87] This process of comparative engagement was also *inductive*, as well as *reflexive*, in character: it informed the idea that there were dangers to overly weak, as well as overly strong, forms of judicial review; and helped inform the construction of the core concepts of *democratic burdens of inertia* and *blind spots,* which lie at the centre of a theory of responsive judicial review.

The same analysis could be applied to other leading constitutional theories, of the kind explored in Part C.II *supra*. Sadurski, for example, engages in broad forms of *inductive* comparison to construct his theoretical account of constitutional populism. There is also a close connection between his two major recent books on populism, one of which is almost wholly inductive (*Poland's Constitutional Breakdown*) and one of which combines both inductive and reflexive comparison across a wider canvas (*A Pandemic of Populists*).

In *The Law as a Conversation Among Equals,* Gargarella largely seems to develop his account of democracy through a process of imaginary dialogue with past political theories and thinkers. Hence, the prime focus of his comparative engagement is *illustrative* in nature. But there are also indications that his theory is informed by a process of *reflexive* constitutional comparison—and especially, engagement with the leading progressive constitutional projects in Latin America. This is in part because *Conversation Among Equals* builds on the work and theoretical insights developed in his previous book on *Latin American Constitutionalism*, *1810–2010: The Engine Room of the Constitution*, and the process of *reflexive* comparison it involved: the book used a wide-ranging account of Latin American constitutional practice to challenge the dominant emphasis in (then) contemporary constitutional theory on constitutional rights provisions.[88] But it is also an explicit part of Gargarella's argument in *Conversation Among Equals.*

Gargarella notes in the more recent scholarship that the 1917 Mexican Constitution was an 'important achievement' in progress towards a more inclusive, egalitarian form of constitutional politics.[89] The same could be said, he notes, for the 'new constitutionalism' in Latin America adopted in the 1990s, or the neo-Bolivarian constitutional models adopted in Bolivia and Ecuador in recent decades.[90] But close engagement with the implementation of these reforms also informs Gargarella's scepticism about 'traditional', liberal, elite-driven models of constitutionalism and the separation of powers: none of these Constitutions,

Development 7 (1993), p. 35; *David A. Strauss,* The Modernizing Mission of Judicial Review, University of Chicago Law Review 76 (2009) p. 859.

87 See *Rosalind Dixon*, Weak-Form Judicial Review and American Exceptionalism, Oxford Journal of Legal Studies 32 (2012), p. 487; *Rosalind Dixon*, A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?, Federal Law Review 37 (2009), p. 335, *Rosalind Dixon*, The Core Case for Weak-Form Judicial Review, Cardozo Law Review 38 (2017), p. 2193.

88 *Roberto Gargarella,* Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution, Oxford 2013.

89 *Gargarella*, note 44, p. 177.

90 Ibid., pp. 176–177.

Gargarella suggests, has achieved anything like the social and economic transformation or redistribution needed to achieve political and material equality, and trust in democratic forms of government.[91] This process of *reflexive* comparison also seems a central motivating force in Gargarella's attempt to develop a more radically bottom-up, participatory, deliberative and dialogic model of constitutional politics.

The same is true for leading theoretical work on constitution-making and amendment. Lerner, for example, engages in a process of *reflexive* comparison (focused on Ireland, India and Israel) to identify limits in, or gaps, in existing constitutional theories of constituent power and constitution making. But she also goes on to engage with the constitution-making processes in those countries *inductively*, to construct a new theory of incremental constitution making. In addition, she mines the variety of different approaches to incrementalism in each country to construct a set of sub-types of incremental constitution making, involving what she labels 'informal consociationalism' (Israel), 'constructive ambiguity' (India) and 'symbolic ambivalence' (Ireland).[92]

In 'Is it Time to Abandon the Theory of Constituent Power', Verdugo engages in a form of *reflexive* comparison, suggesting that the application of the theory in various Latin American contexts points both to its descriptive limits, and to its limits as a normatively desirable theory. At the same time, he explores different variants of modified constituent power theory, involving courts as mediators of the scope of the power. And in doing so, he engages in a process of *inductive* comparison: in Colombia, Verdugo notes, courts helped 'open up' the process of constitution making in adverse conditions; in Chile, courts were empowered to supervise the constitution-making process, and in Tunisia, courts found that they have implied power to regulate or supervise secondary aspects of the process.[93] A process of comparative engagement thus served to identify different variants of the relationship between courts and constituent power.

Each of the three modes of comparative engagement should therefore be seen as an ideal type, within a broader terrain of complex, real-world comparative constitutional engagement. There is still value, however, to distinguishing them, as ideal types: doing so allows for a clearer account of the appropriate scope and focus of each mode of comparative engagement, by constitutional theorists. And it arguably helps guard against the danger that the claims made by a particular constitutional theory will not be adequately grounded in practice.

D. Scope and Methods

What is necessary to ensure that the claims a particular theory makes are supported by underlying constitutional practice? First and foremost, transparency in the relationship

91 Ibid., chapter 12.

92 *Lerner*, note 70, chapters 3–5.

93 *Verdugo*, note 71, pp. 24–25.

between constitutional theory and practice; second, symmetry between the generality of claims made and relevant scope of comparison; and third, a degree of self-awareness or reflexivity on the part of scholars as to how they approach this relationship.[94]

I. Transparency

Why is transparency of this kind important? Transparency allows other scholars to assess the rigour and persuasiveness of theoretical claims in light of their empirical underpinnings and foundations. It also provides the basis for a more meaningful engagement with those ideas by future scholars.

An important determinant of how we engage with comparative practice, as theorists, is the existing state of the scholarly literature. If it is already deeply informed by comparison, or well-developed, the best starting point will often be reflexive in nature, and aimed at testing and refining those existing ideas. Conversely, the earlier the relevant set of theoretical ideas are, the more likely it is that inductive or illustrative modes of theorising and comparison will be appropriate.[95] To assess this, however, the necessary starting point is transparency within existing constitutional theory: we need to know what practices inform existing theories, in order to select between these different modes of comparison.

Moreover, transparency is important to comparative constitutional theorising as a collective enterprise. All constitutional scholarship is ultimately a collective enterprise—both through the peer review process, and through a broader process of scholarly dialogue that helps refine and improve our understanding. Constitutional theory likewise depends on a form of scholarly dialogue. But this is even more true for *comparative* constitutional scholarship and engagement.[96]

In prior work, one of us (Dixon) has argued that the best, safest guide to a rigorous comparative constitutional studies is one that relies on collaborative and overlapping forms of scholarship, where the ideas developed by one theorist are tested and refined by another in an overlapping and complementary set of studies.[97] Transparency in case selection aids this kind of collaborative approach, and the same norms apply to constitutional theorising. The more we surface the jurisdictional underpinnings to our theories, the more we invite

94 See *Liora Lazarus*, Constitutional Scholars as Constitutional Actors, Federal Law Review 48 (2020), p. 483; *Liora Lazarus*, Constitutional scholars and scholactivism, International Journal of Constitutional Law 20 (2022), p. 559.

95 This difference might also be one reason that different modes of comparative engagement are more common in some areas than others, depending on their 'newness' in the field. We are indebted to Berihun Gebeye for pressing us on this point. Relatedly, see *Mark Graber*, Generational and constitutional change, DPCE 3 Online (2022), p. 1549 (reflecting on the foci of different generations of constitutional scholars).

96 *Dixon*, note 1, p. 193; *Rubio-Marín*, note 62, p. 11.

97 *Dixon*, note 1.

and allow other theorists to test and refine our theories in light of related but distinct real world constitutional systems and cases.

As Part B notes, almost all inductive comparison relies to some degree on prior doctrinal scholarship setting out the contours of constitutional doctrine and practice in various jurisdictions. The broader this reliance, the more general a process of inductive comparison and theory formation can also be. Take Rubio-Marín's development of the idea of gender constitutionalism, and its many variants: Rubio-Marín suggests that this kind of *general* theorising about the relationship between gender and constitutions was only possible through engagement with the work of many different scholars of gender and constitutions worldwide.[98]

Almost all empirical comparison also involves collaboration among scholars: either it involves scholarly teams to code the data necessary for large-n analysis, or else a process of iterative, 'concentric' qualitative comparison among scholars. The leading tools for qualitative forms of empirical comparison involve applying concepts such as the 'most similar' or 'most different' cases principle, and yet no individual scholar can hope accurately to survey every jurisdiction with a view to applying this principle. Instead, they must rely on a more limited form of survey or 'scoping' exercise, which seeks to identify similar or different cases—in the hope that others will then retest their findings on the basis of related pairings of cases.[99]

Reflexive comparison will be especially well-suited to a dialogue or collaboration of this kind among scholars. Often, collaboration of this kind can allow theories to be tested in new contexts, by scholars with specific expertise in constitutional law in those contexts. And this can mean that in developing a theory, scholars can choose *either* to focus on a narrower set of jurisdictions and offer suitably qualified theoretical ideas in the hope they will then be further expanded and generalised by others drawing on different contexts and examples, *or* on a broader set of jurisdictions and claims, knowing that those claims might then be narrowed through future processes of reflexive comparison.[100]

Take the challenge by Verdugo to ideas about constituent power: Verdugo takes existing ideas about constituent power developed in Europe (for example, by Carl Schmitt and Emmanuel-Joseph Sieyès), and engages in a reflexive re-examination of them focused on constitutional systems in Latin America. This also corresponds to Verdugo's expertise

98 *Rubio-Marín*, note 62, pp. 10–12 (comparing the exercise to collective carpet-weaving, or a symphonic choir).

99 *Dixon*, note 1.

100 This might be one answer to Stone and Weis's critique of Waldron's theory of constitutional rights in *Jeremy Waldron*, The Core of the Case Against Judicial Review, Yale Law Journal 115 (2016), p. 1346: while Waldron offered a theory that was too general relative to the empirical basis he drew on, he could be understood to have done so in a tentative way, open to the possibility of reflexive refinement.

in Chilean constitutional law,[101] and broader Latin American constitutional developments (especially in Bolivia),[102] as well as his Spanish-language skills.

Verdugo's *Foreword* then led to a vibrant exchange among scholars invited to respond to his argument, several of whom adopted a reflexive and comparative approach to testing the persuasiveness of Verdugo's theoretical claims. This again allowed for the process of reflexive engagement to draw on true comparative expertise: Christine Bell, for example, focused on the experience of constitution making in post-conflict settings in Kenya and Nepal as a basis for affirming Verdugo's view that constitutional legitimacy is best seen as a continuum, and through the prism of compromise, rather than an on/off idea of constituent power.[103] This response builds on the deep expertise of Bell as a leading scholar of post-conflict constitutions.[104]

Conversely, Nicholas Aroney, Erin Delaney and Stephen Tierney focused their response to Verdugo on federal constitutional systems, such as Australia, the US, India and Switzerland, drawing on the constitutional experiences of these systems to suggest potential limits or qualifications to Verdugo's theory. Indeed, they suggested that in situations of 'coming together' federalism,[105] the idea of constituent power may remain more important than Verdugo suggests—as at least one possible conceptual answer to the central *problematique* facing federal systems, namely: 'the foundational recognition of a plurality of territorially demarcated jurisdictions and their constituent populations'.[106] Again, this reflexive engagement is based on deep expertise on the part of the authors: Aroney, Delaney and Tierney are some of the world's leading scholars of constitutional federalism, and have particular expertise in the origins and operation of federalism in Australia and the US, among other countries.[107]

101 See, e.g., *Sergio Verdugo / Luis Eugenio García-Huidobro*, How Do Constitution-Making Processes Fail? The Case of Chile's Constitutional Convention (2021–22), Global Constitutionalism 13 (2024), p. 154.

102 *Sergio Verdugo*, The Fall of the Constitution's Political Insurance: How the Morales Regime Eliminated the Insurance of the 2009 Bolivian Constitution, International Journal of Constitutional Law 17 (2020), p. 1098.

103 *Christine Bell*, Constitutionalizing Conflict: Beyond Constituent Power: Afterword to the Foreword by Sergio Verdugo, International Journal of Constitutional Law 21 (2023), p. 1189.

104 See e.g., *Christine Bell*, On the Law of Peace: Peace Agreements and the Lex Pacificatoria, Oxford 2008; *Christine Bell*, Introduction: Bargaining on constitutions – Political settlements and constitutional state-building, Global Constitutionalism 6 (2017), p. 13.

105 *Nicholas Aroney / Erin F. Delaney / Stephen Tierney*, Federal Exceptionalism and Constituent Power: Afterword to the Foreword by Sergio Verdugo, International Journal of Constitutional Law 21 (2023), p. 1182.

106 *Aroney / Delaney / Tierney*, note 105, p. 1183.

107 See, e.g., *Nicholas Aroney*, The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution, Cambridge 2009; *Erin F. Delaney / Ruth Mason*, Solidarity Federalism, Notre Dame Law Review 98 (2022), p. 617; *Gabrielle A. Appleby / Erin F. Delaney,* Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony,

Similar forms of reflexive comparison are implicitly contemplated by other scholars, such as Gebeye in his development of a theory of African constitutionalism. In developing a theory of legal syncretism, Gebeye engages deeply with the experiences of Ethiopia, Nigeria and South Africa, but also with a broader range of African jurisdictions. Through this mix of inductive theory formation, and reflexive testing of existing theoretical ideas, Gebeye also generates a theory that he suggests is capable of explaining constitutionalism and pointing to constitutional reforms across Africa.[108] But Gebeye further gestures at the possibility that the idea of legal syncretism could guide or inform constitutional debate and reform in other post-colonial contexts[109]—he does not spell those possibilities out, but leaves them to future processes of reflexive comparison and testing by other scholars working in and on the Global South. Both postures are hallmarks of rigorous approaches to constitutional scholarship, and they are especially valuable in this context: transparency in comparative engagement helps promote a truly collaborative approach to theory formation, testing and refinement.

II. Symmetry

A second requirement of rigorous constitutional theorising is that it draws on a set of comparative practices adequate to ground the claims that it seeks to make. For instance, as noted in Part A *supra*, both *inductive* and *illustrative* comparison can be broad or narrow in scope. The most important consideration, in the selection of comparative cases, is symmetry: the scope of comparison must match the generality of the claims a constitutional theory makes. That is, the broader the process of comparison, the more feasible it is to develop a general theory of constitutions or constitutionalism, whereas the narrower the comparison, the more qualified or limited the theory must be.

Take Aileen Kavanagh's theory of collaborative constitutionalism. On one view, this is a theory of British constitutionalism, and hence can legitimately rely on an inductive process of theory formation based solely on British constitutional experience. But on another view, the theory is more general, and seeks to guide courts, legislators and executive actors in all constitutional democracies toward an ethos of mutual respect, reciprocity and restraint. And if so, as Stone and Weis note, one could legitimately expect the theory to engage with a broader range of cases, beyond the United Kingdom.[110]

Yale Law Journal 132 (2023), p. 2419; *Stephen Tierney*, The Federal Contract: A Constitutional Theory of Federalism, Oxford 2022.

108 *Gebeye*, note 75, chapter 7.

109 Ibid.

110 *Stone / Weis*, note 5, p. 13: 'Kavanagh seeks to reorient constitutional theory, and ultimately constitutional practice, toward an understanding of the separation of powers that values and promotes interaction along collaborative lines. And yet, it is unclear how tenable this normative thesis is given the theory's empirical base – although descriptively robust – is limited to a single jurisdiction'.

In Hungary or Poland, for example, an argument for judicial restraint could be understood as an argument in support of courts upholding a range of abusive forms of constitutional change.[111] Or in Venezuela, an argument for comity between branches could be understood as an invitation to collusion between the Maduro regime and the Supreme Court —a form of collusion that has arguably already occurred and contributed to a form of 'abusive judicial review', which itself has accelerated the erosion of constitutional democracy in that jurisdiction.[112] Broader comparative engagement, therefore, might ultimately point to the importance of both collaboration, contestation and (necessary) conflict as values within a healthy democratic constitutional order.[113]

This point is put this way by Adrienne Stone and Lulu Weis in their important work on generality versus specificity in constitutional theorising: for 'propositions that apply beyond a single case or single jurisdiction […] comparative work is needed in the process of theory-formation'.[114] The scope of that comparative work varies in accordance with the generality of the relevant theoretical propositions being advanced.

For *reflexive* comparison, the choice of comparators is more open. A scholar may choose to focus on a single country or jurisdiction, or small sub-set of countries or jurisdictions, regardless of the ingoing generality of the relevant constitutional inquiry. What matters is *novelty*: attention to cases that go beyond those already embedded, or implicit, in existing constitutional theoretical scholarship.

There is clearly value to studies that focus on the same countries, or cases, as an original constitutional theoretic study: studies of this kind can help critically re-examine or revisit the experiences of an existing constitutional system and thereby assess whether they do in fact support the inductive process of constitutional theory formation. But scholarship of this kind is not comparative in nature. It may be 'thick' doctrinal, or socio-legal, in focus, but it does not involve any true form of reflexive comparison.[115]

True reflexive comparison requires a focus on certain constitutional experiences outside the contemplation of a constitutional theorist in the process of theory formation.[116] Only in this way can the process help test whether the original theory is in fact more general in application than originally thought, or else, more limited or qualified in scope.

Comparison of this kind can be conducted by the original constitutional theorist themself, as part of an *iterative* process of constitutional theory formation and testing. But

111 *Sadurski*, note 60. See also *Rosalind Dixon / David Landau*, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy, Oxford 2021.

112 *David Landau / Rosalind Dixon*, Abusive Judicial Review: Courts against Democracy, UC Davis Law Review 53 (2020), p. 1313.

113 *Rosalind Dixon*, A Not Too Collaborative Constitution? Collaboration as Constitutional Value vs Model?, Working Paper (on file with authors).

114 *Stone / Weis*, note 5, p. 13. See e.g., *Michael G. Breen*, The Origins of Holding-Together Federalism: Nepal, Myanmar, and Sri Lanka, Publius: The Journal of Federalism 48 (2018), p. 26.

115 *Dixon*, note 1.

116 See e.g., *Lerner,* note 70.

it can also be conducted by other scholars, seeking to test and refine existing theories. In this sense, reflexive comparison is distinct from that which occurs in the process of inductive theory formation: here, Stone and Weis suggest, it may be too late for comparison 'after the point of theory formation'.[117] The theory itself may not be sufficiently flexible to allow for appropriate adjustment in light of new cases and contexts. But for reflexive comparison, the aim is to expand or qualify the theory in light of new cases and contexts, and hence that process can occur iteratively, through ongoing individual and collective scholarly endeavours.

III. A Self-Aware and Reflexive Scholarly Outlook

Finally, the hallmark of rigorous comparative engagement, by constitutional theorists, rests on a closely related form of scholarly self-awareness or reflexivity.[118] (It is likewise important for judges and lawyers to engage in in reflexive or 'reflective' processes of comparison, in order critically to test their assumptions about existing constitutional norms and values.[119])

There are some general guidelines to help scholars in their approach to this task, but these guidelines depend on the specific type of engagement between constitutional theory and practice. They do not tell a scholar which type of engagement to prefer; this is something that will almost always depend on the question being asked, and the existing state of the constitutional theory literature.

Hence, it will be especially important for scholars to approach this task in a reflexive and self-critical way that questions and tests, rather than pre-supposes, what mode of comparison should be preferred; and that acknowledges the idea of overlap and blurred boundaries between modes—as well as their different demands and requirements.

In this sense, the idea of 'reflexivity' in comparative constitutional theorising can be understood as operating at two levels: one that involves idea of testing and refining existing theories in light of the insights gained from the application to new contexts, and the other, a form of self-awareness and self-criticism on the part of scholars as to the relationship between constitutional theory development and constitutional comparison.

117 *Stone / Weis*, note 5, p. 9.

118 *Lazarus*, note 94.

119 Judges and lawyers are also likely to engage in good decision-making when they engage in reflexive or reflective processes of comparison, aimed at encouraging self-reflection about existing constitutional norms, values and assumptions: see e.g., *Sujit Choudhry*, How to do Comparative Constitutional Law in India: *Naz Foundation*, Same Sex Rights, and Dialogical Interpretation, in: Sunil Khilnani / Vikram Raghavan / Arun K. Thiruvengadam (eds.), Comparative Constitutional in South Asia, Oxford 2016; *Michelman*, note 50; *Dixon*, note 1; *Jackson*, note 81.

E. Conclusion

Not all constitutional theory is developed in dialogue with constitutional practice. But constitutional theorising clearly benefits from engagement with comparative constitutional practice. *Inductive* processes of comparison create the possibility of new understandings, developed from the bottom up, of the relationship between the individual and the state, and the scope, structure and identity of state institutions. *Reflexive* modes of comparison open up possibilities for the refinement of existing theoretic ideas—pointing both to a better to understanding of the necessary preconditions for a theory to apply, and hence helping to narrow its scope of operation, or else ways of adapting existing ideas to broaden their application in ways that are appropriately cognisant of the variety of constitutional forms worldwide. *Illustrative* comparison likewise serves to test the plausibility of theoretical ideas against real-world settings and conditions.

Constitutional theorists should thus be actively encouraged toward a comparative turn, especially a turn toward a broad range of constitutional experiences that include the attention to constitutionalism in the 'Global South'.[120] Existing constitutional theorising often engages with the Global South, but with a relatively narrow range of jurisdictions within it. Therefore, part of the call for a comparative turn in constitutional theorising is a call to engagement with constitutional practices in countries beyond the 'usual suspects'. The more we understand the variety of ways in which constitutional theory can engage with practices in a wider range of jurisdictions, the richer theory will also be.

Part of the aim of the essay is to call for a more transparent, symmetric and self-aware approach when engaging with this broader range of constitutional practices within constitutional theorising. The article does not seek to prescribe an overly demanding standard of comparative engagement. On the contrary, it suggests that constitutional theory can be enriched by comparative practise in three distinct, if overlapping ways. And that some of these modes, illustrative—for example, are relatively undemanding.

However, it suggests that transparency, symmetry and self-awareness around comparative engagement is extremely important to the rigour of constitutional theorising. Like Stone and Weis, we suggest that this applies from the outset in the development of constitutional theory, but we emphasise that it is equally important in the refinement of constitutional theoretic ideas through processes such as reflexive and illustrative comparison.

The article therefore is at once an invitation to comparative engagement and a call for greater rigour in that process. But the standards of rigour we propose are eminently achievable, indeed, even fairly undemanding. They are a call for matching modes of theory formation with appropriate forms of case selection, and above all for transparency by

120 *Philipp Dann*, Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies, Comparative Constitutional Studies 1 (2023), p. 174; *Samararatne*, note 3; *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), p. 5.

authors in identifying what countries they have engaged within theory formation, why, and what this says about the narrowness or breadth of the ideas they have developed.