ABHANDLUNGEN / ARTICLES

Interdisciplinary synergies in comparative research on constitutional judicial decision-making

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Abstract: Interdisciplinary research in comparative constitutional law and politics is often talked about but rarely theorized or practised. And yet, such research is urgently required to meet the complex problems posed by the rise of populist constitutionalism and the endurance of other forms of authoritarian governance. Against this background, this article examines the potential for productive interdisciplinary dialogue between positive political science and legal-doctrinal and normative approaches to constitutional judicial decision-making. While research in this area is founded on a wide range of epistemologies and methods, the article argues, there are at least two areas in which interdisciplinary dialogue might both promote more rigorous research and deliver practical benefits. The first involves greater use of quantitative social science methods in comparative doctrinal research; and the second, the mutual challenging of settled assumptions as between normative constitutional theorists and positive political scientists involved in comparative research on (1) the determinants of judicial behaviour and (2) the link between constitutional judicial decision-making and various non-case outcomes.

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A. Introduction

Interdisciplinary research in comparative constitutional law is more talked about than practised.[1] Almost everyone in the field seems to agree that this kind of research is a good idea,

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1 A search of the *International Journal of Constitutional Law* for the term 'interdisciplinary' produced 50 hits. Of these, only one claimed to be engaging in interdisciplinary research itself. Many of the other hits were to editorials, forewords or book reviews in which 'interdisciplinary' was being used as a synonym for 'multidisciplinary'. A review of the major handbooks, monograph series and edited anthologies revealed a similar trend. Notes on file with author.

but very few scholars are actually theorising it or thinking through the many challenges that attend it.

This state of affairs would be an academic curiosity but for the fact that the recent rise of populist constitutionalism and the durability of other authoritarian forms of governance urgently call for an interdisciplinary response. We need to know, not just why liberal constitutionalism is under threat, but also what we value about this ideal and whether it is worth defending. While normative constitutional theorists and positive social scientists have specialist competencies in respect of the distinct parts of this question, the whole needs to be larger than the sum of its parts. Mere multidisciplinarity, in other words, is not enough. We need an integrated research agenda that, in addition to whatever *scholarly* virtues it may have, also has some *practical* utility for those involved in constitutional design, judicial practice and political activism.

The aim of this article, against this background, is to explore the prospects for genuinely interdisciplinary research in one subdimension of the field: research on judicial decision-making. While the choice of this topic risks reinforcing the court-centric focus of comparative constitutional law, it is motivated by two considerations: (1) the wealth and range of the research on this topic that is being conducted; and (2) the starkness of the differences in epistemology and method between the legal and social scientific approaches to it. It is in that sense a useful testing ground, both for the field's ability to overcome the disciplinary divide between law and social science and also for its ability to make a practical difference in the world.

I begin by setting out what each side of the disciplinary divide brings to the table and what its limitations, when viewed as a purely monodisciplinary enterprise, are. Positive political scientists, I show, have been interested in the 'determinants' of judicial behaviour – the empirically observable factors that influence the policy outcome of constitutional cases.[2] For a long time a mainly American endeavour, this line of research has taken on a comparative dimension over the last twenty years as scholars have started to use conceptual frameworks and methods first developed in the US to study judicial decision-making in other parts of the world. At the same time, this line of research has been extended to include research on the link between judicial decision-making and various *non-case* outcomes, i.e. institutional effects other than the immediate policy issue for determination, such as the impact of particular approaches to decision-making on a court's institutional legitimacy.

On the other end of the spectrum, academic lawyers have been engaged in two main types of research. The first is doctrinal in the sense that its practitioners draw on foreign law to assist judges in resolving complex questions of constitutional interpretation. In stark contrast to the external, knowledge-building ambitions of positive political science, this form of research adopts an insider-participatory perspective in seeking to resolve concrete questions facing a particular constitutional system. Judicial decision-making, on this approach,

2 For a critical overview of the literature, see *Frederick Schauer*, Incentives, Reputation, the Inglorious Determinants of Judicial Behavior, University of Cincinnati Law Review 68 (2000), p. 615.

is assumed to be motivated by a good-faith desire to get the law right, and foreign jurisprudence is treated as a resource that, suitably adjusted to take account of differences in constitutional culture, can assist judges in the host jurisdiction to give the best answer to the questions presented.

In addition to this type of research, academic lawyers have offered competing theorisations of the appropriate judicial role in liberal constitutional systems. While some of these theorisations are targeted at specific jurisdictions and thus collapse back into a kind of meta-doctrinal research, others are implicitly comparative in the sense that they transcend the confines of any one jurisdiction to theorize the requirements of judicial decision-making in liberal constitutional systems more generally.[3]

In the absence of meaningful interdisciplinary dialogue, the mutual co-existence of these two research agendas has depended until now on the willingness of each side to suspend its disbelief in the reliability of the other's premises. Academic lawyers, for their part, have had to bite their tongues about what for them is the implausible positive social science notion that judicial reasoning is but a smokescreen for the pursuit of policy preferences. Positive social scientists, in turn, have had to politely accept academic lawyers' stubborn attachment to the equally unrealistic idea, from their perspective, that constitutional law is somehow immune to the influence of judicial ideology and political context.

While mutual suspension of disbelief of this kind has helped to keep the peace, it has hindered progress towards a synthetic account of constitutional adjudication that is larger, and thus more useful, than the sum of its disciplinary parts. The positive political science strand, for its part, has gathered an impressive amount of support for the view that factors other than a good-faith desire to get the law right influence the way judges decide constitutional cases. But the goal of a predictive theory of constitutional judicial decision-making has thus far remained elusive. In the absence of that, the usefulness of this line of research to constitutional design remains doubtful. This body of work has also been hampered by the lack of a clearly stated, normatively delineated goal that judicial decision-making in liberal constitutional democracies is meant to serve. Instead, research has been dispersed between examining the effects of decision-making on a range of outcomes, the relevance of which to the promotion of liberal constitutionalism remains unclear.

Similarly, on the side of comparative doctrinal research and normative constitutional theory, inattention to the findings emanating from positive political science research has led to certain blind spots and inefficiencies. While the comparative methods used in doctrinal research have a distinct logic, which is different from the casual-explanatory logic that underlies comparative research in positive political science, some of the comparative research that has been conducted by academic lawyers has a decidedly amateurish, seat-of-the-pants feel to it. Likewise, normative constitutional theory, while deliberately and self-consciously idealistic, is often premised on assumptions about the circumstances of constitutional adju-

3 See especially Jeremy Waldron's approach, discussed in B.IV below.

dication that are so unrealistic as to undermine its usefulness to constitutional designers and judges alike.

With the preoccupations and limitations of the two lines of research set out in this way, section 3 asks whether there is any basis for interdisciplinary dialogue between them and, if so, whether such dialogue is likely to deliver practical benefits. Two main opportunities for productive dialogue are identified: (1) greater use of quantitative social science methods in comparative doctrinal research; and (2) the mutual challenging of settled assumptions as between normative constitutional theorists and positive social scientists involved in research on judicial decision-making.

Noting that the participatory-insider perspective adopted by doctrinal researchers cannot easily be integrated with the external perspective of positive social science, section 3.1 argues that greater use of quantitative social science methods is a question of country-by-country legal-cultural change rather than interdisciplinary synthesis. Scholars and judges working in legal systems in which doctrinal reasoning is already open to consequentialist arguments should find it relatively easier to turn to quantitative social science when making foreign legal comparisons than scholars working in legal systems in which this is not the case. Either way, however, the most that can be expected of this process, given doctrinal research's distinct perspective, is the incorporation of quantitative social science methods within doctrinal reasoning. The role of legal academics in this process is to act as legal-cultural change agents, prodding judges and other legal professionals to see how reference to foreign law in constitutional cases might be improved by better use of positive political science research methods.

As other scholars have noted, normative theorising about judicial review needs to proceed from more realistic premises about the institutional and political constraints under which constitutional judges work. Positive social scientists can assist here in helping normative theorists to think more carefully about what the empirically observable circumstances of constitutional adjudication mean for the implementability of their normative prescriptions. Unlike doctrinal researchers and constitutional judges, there is no question of normative theorists using quantitative social science methods. Rather, this form of engagement is about normative constitutional theorists rethinking their premises in light of their exposure to the findings of another discipline. Likewise, positive social scientists who work on the determinants of judicial behaviour have much to learn from normative constitutional theorists, not just about how to model judicial decision-making more accurately, but also about how to re-orient their research to contribute to the field's overarching interest in the fate of liberal constitutionalism.

B. Overview of existing lines of research

I. The determinants of judicial behaviour

The study of judicial decision-making within positive social science has, until recently, been a largely North American endeavour.[4] Originating in the legal realists' critique of formalism in the 1920s and 1930s,[5] this line of research took off from the 1940s as the behavioural revolution swept through US social science departments.[6] Finally possessed of the requisite theoretical framework and methodological tools, scholars began a search for the 'determinants' of judicial behaviour – the empirically measurable influences on US Supreme Court decision-making. Since the first use of ideological scaling by Glendon Schubert,[7] the statistical methods deployed by judicial behaviouralists have become more sophisticated. At the same time, the study of judicial decision-making on the US Supreme Court has been extended by each new movement in American political science, so that this line of research now includes work done by rational-choice scholars using formal modelling[8] and studies by historical institutionalists using more qualitative approaches.[9] Though methodologically diverse in this way, the common goal has been to explain what causes the US Supreme Court to decide cases the way it does. For behaviouralist scholars, the further aim has been to develop an empirically testable, predictive theory of 'case outcomes' (understood as judicial 'votes' on policy rather than doctrinal developments). With few exceptions, the normative merits of different modes of judicial decision-making have not been part of this research agenda.

Two main empirically testable theorisations of the determinants of US Supreme Court decision-making have emerged. The first, the so-called 'attitudinal model', holds that the justices decide cases according to their 'sincere' policy preferences – their legally and politically unconstrained view of the case outcome in policy terms closest to their preferred position.[10] Against this, proponents of the 'strategic model' have endeavoured to show that case outcomes in policy terms are best explained when one takes into account two major

4 See *Arthur Dyevre*, Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour, European Political Science Review 2 (2010), p. 297.

5 See *William Twining*, Karl Llewellyn and the Realist Movement, Cambridge 2012.

6 For a comprehensive history of the development of this subfield, see *Nancy Maveety*, The Pioneers of Judicial Behavior, Ann Arbor 2003, p. 9. The origins of the attitudinal model lie in the work of *Herman C. Pritchett,* The Roosevelt Court: A Study in Judicial Votes and Values, 1937-1947, New York 1948.

7 *Glendon Schubert*, The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963, Evanston, IL 1965.

8 See, for example, *Jeffrey A. Segal*, Separation-of-Powers Games in the Positive Theory of Courts and Congress, American Political Science Review 91 (1997), p. 28.

9 See the essays collected in Cornell W. Clayton and Howard Gillman (eds.), Supreme Court Decision-Making: New Institutionalist Approaches, Chicago 1999.

10 The fullest statement of the model is contained in *Jeffrey A. Segal and Harold J. Spaeth*, The Supreme Court and the Attitudinal Model Revisited, New York 2002.

sets of constraints on judicial behaviour: the internal constraints attendant on the justices' need to be part of the majority opinion, and the external constraints attendant on the political branches' capacity to frustrate the implementation of the US Supreme Court's decisions.[11]

While law has always figured as one possible determinant of decision-making in these studies, its role was from the very beginning problematized. The various possible influences that law might exert on US Supreme Court decision-making have thus been treated as independent variables making up what is collectively known as the 'legal model'.[12] One famous study, for example, subjected law's alleged constraining influence in the form of precedent to empirical testing, and found only a small effect.[13] This uncompromisingly empiricist approach has finally fulfilled the legal realists' ambition of using social science to test the determinacy of law. But it has generated considerable methodological challenges in modelling law's causal influence, with several studies criticized for failing to understand the way law guides judicial decision-making.[14] Likewise, on the side of the dependent variable, criticisms have been made of the reduction of law to the policy outcome of cases rather than a more nuanced understanding of the remedial order or doctrinal holding.[15]

In the US, these challenges have driven the development of ever more elaborate empirical models of judicial decision-making,[16] with one major reformulation claiming to show that the Supreme Court is influenced by both law and politics.[17] Further research has at the same time been conducted on judicial decision-making by the lower courts, where prece-

11 The major monograph statement of the approach is *Lee Epstein and Jack Knight*, The Choices Justices Make, Washington, D. C. 1998. An overview of the field is given in *Lee Epstein and Jack Knight*, Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead, Political Research Quarterly 53 (2000), p. 625. See also Lee Epstein and Tonja Jacobi, The Strategic Analysis of Judicial Decisions, Annual Review of Law & Social Science 6 (2010), p. 341.

12 This term is used, usually sceptically, by political scientists as a shorthand for 'what lawyers think the Court does'.

13 *Harold J. Spaeth and Jeffrey A. Segal*, Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court, New York 1999, p. 288.

14 This literature is summarized in *Howard Gillman*, What's Law Got to do with It? Judicial Behavioralists Test the 'Legal Model' of Decision Making, Law & Social Inquiry 26 (2001), pp. 465, 474-75.

15 See *Stephen B. Burbank*, On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility, in Charles Gardner Geyh (ed.), What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake, Palo Alto, CA 2011; *Carolyn Shapiro*, Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court, Hastings Law Journal 60 (2009), p. 477, 486; *Harry T. Edwards* and *Michael A. Livermore*, Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking, Duke Law Journal 58 (2009), p. 1895, 1924-27; *Gillman,* note 14, pp. 468, 470-71.

16 See, for example, *Mark J. Richards* and *Herbert M. Kritzer*, Jurisprudential Regimes in Supreme Court Decision Making, American Political Science Review 96 (2002) p. 305.

17 *Michael A. Bailey*, and *Forrest Maltzman*, The Constrained Court: Law, Politics, and the Decisions Justices Make, Princeton 2011.

dent has always been thought to have a greater role to play.[18] By 2013, this second wave of research had persuaded Lee Epstein and Jack Knight, the two leading proponents of the strategic model, to abandon their conceptualisation of judges as policy-preference maximizers. Instead, they conceded, empirical research had shown that judges had as many as '20-odd goals, motives and preferences'.[19] While these findings were still compatible with the basic tenets of the strategic model, Epstein and Knight argued, they were fatal to theories that modelled judicial decision-making as exclusively driven by the justices' ideological attitudes.[20]

While all of this was going on, the comparative wing of the field had begun testing whether the attitudinal and strategic models could explain decision-making by apex courts in other regions of the world.[21] In the most ambitious attempt to date to synthesize this literature, Arthur Dyevre has offered a 'unifying theory of judicial behaviour' that combines the attitudinal and strategic models to explain judicial decision-making in the US and Europe.[22] Dyevre's theory distinguishes between 'macro', 'meso' and micro' variables, which he argues exert different degrees of influence at different times and in different settings.[23] Thus, 'political fragmentation' and 'public support' are macro variables that increase the prospects of judicial supremacy when their values are high.[24] Similarly, variables like judicial term limits and decision-making procedures can be collected together at the meso level, with judicial attitudes at the micro level.[25] While welcome as an attempt to pull together a complex literature, Dyevre's theory falls short of generating its own empirically testable propositions. Rather, what it (very usefully) does is to illustrate how difficult it is, given the wide range of variables interacting in sometimes contradictory ways, to develop a parsimonious general theory of judicial decision-making in constitutional cases.

Perhaps for this reason, Diana Kapiszewski, in her synthesis of the literature, offers what she calls a 'thesis' rather than a theory.[26] Like Dyevre, Kapiszewski contends that a range of factors, including judicial ideology, the law, legislative preferences, and public

18 See *Cass R. Sunstein, David Schkade, Lisa M. Ellman* and *Andres Sawicki*, Are Judges Political? An Empirical Analysis of the Federal Judiciary, Washington, D.C. 2006; *Frank B. Cross*, Decision Making in the US Courts of Appeals, Stanford 2007.

19 *Lee Epstein* and *Jack Knight*, Reconsidering Judicial Preferences, Annual Review of Political Science 16 (2013), pp. 11, 18.

20 Ibid, 24.

21 See *Theunis Roux*, American Ideas Abroad: Comparative Implications of U.S. Supreme Court Decision-Making Models, International Journal of Constitutional Law 13 (2015), p. 90 for a summary of this literature.

22 *Dyevre,* note 4.

23 Ibid, 318.

24 Ibid.

25 Ibid.

26 *Diana Kapiszewski*, Tactical Balancing: High Court Decision-making on Politically Crucial Cases, Law & Society Review 45 (2011), p. 471.

opinion, influence judicial decision-making in 'politically crucial cases'.[27] Unlike, Dyevre, however, she subsumes all these factors under a single framework in arguing that judges 'tactically balance' them on a case-by-case basis. Her thesis is also explicitly directed at courts in both 'developed and developing democracies'.[28] It is therefore potentially more far-reaching. In particular, its all-encompassing, eclectic nature means that Kapiszewski's thesis could in theory be used to explain decision-making by constitutional courts in Latin America, Africa and Asia. On the other hand, given its deliberately non-predictive ambitions, Kapiszewski's approach is at the same time restricted to providing an *ex post* explanation of why politically crucial cases come out the way they do.[29] Its utility as a guide to constitutional design and judicial practice is therefore limited.

II. The impact of judicial decision-making on non-case outcomes

A separate body of positive social science literature considers the causal link between various approaches to judicial decision-making and outcomes apart from the immediate legal or policy issue for determination. These non-case outcomes range from the impact of decisions on judges' institutional security (in the sense of vulnerability to dismissal) to constitutional judges' capacity to contribute to the consolidation of democracy. This strand in the literature must be read in combination with studies of the structural conditions that enable constitutional courts to contribute to these outcomes, such as the extent of political fragmentation in the country[30] or the ideological distance between the judiciary and the governing political regime.[31] For current purposes, however, the focus falls on the question of judicial agency, i.e. on research that explores how constitutional judges themselves, through their decision-making practices, may contribute to various ends.

Of the non-structural, agency-based theorisations, the most important has been 'tolerance interval' theory, which can be seen as an extension of the strategic model to the question of what constitutional judges have done, and more prescriptively, need to do, to build their court's institutional legitimacy. On this understanding, constitutional judges may and do act strategically, not just to maximize the chances that their preferred policy will be adopted, but also to promote the achievement of various institutional and societal goals.

27 Ibid, 472.

28 Ibid.

29 Ibid, 481-82 (stating that the thesis was 'inductively derived' and that no attempt was made to 'test' it).

30 See *Rebecca Bill Chavez*, The Rule of Law and Courts in Democratizing Regimes, in Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds.), Oxford Handbook of Law and Politics, New York 2008, p. 63.

31 This approach, known as 'regime politics theory', originated in the work of *Robert A. Dahl* (Decision-making in a Democracy: The Supreme Court as a National Policy-Maker, Journal of Public Law 6 (1957), p. 279). For a critical exposition, see *Mark A. Graber*, Constitutional Politics in the Active Voice, in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds.), Consequential Courts: Judicial Roles in Global Perspective, New York 2013, p. 363.

They do this principally by anticipating the likely responses to their decisions and adjusting them to ensure that they will be enforced. In the technical vocabulary used by scholars working in this vein, constitutional judges acting strategically 'place' their decision within the 'tolerance interval' in 'two-dimensional policy space' that defines whether political actors with the power to punish the court will see their interests better served by accepting the decision.[32]

According to the leading version of this theorisation – Epstein, Knight and Shvetsova's study of decision-making on the early Russian Constitutional Court – this kind of strategic behaviour triggers a virtuous cycle since each decision that is placed inside the tolerance interval is *ex hypothesi* enforced. Enforcement in turn enhances the Court's reputation as an effective institution, meaning that the tolerance interval for later decisions is widened in a positive feedback loop.[33] Conversely, decisions outside the tolerance interval are not enforced, causing the tolerance interval to shrink over time. A similar idea is propounded by Tom Ginsburg in his study of the establishment of judicial review in four Asian countries. Using a more interpretive methodology, Ginsburg shows how cautious respect for other political actors' policy preferences and their capacity to retaliate allowed constitutional courts progressively to build their institutional legitimacy.[34]

Other studies focus on the link between judicial decision-making and the ability of constitutional courts to play 'consequential roles in governance'.[35] Thinner versions of this line of research collapse back into policy-preference maximization. Martin Shapiro, for example, defines a consequential constitutional court as 'a reviewing court with some decisions entailing substantial changes in public policy that are obeyed by other policy makers and implementers.'[36] Thicker versions, however, frame the outcome in ways that come close to the liberal-constitutionalist ideal for what courts should strive to do. Robert Kagan, for example, gives the following definition:

> *To say that a constitutional court has played a significant role in governance of a nation implies that the court's decisions are consequential – that they make a difference, have an independent effect on politics, public policy, and power relationships, or on*

32 *Lee Epstein, Jack Knight* and *Olga Shvetsova*, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, Law & Society Review 35 (2001), pp. 117, 128; *Tom Ginsburg*, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, Cambridge 2003 pp. 65-89.

33 *Epstein, Knight* and *Shvetsova*, note 32, p. 128.

34 *Ginsburg*, note 32.

35 See the various studies anthologized in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds.), Consequential Courts: Judicial Roles in Global Perspective, New York 2013.

36 See *Martin Shapiro*, The Mighty Problem Continues, in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds.), Consequential Courts: Judicial Roles in Global Perspective, New York 2013, pp. 380, 380.

> *social or economic life, the treatment of minorities, criminal suspects, political or religious dissidents.*[37]

There is a much greater normative tilt to this definition than is customary in political science literature, emphasizing as it does the effectiveness of constitutional courts in contributing to the realization of various ideals associated with liberal constitutionalism. As argued below, Kagan's definition may therefore serve both as a useful interdisciplinary bridge between political science and normative approaches to judicial decision-making and as a concept that can be used to draw out the practical implications of research.[38]

Epstein, Knight and Shvetsova, as we have seen, assess the relationship between judicial decision-making and two outcomes: the short-term effectiveness of a decision (i.e. whether it is implemented) and longer-term institutional legitimacy (i.e. diffuse public support). The latter concept has been the subject of sustained research by James Gibson and others under the rubric of 'legitimacy theory'.[39] In broad terms, this theory holds that institutional legitimacy is a condition for the effectiveness of constitutional courts.[40] In earlier versions, Gibson and his colleagues tested this proposition by linking public opinion surveys of public support to curial effectiveness.[41] The theory in that form does not speak directly to judicial decision-making. However, later work has tested the link between popular views of the decision-making process and the institutional legitimacy of courts. In one study, for example, Gibson and Gregory Cadiera sought to explain why it is that the general acceptance in the US that Supreme Court justices are driven by ideology has not led to lack of public support for the Court. On the basis of their survey results, Gibson and Caldeira conjecture that the reason is that the American public thinks of the justices as extrapolating the implications of their ideological premises for the cases they decide in an ideologically 'principled' way.[42] While law might not control judicial decision-making, the justices are not seen as partisan-political actors but as sincere exponents of a liberal or conservative understanding of the American constitutional project.

37 *Robert Kagan*, A Consequential Court: The U.S. Supreme Court in the Twentieth Century, in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds.), Consequential Courts: Judicial Roles in Global Perspective, New York 2013, p. 199.

38 See section C.II below.

39 *James L. Gibson, Gregory A. Caldeira* and *Vanessa A. Baird*, On the Legitimacy of National High Courts American Political Science Review 92 (1998), p. 343; *James L. Gibson*, Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?, in Charles Gardner Geyh (ed.), What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake, Palo Alto, CA 2011, p. 281.

40 *James L. Gibson*, The Evolving Legitimacy of the South African Constitutional Court in François du Bois & Antje du Bois-Pedain (eds.), Justice and Reconciliation in Post-Apartheid South Africa, Cambridge 2008, p. 229.

41 Ibid.

42 *James L. Gibson* and *Gregory Caldeira,* Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?, Law & Society Review 45 (2011), p. 195.

In this version, the theory promises to supplement Epstein and Knight's work on strategic decision-making. By studying what reasons representative samples of the public in countries with judicial review give for supporting courts, and linking those reasons to the public's understanding of the influences on judicial decision-making, Gibson and his colleagues' research might one day deliver a general theory of the conditions for constitutional courts to play a role in the maintenance of liberal-democratic systems of government. This research also has profound implications for normative constitutional theory. It forces a rethink, for example, of the conventional idea that a commitment to constitutional principle means a commitment to developing a uniform, legally coherent understanding of the dictates of constitutional values for all decided cases. If the American experience is generalizable, at least, constitutional courts may enjoy public support even where judges are perceived as adjudicating cases according to one of several possible interpretations of constitutional values.

III. Doctrinal research in comparative constitutional law

Doctrinal research in comparative constitutional law endeavours to contribute to the development of constitutional law in a particular jurisdiction.[43] The researcher adopts the position of a participant in[44] – or at least a professionally-informed observer of[45] – the chosen legal system and draws on foreign law to inform the meaning and application of constitutional norms. The basic aim of this line of research is to improve the legal regulation of society by providing judges with an additional, non-binding source of guidance for their decisions.[46]

Beyond this very broad characterisation, it is difficult to generalize about this line of research because it takes different forms according to the legal tradition in which the researcher is working. One conventionally accepted difference is thus that doctrinal researchers in continental Europe stand at the centre of the legal system – acting as its main systematizers.[47] In Anglo-American jurisdictions, by contrast, *judges* take centre stage,

43 See *Armin von Bogdandy*, The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe, International Journal of Constitutional Law 7 (2009), p. 364.

44 *Christopher McCrudden*, Legal Research and the Social Sciences, Law Quarterly Review 122 (2006), pp. 632, 633.

45 *Michel Rosenfeld*, Comparative Constitutional Analysis in United States Adjudication and Scholarship, in Michel Rosenfeld and András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012, pp. 38, 39.

46 *András Jakab, Arthur Dyevre, Giulio Itzcovich,* Introduction: Comparing Constitutional Reasoning with Quantitative and Qualitative Methods, in András Jakab, Arthur Dyevre, Giulio Itzcovich (eds.), Comparative Constitutional Reasoning, Cambridge 2017, pp. 1, 4.

47 *Armin von Bogdandy*, Comparative Constitutional Law: A Continental Perspective, in Michel Rosenfeld and András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012, pp. 25, 26.

with doctrinal researchers acting as *ex post* commentators and critical sounding boards.[48] Even within these two main traditions, there are subtle distinctions between the way doctrinal research is conducted in seemingly similar countries.[49] Since comparative constitutional law research that is offered as a contribution to the construction of constitutional law doctrine needs to respect these differences if it is to be effective, its style and mode of presentation will vary according to the tradition in which the researcher is participating.

Perhaps for this reason, there have been few attempts to define doctrinal research in comparative constitutional law as a general matter. The literature that exists mostly has to do with the legitimacy and appropriateness of the methods of constitutional comparison used by judges rather than the aims and purposes of doctrinal research.[50] This is not the place to attempt a more general definition. For current purposes, it is enough to note the obvious differences between doctrinal research in comparative constitutional law and positive political science research on judicial decision-making in constitutional cases. Whether participating or observing, the doctrinal researcher's working assumption is that law is a significant influence on constitutional adjudication. While most academic lawyers are broadly familiar with debates in legal theory over the determinacy of law, when writing in a doctrinal mode they set any scepticism they may have to one side. Suspending their disbelief in the determinacy of law, they present arguments in professionally accepted form aimed at convincing the reader of the best interpretation of the legal materials in relation to given doctrinal questions.

Just how those arguments are presented depends on the status of foreign law as a source of law in the jurisdiction concerned. In countries like Australia and South Africa, where there has never been any real contestation over the legitimacy of reference to foreign law as a non-binding source of guidance on how constitutional norms ought to be interpreted, foreign-law comparisons may be extensive and deep.[51] Their aim is either to demonstrate a convergent understanding of a particular legal norm or the direct opposite – the institutional and legal-cultural differences that dictate a particular interpretation in the targeted jurisdiction.[52] In Europe, doctrinal research in comparative constitutional law may additionally be aimed at assisting the project of European integration, so that divergent understandings are seen as challenges to be resolved rather than reasons to justify a different interpretation. In

48 *Michel Rosenfeld*, Comparative Constitutional Analysis in United States Adjudication and Scholarship, in Michel Rosenfeld and András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012, pp. 38, 39.

49 See *Alexander Somek*, The Indelible Science of Law, International Journal of Constitutional Law 7 (2009), p. 424.

50 See, for example, *Cheryl Saunders*, The Use and Misuse of Comparative Constitutional Law, Indiana Journal of Global Legal Studies 13 (2006), p. 37.

51 For exemplary Australia research, see *Adrienne Stone*, Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication Melbourne University Law Review 25 (2001), pp. 374.

52 Ibid.

the United States, where the legitimacy of reference to foreign law by the Supreme Court is still hotly disputed,[53] and where doctrinal research is in any event beset by deep scepticism about the determinacy of law, references to foreign-law practices are offered as options for consideration in the pragmatic search for improved legal regulation.[54]

The research methodology that is utilized for these purposes tracks the professionally accepted conventions for referring to foreign law as it exists in the jurisdiction concerned. Broadly speaking, those conventions will vary along a continuum from a more formalist style, where law is assumed to be an autonomous social subsystem with a principled, logical structure, to a more consequentialist style, where law is assumed to be a porous social subsystem open to the influence of other social subsystems.[55] The legitimacy of using positive social science methods in doctrinal research in comparative constitutional law will vary accordingly, with social science more readily integratable into doctrinal research in consequentialist as opposed to formalist systems. Ironically, what this means is that the country that is by legal-cultural orientation most inclined to value the use of social science in doctrinal research – the United States – is also the country in which the general legitimacy of reference to foreign law is most contested. This may be one explanation for the slow progress of calls for quantitative social science methods to be more widely utilized in comparative constitutional law research, but there are others as well, as section C.I explains.

IV. Normative constitutional theory

An underlying normative theory of the legitimate role that constitutional courts perform in adjudicating cases is an implicit part of most doctrinal research in constitutional law. In their explicit form, however, such theorisations belong to a separate line of research commonly collected under the rubric of normative constitutional theory. Offered as a justification of the legitimacy of judicial review in a particular jurisdiction in light of its institutions and traditions, such theories are tied to their local context. Many such theories, however, are implicitly comparative in so far as they purport to address the legitimacy of judicial review in liberal constitutional systems more generally.

The best-known example of this implicit comparative theorizing is Ronald Dworkin's account of constitutional courts as 'forums of principle'.[56] While the American origins of his account are plain to see in the case-law examples Dworkin uses, his theory is not offered as an understanding just of the American tradition, but as a prescription for how

53 See *Sujit Choudhry*, Migration as a New Metaphor in Comparative Constitutional Law, in Sujit Choudhry (ed.), The Migration of Constitutional Ideas, Cambridge 2006, p. 1.

54 See *Vicki C. Jackson*, Constitutional Law in an Age of Proportionality, Yale Law Journal 124 (2015), p. 3094.

55 *Patrick S. Atiyah* and *Robert S. Summers*, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions, Oxford 1987.

56 See *Ronald Dworkin*, The Forum of Principle, New York University Law Review 56 (1981), p. 469.

judges in liberal-democratic constitutional systems should approach their adjudicative task. And indeed, this is how his work has been understood, with the 'forum of principle' idea very influential in Latin America, for example.[57] The same might be said of Richard Posner's account of legal pragmatism,[58] which is very American in its origins but has obvious comparative implications.[59] Finally, Jeremy Waldron's critique of the normative justifiability of judicial review explicitly demarcates its range of application by reference to a set of comparative indicators.[60]

There is a vast range of normative theorisations of the judicial role in liberal constitutions, which cannot be summarized here.[61] A basic distinction may be drawn, however, between legalist theories that assume some degree of autonomy for law from other social systems and pragmatist theories that assume the permeability of law and politics. For current purposes, at least, that distinction seems to be the most significant factor affecting these theories' capacity to take account of positive social science research, although not necessarily in the way one might suppose.

Ronald Dworkin's influential body of work is exemplary of the first, legalist style of theory.[62] The crucial distinction he famously draws is between principled decision-making, the legitimate domain of constitutional adjudication in liberal constitutional systems, and policy-based reasoning, the domain of politics.[63] For Dworkin, judges in liberal constitutional systems should devote themselves to a search for the morally best interpretation of the law that fits with past decisions and their society's constitutional tradition. Constitutional rights, on this conceptualisation, are principles that guide judges in their resolution of concrete disputes. Constitutional adjudication amounts to offering a 'moral reading' of the framers' plan for government in light of the best contemporary understanding of the precepts they enshrined.[64] As long as judges cleave to the principled elaboration of constitutional law in this way, they remain above politics and function as impartial arbiters of disputes about whether the constitutional rules of the game have been respected.

57 *Javier A. Couso*, The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America, in Javier A. Couso, Alexandra Huneeus and Rachel Sieder (eds.), Cultures of Legality: Judicialization and Political Activism in Latin America, Cambridge 2010, p. 141.

58 *Richard A. Posner*, Law, Pragmatism, and Democracy, Cambridge, MA 2003.

59 *David Landau*, Legal Pragmatism and Comparative Constitutional Law, in Gary Jacobsohn and Miguel Schor (eds.), Comparative Constitutional Theory, Cheltenham, UK 2018, p. 208.

60 *Jeremy Waldron*, The Core of the Case against Judicial Review, Yale Law Journal 115 (2006) p. 1346.

61 *Richard H. Fallon, Jr.,* How to Choose a Constitutional Theory, California Law Review 87 (1999), p. 535. For a pragmatist's reply see *Michael C. Dorf*, Create Your Own Constitutional Theory, California Law Review 87 (1999), p. 593.

62 See *Ronald Dworkin*, Law's Empire, Cambridge, MA 1986; *Ronald Dworkin*, A Matter of Principle, Oxford 1986.

63 *Ronald Dworkin*, Taking Rights Seriously, London 1977, p. 85.

64 *Ronald Dworkin*, Freedom's Law: The Moral Reading of the American Constitution, Cambridge, MA 1996.

Dworkin's conception of constitutional judging is deliberately Utopian – offered as an ideal theorisation of what judges in liberal constitutional democracies should strive to do, without any expectation that they will succeed in every case.[65] This style of theorising, Dworkin argues, is justified because it allows us to see any deviation from the normative ideal for judging as a compromise with the 'law'.[66] On this view, a more realistic theorisation would muddy the waters between normative constitutional theory, which is meant to be idealized, and practical prescriptions. In one, seldom-remarked-on passage, however, Dworkin does concede that, in the real world, even judges who are committed to deciding cases in the principled way he prescribes must sometimes make, not so much pragmatic compromises as considered decisions to deviate from the path of principle in the interests of their court's capacity to function as a forum of principle over the long run. Dworkin's precise formulation is worth quoting in full. 'An actual justice,' he writes, 'must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other justices and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level.'[67] This concession to the need to keep one eye on the long-term sustainability of principled judicial decision-making is a vital bridge to positive social science research, as explored below.[68]

In contradistinction to legalist theories of this type, Richard Posner's pragmatic theory departs from the classic legal realist premise that constitutional rights adjudication is not determinate, and therefore that appeals to the principled or objective nature of constitutional decision-making can never on their own serve to justify judicial review.[69] Instead, what judges should endeavour to do is identify the competing constitutional values and societal goals implicated by the facts of the case and come to a pragmatic resolution. In his approving assessment of the US Supreme Court's decision in *Bush v Gore*,[70] for example, Posner argues that the major consideration driving the Court's decision was the need to resolve a potentially damaging political conflict, and that the majority justices' massaging of the legal authorities was justified to that extent.[71] Attachment to legal principle, however, is not something that Posner thinks must always give way to other considerations. Every case will present its own mix of factors, and sometimes the value of adhering to precedent will be the pragmatic consideration that carries the day.[72]

65 *Dworkin*, Law's Empire, note 62, p. 239.
66 Ibid, 380.
67 Ibid, 380-81.
68 See section C.II.
69 *Richard A. Posner*, Law, Pragmatism, and Democracy, Cambridge, MA 2003.
70 531 U.S. 98 (2000).
71 *Posner,* note 69, pp. 322-56.
72 Ibid 63-64.

The important feature of this theorisation for current purposes is that it does not regard law as a closed system of rules and principles, but rather as a practice that is open to the influence of any body of knowledge that may help to throw light on the best, practical resolution of the case. Understood in this way, pragmatic constitutional adjudication *as a form of judicial practice* is far more open to the deployment of positive social science methods than a Dworkinian 'forum of principle' approach. And, indeed, the ascendancy of legal pragmatism in the US is closely associated with the general openness of legal reasoning in that country to such methods. Ironically, however, this may mean that pragmatist constitutional theories cannot really enter into interdisciplinary dialogue with social science theories of decision-making: by reducing judicial decision-making to a practice in which judges freely draw on social science to choose the socially optimal resolution to a case, pragmatist theories deprive law of its disciplinary specificity, and thus of its capacity to enter into interdisciplinary dialogue. Or, to put the same point slightly differently, it may be that pragmatist constitutional theories are always already interdisciplinary to the extent that they counsel judges to balance the need to respect backward-looking legal norms against forward-looking consequentialist considerations.

C. Synergy

This section looks at the potential for interdisciplinary dialogue across the vast range of comparative research that is being conducted on judicial decision-making in constitutional cases. Two potential areas are identified: opportunities (1) to enhance comparative doctrinal research through greater use of quantitative social science methods; and (2) for mutual learning by scholars engaged in positive social science research on the determinants of judicial decision-making and normative constitutional theorists.

I. Enhancing doctrinal research through quantitative social science methods

As a conceptual matter, the methods used by positive social science researchers (as opposed to their causal-explanatory epistemological framework) may be used by doctrinal researchers and legal practitioners when referring to foreign law in at least two circumstances: (1) when the application of a legal norm hinges on an inquiry into the consequences of adopting one rival interpretation of the norm over another; and (2) when the application of a legal norm depends on some conclusion about the extent of convergence of foreign law on a common set of interpretations or practices.

In the first case, quantitative social science methods may be used to show what the consequences have been in other countries of adopting one or the other rival interpretation of the norm. This kind of argument already forms part of comparative constitutional law reasoning in many jurisdictions, but often the methods followed are somewhat impressionistic. Thus, a judge in country X might reason that one of the rival interpretations of the norm has produced poor outcomes in country Y, and therefore should not be adopted. Relevant con-

textual differences between country X and country Y might not be systematically examined, however, and the comparative methods used might otherwise be inadequate to draw a reliable causal inference about what is likely to happen in country X. Multivariate regression analysis could be used in this situation to eliminate confounding variables and conduct a more rigorous inquiry.

In the second case, quantitative social science methods might prove useful where the construction of the legal norm is contingent on the prevalence of some or other transnational legal practice.[73] The classic example of this type of case in comparative constitutional law is a general limitations clause providing that a right may be limited by a law of general application where it is reasonable and justifiable in an open and democratic society to do so. That question necessarily invites, first, a conceptual definition of the term 'open and democratic society', and then an investigation into the practices of societies of that type. As in the first case, this kind of survey is often done in an ad hoc, random-sampling kind of way. But it could be done more rigorously using, for example, descriptive statistics.[74]

So much for the possibilities at a conceptual level. Whether or not empirical social science methods *are* used in these types of cases will depend on the legal tradition concerned and its openness both to foreign law and to the use of quantitative methods. As there is no transnational discipline of doctrinal research – only various national and area-of-law-specific traditions – the degree of receptivity to the use of quantitative social science methods will vary. In legal traditions where consequentialist, policy-based reasoning is *de rigeur*, we should expect to find greater openness to the use of quantitative methods. In more formalist traditions, however, we should expect there to be some resistance. In all such cases, reference to foreign law as non-binding authority would also need to be generally accepted as legitimate.

The rule that the local legal tradition will influence the form that doctrinal research takes is subject to one major qualification to do with the fact that doctrinal researchers often play a vanguard role in the development of legal reasoning methods. Because of their different status in the legal profession, and especially the fact that they are not deciding cases with real consequences for litigants, doctrinal researchers can afford to be a little bit more inventive: they can attempt to persuade defenders of the legal-reasoning status quo to rethink their convictions. In this guise, it might be possible for doctrinal researchers to initiate a conversation with other members of the legal profession, including judges, about how quantitative social science methods could be used to improve the way judges refer to foreign law in constitutional cases. Even in this case, however, there would be no question of interdisciplinary synthesis. Rather, increasing recourse to quantitative social science methods as a tool in doctrinal analysis would be a form incorporationism, i.e. the methods of

73 See *Vicki C. Jackson*, Methodological Challenges in Comparative Constitutional Law, Pennsylvania State International Law Review 28 (2010), pp.319, 322-23.

74 See *Rosalind Dixon*, Proportionality and Comparative Constitutional Law versus Studies, Law & Ethics of Human Rights 12 (2018), p. 203.

quantitative social science would be put to use in answering those parts of a doctrinal problem to which they were suited. The nature of the problem, however, and the overall framework for the analysis, would remain a legal-interpretive rather than causal-explanatory one.

The fact that reference to foreign law in doctrinal analysis occurs within an overarching legal-interpretive framework explains practices that otherwise appear anomalous from a positive social science perspective. The Israeli Supreme Court's penchant for citing decisions by courts in the US, Canada, and Germany, for example, is questionable according to the social science rules of causal inference. From that perspective, a country like Pakistan, with similar 'tensions between secularism and religiosity', would make a much better comparator country.[75] But the Israeli Supreme Court's practice of citing US, Canadian and German decisions has to do with its identification of these countries' jurisprudence as being founded on values that the Israeli constitutional system shares. The comparison is ideologically driven in that sense. But that is precisely the point. The Supreme Court is not referencing these countries' jurisprudence because it thinks their constitutional challenges are similar to Israel's, but because their jurisprudence is founded on values that, for better or worse, the justices think are an appropriate benchmark for Israel. Within the confines of this legal-interpretive rationale, to be sure, quantitative methods could be used to sharpen the comparison. But the choice of country for comparison, to be legally authoritative, must follow a legal-interpretive rather than causal-explanatory logic.

The significance of this understanding of the role of quantitative social science methods in doctrinal research in comparative constitutional law can be seen by contrasting it with other understandings. In a 2018 journal article, for example, Rosalind Dixon gives an example of how quantitative social science methods could be used to improve 'doctrinal/conceptual research'.[76] The necessity and legitimacy stages of proportionality reasoning, Dixon argues, would benefit from more rigorous use of empirical methods in ascertaining 'foreign legislative practices' and 'general constitutional patterns' respectively.[77] Dixon presents this argument as conforming to Ran Hirschl's call for comparative constitutional studies to embrace law/social science interdisciplinarity. There is a need, she argues, for greater '"dialogue"' between conceptual and empirical approaches to constitutional comparison'.[78] As her article progresses, however, it becomes clear that she is not talking about interdisciplinary dialogue, but the actual use by constitutional judges of quantitative methods. Thus, Dixon argues, judges applying the necessity stage of proportionality reasoning could draw on 'thin' forms of comparison to establish the range of plausible legislative responses to the problem, and then 'thicker' forms of comparison to get at their effective-

75 *Ran Hirschl*, Comparative Matters: The Renaissance of Comparative Constitutional Law, Oxford 2014, p. 23.

76 *Dixon,* note 74.

77 Ibid, 205.

78 Ibid, 210.

ness.[79] Likewise, judges looking at the legitimacy of impugned legislation might use quantitative social science methods to gain more traction on the extent to which liberal democracies generally countenance legislation of the type they are reviewing.[80] In both those respects, judges' receptivity to Dixon's arguments would be conditioned by accepted modes of constitutional reasoning in the jurisdiction concerned. This does not mean that these accepted modes are static and that judges could not be persuaded to develop them. But it does mean that greater use of quantitative social science methods in proportionality reasoning is not a matter of scholarly field redefinition (as Dixon would have it) but a question of changing legal-professional practice. Any greater use of quantitative social science methods by a constitutional court would not constitute interdisciplinary dialogue as such but the incorporation by the constitutional court concerned of such methods within a still predominantly legal-interpretive paradigm.

A similar point might be made about David Landau's call for comparative constitutional law to take greater account of legal pragmatism. Though American in its origins, Landau argues, legal pragmatism as an approach to constitutional decision-making holds numerous benefits for the practice of constitutional law in other parts of the world, and is not necessarily incompatible with other legal cultures.[81] German constitutionalism's turn to 'value formalism', for example, has made it 'more hospitable to the considerations that animate pragmatism'.[82] That change, in turn, has paved the way for German constitutional reasoning, and particularly proportionality reasoning, to make greater use of quantitative social science.[83] Landau then illustrates this point by showing how recourse to quantitative social science problematizes what Robert Alexy thinks is the relatively easy question of whether tobacco labelling laws disproportionately limit the freedom of speech.[84] (They don't, Alexy thinks, because the infringement of the right is relatively trivial in contrast to the importance of the legislative goal. Against this, Landau shows that this analysis might change depending on the answer to various empirical questions.) While this critique of Alexy's conceptualism is well made, Landau's example precisely shows the power of legal-cultural presuppositions in shaping recourse to social science: it never entered Alexy's head to consider empirical research on the effectiveness of tobacco-labelling laws because that, for him, would have been contrary to law's autonomy as a discipline. For quantitative social science methods to be integrated into German proportionality reasoning, this again suggests, there

79 Ibid.

80 Ibid.

81 *David Landau*, Legal Pragmatism and Comparative Constitutional Law, in *Gary Jacobsohn* and *Miguel Schor* (eds.), Comparative Constitutional Theory, Cheltenham, UK 2018, p. 208.

82 Ibid, p. 208 footnote 93 (citing *Michaela Hailbronner*, Traditions and Transformations: The Rise of German Constitutionalism, Oxford 2015).

83 Ibid.

84 Ibid.

would need to be a significant shift in legal-professional conceptions of the appropriate judicial role and its relationship to the democratic policy-making process.[85]

In summary: interdisciplinary synthesis of doctrinal research in comparative constitutional law and positive social science is neither epistemologically nor practically possible. The hermeneutical, participatory-insider perspective of doctrinal research cannot be fused with positive social science's external, knowledge-building perspective and its causal-explanatory, theory-building ambitions. In any case, there is no single, transnational discipline of doctrinal comparative constitutional law with which positive social science could enter into such an interdisciplinary dialogue. What we have, instead, are a range of different national (and supranational in the case of the European Union) legal traditions with various degrees of openness to the use of quantitative social science methods in constitutional reasoning. Any drive to encourage greater use of these methods by doctrinal researchers, judges and other legal professionals when referring to foreign law in constitutional cases would meet varying levels of resistance. Doctrinal researchers could act as legal-cultural change agents, here, by modelling the use of quantitative social science methods in their research. But whether this drive proves successful or not would in the end be determined by the dynamics of legal-professional practice in each jurisdiction. No doubt, some global consensus in favour of the usefulness of quantitative social science methods might one day emerge, with proportionality reasoning the most likely candidate for first-mover status. But even if this were to occur, this phenomenon would not be an instance of interdisciplinary synthesis but incorporationism, i.e. the use of quantitative social science methods in comparative constitutional reasoning would be subordinated to the conceptual frameworks and value-laden purposes of doctrinal analysis.

II. Positive political science research and normative constitutional theory

Positive political science research on the determinants of judicial behaviour and normative constitutional theory, we have seen, have very different aims. The first endeavours to explain the causes of case outcomes and various institutional effects, while the second tries to map out an ideal approach to decision-making in constitutional cases. On the face of things, it seems unlikely that two such very different enterprises could be fused into a single research program without one or the other sacrificing its principal rationale. But this does not mean that these two lines of research are not useful to each other: the normative branch in assisting political scientists to model the process of judicial decision-making in ways more compatible with legal-professional understandings, and the positive social science branch in challenging normative theorists to ground their theories in more realistic premises about the circumstances of judging.

85 See *Niels Petersen*, Braucht die Rechtswissenschaft eine Empirische Wende?, Der Staat 49 (2010), p. 435.

In the United States, there is a long-standing tradition of this kind of interdisciplinary dialogue. The year 2011, for example, saw the publication of a major edited anthology on the role of law in judicial decision-making with contributions from both political scientists and legal academics.[86] Unfortunately, however, there has been nothing similar in comparative constitutional law and politics. Comparative research by political scientists on judicial decision-making has developed in glorious isolation from normative constitutional theory, and normative constitutional theorists, with only a few exceptions,[87] have returned the compliment. Indeed, some normative constitutional theorists are openly sceptical about the need to 'entangle' their accounts of judicial review in the messy business of empirical reality.[88]

This mutual ignorance, section B showed, has led to suboptimal results on both sides. Political scientists have modelled law in ways that legal professionals, including judges, have found counterintuitive and normative theorists, if they bothered to look, would find contrary to liberal constitutionalist principles. By the same token, normative theorists, particularly of a Dworkinian stripe, have tended to offer idealistic prescriptions about constitutional judging that pay little attention to the overwhelming empirical evidence that judges are influenced by factors other than the law. They have defended this approach on the basis, either that the empirical evidence is premised on false depictions of the process of judging, or that normative theorising can afford to be – indeed, is supposed to be – a little bit otherworldly. This tendency to dismiss the value of positive social science, to be sure, has not been true of legal pragmatists. Richard Posner's work, in particular, has been in constant dialogue with empirical findings on the determinants of judicial decision-making. The issue in this case is rather that, for pragmatism's critics, Posner's account of judging is not so much a normative theory of judicial review as a grab-bag of vague and unimplementable prescriptions. Dworkin and his followers have also been at pains to deny that Posner's theory is compatible with the basic tenets of liberal constitutionalism.

Is there anything to be redeemed from this impasse? On the side of positive political science, interdisciplinary dialogue with normative constitutional theory would seem to be useful in two main respects: in modelling judicial decision-making in constitutional cases, in all the contexts in which it occurs, as accurately as possible; and, in so far as the goal is to understand the impact of judicial decision-making on non-case outcomes, to define those outcomes in ways that more closely relate to the ideal role of courts in liberal-democratic systems of government.

As to more accurate modelling, there is probably not much that can be added from a comparative perspective to what has already been said in the context of the US debate. Since the approaches and methods are largely the same, many of the critiques that have been made of the empirical models of US Supreme Court decision-making could be extend-

86 Charles Gardner Geyh (ed.), What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake, Palo Alto, CA 2011.

87 See the discussion of Barry Friedman's and Roni Mann's work in C.II below.

88 *Waldron*, note 60.

ed to their comparative offspring. As far back as 2006, for example, Barry Friedman identified three problems with these models: their lack of 'normative bite', in the sense that scholars had lost track of why it was they were studying the determinants of judicial behaviour; inattention to the complex way law and legal institutions structure judicial decision-making; and the use of inaccurate or distorted data.[89]

Almost all of these criticisms could be extended to the comparative study of judicial decision-making by positive political scientists. Since it would be invidious to single out individual publications by name, we might simply list here recurrent problems relating to assumptions (e.g. formal models of strategic decision-making that assume policy-preference maximization as the main motivation for judging in all contexts, even though this idea has been abandoned by its chief proponents), conceptual operationalization (e.g. judicial independence operationalized as decisions for and against the government when the idea of judicial independence is clearly more complex than that), and coding (e.g. binary coding used for case outcomes when closer analysis reveals that the decision had more nuanced effects). The contention is not that comparative political science research is systematically beset by problems of this kind, only that many of the problems that have been identified with research on the US Supreme Court likely affect the comparative literature, too. Given that, it would be preferable if positive and normative scholars could work together, as has happened in the US, to design and interpret the results of research of this kind.

The second way in which interdisciplinary dialogue could enhance positive political science research relates to research on the impact of judicial decision-making on non-case outcomes. Here, normative theorists might challenge political scientists to specify both their models and their outcomes in ways that are compatible with liberal constitutional theory. If the comparative political science literature is to connect with normative theory at least, the main institutional outcome that needs to be studied is not institutional legitimacy, but institutional effectiveness in the construction and maintenance of liberal-democratic systems of government. As in Robert Kagan's definition alluded to earlier,[90] liberal constitutional theory's concern is for a constitutional court's effectiveness in facilitating the establishment of a particular kind of polity, one founded on respect for minority rights, the principle of non-discrimination, free political participation and a minimum level of social welfare provision for all. It would be of immense help to normative theorisations of courts' role in liberal-democratic systems of government if at least some of the empirical research that is being conducted were redirected at assessing the impact of judicial decision-making on that kind of outcome.

So much for what positive political scientists might take from normative constitutional theory. What about the question of what normative constitutional theorists might learn from comparative political science research on judicial decision-making? Here, there appear to be two main challenges to which normative constitutional theory must respond: (1) the pos-

89 *Barry Friedman*, Taking Law Seriously, Perspectives on Politics 4 (2006), p. 261.

90 Section B.II.

sibility that good faith interpretation of the law is not the only, or not the primary, motivation for judging; and (2) the fact that there might be constraints, outside of the law, on judging – whether those be the internal constraints that flow from the need to be part of a majority opinion or the external constraints of the political environment.

One way that normative constitutional theory might deal with the first challenge is simply to deny the compatibility with liberal-democratic values of anything other than a good-faith search for the correct legal answer. While empirical models might show that factors other than the law motivate judges, this response would go, these motivations must be treated as deviations from the liberal ideal. And, indeed, legalist theories tend to go this route. Since the legitimacy of judicial review in liberal constitutional theory is founded on its imperviousness to political influence, Dworkin and others say, any influence of non-legal factors is antithetical the ideal of adjudication according to law. This type of response, then, is in the nature of a conversation-stopper. It amounts to saying to positive political scientists that their job is to explain what causes judges to behave as they do while normative constitutional theory's job is to say what judges should do, and that these are simply two very different enterprises that need not take account of each other.

A second type of response is more accommodating, but has perils of its own. As noted in section B.IV, legal pragmatists accept non-legal motivations as an inevitable part of judging and build their normative prescriptions on that premise. While not necessarily condoning extra-legal motivations as normatively desirable in themselves, legal pragmatists argue that (a) given their inevitability, it is better for judges to be candid about them; and (b) the influence of these motivations, especially when acknowledged, is not fatal to the goal of sound constitutional adjudication. For legal pragmatists, in other words, empirical social science findings on extra-legal judicial motivations are grist to the mill of their view of judging as a somewhat eclectic enterprise. Indeed, Posner himself wrote an influential 1993 paper characterizing judging as motivated by multiple factors – a view that leading proponents of the strategic model now accept as accurate.[91] Interdisciplinary dialogue between positive social science and legal pragmatism has in this sense long been the norm. The problem with legal pragmatism for current purposes is not its compatibility with positive social science, but rather whether it is properly described as a constitutional theory that conforms to the values of liberal constitutionalism.

For Dworkinians, the answer to this question is clearly 'no': legal pragmatism's openness to positive social science as a tool for judging (rather than as a tool for explaining the nature of judging) comes at a price, viz. the construction of a theory that flouts basic tenets of liberal-democratic constitutionalism. In their well-known exchanges, Dworkin thus denied that Posnerian pragmatism was a defensible *liberal* theory of judicial review.[92] In Dworkin's view, only a theory that explains how judges should decide constitutional cases

91 *Epstein* and *Knight,* note 19, citing *Richard A. Posner*, What do Judges and Justices Maximize? (The Same Thing Everybody Else Does), Supreme Court Economics Review 3 (1993), p. 1.

92 *Dworkin*, Law's Empire, note 63, pp. 151-75.

while remaining above policy considerations was compatible with that ideal. While judges could take the *interpretive* social sciences into account, it was neither necessary nor appropriate to make use of positive (or what Dworkin called 'causal') social science.[93] Rather, courts should function as 'forums of principle', deliberately 'call[ing] some issues from the battleground of politics' and settling them according to the terms of the political theory that best justifies their society's constitutional practices.[94]

Dworkin's position might be different, however, when it comes to the relevance of positive social science to understanding the situations in which judges need to pull back from deciding cases according to principle. As we have seen, Dworkin was prepared to countenance two situations of this sort. The first concerned cases where adjustments on principle were required to 'to gain the votes of other justices' and the second where such adjustments were necessary to make the justices' 'joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level.'[95] Those two situations roughly correspond to what the strategic model identifies as the internal and external constraints on decision-making, i.e. the need for judges to take account of majority-opinion writing rules and the capacity of various political actors to frustrate their decisions. While Dworkin himself did not explore the relevance of positive political science to thinking about these situations, his preparedness to countenance them opens the door to interdisciplinary dialogue between his style of normative constitutional theory and positive political science.

As to the issue of internal constraints, Barry Friedman has once again put the question that positive political science poses to normative constitutional theory very pithily. The decision whether to compromise on principle to join a majority opinion, he says, has two dimensions:

> *On one dimension, does a Justice properly adhere to one's [sic] sincere views without regard to the ultimate result? Or does the Justice act strategically … to obtain a second-best outcome? On the other, is it the right thing to join in others' opinions, even if they deviate from one's best judgment, to put a common face on legal meaning, perhaps increasing stability if not social complacency? Or is it proper to stand fast to one's guns, speaking over the heads of one's colleagues to the broader public?'*[96]

Clearly, these are questions that at least admit of answers compatible with a commitment to liberal constitutionalism. Moreover, they follow from a not very controversial empirical premise about constitutional adjudication, viz., that in constitutional systems that provide for judicial decision-making by majority vote, a judge who offers a minority opinion will

93 *Ronald Dworkin*, Social Sciences and Constitutional Rights, The Educational Forum 41 (1977), p. 271.

94 *Dworkin*, The Forum of Principle, note 56, p. 518.

95 *Dworkin*, Law's Empire, note 63, pp. 380-81.

96 The Politics of Judicial Review, Texas Law Review 84 (2005), pp. 257 at 290.

lose the opportunity to put the law on the principled footing that she has reached. The function of positive political science in this guise, as Friedman notes,[97] is not so much to challenge normative constitutional theory's empirical premises, as to supply it with a range of more granular questions than is customarily the case.

The second, external constraint on judging acknowledged by Dworkin is his concession that 'an actual justice must sometimes adjust what he believes to be right as a matter of principle … in order to ... make [the Court's] decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level'.[98] This enigmatic sentence seems to open the door to all kinds of strategic calculations, of a kind that that positive political science might elucidate and whose institutional effects it could measure. But once again, Dworkin does not elaborate on this concession, leaving its implications for normative constitutional theory unclear. Fortunately, in this instance, we have the benefit of a detailed consideration of how normative constitutional theory might take on board positive political science findings about this kind of external constraint and yet respond in ways that maintain its commitment to liberal values.

In a 2018 article, Roni Mann identifies a class of 'institutionally hard' cases in which a principled decision likely will have negative repercussions for the Court in light of the external constraints it is facing.[99] Without attempting to do justice its subtlety, it is worth briefly summarizing Mann's argument as a model for how normative constitutional theory might engage with positive social science findings. Drawing on the Rawlsian idea of 'non-ideal theory' – i.e. a theory about the practical steps one might legitimately take in a non-ideal world to bring about the realisation of some ideal end state[100] – Mann argues that a Court, conformably with liberal constitutional theory, may compromise on principle in institutionally hard cases if the compromise is made, not in the interests of enhancing the Court's power for its own sake, but in order to promote its long-term capacity to function as a 'forum of principle'.[101] Two circumstances in which a principled compromise may be permissible are identified in particular, one in which the Court faces temporary threats to its existence if it proceeds with the principled decision, and the other of which hinges on a sociological assessment that delaying the principled decision would foster a culture of public debate that both results in the eventual adoption of the principled answer and preserves the Court's role as a forum of principle.[102] Resort to compromises of this sort is permissible only if the general presumption against deviating from principle can be rebutted, i.e. the default position is a decision on principle, unless a strong case can be made that one of the

97 Ibid.

98 *Dworkin*, Law's Empire, note 63, pp. 380-81.

99 *Roni Mann*, Non-Ideal Theory of Constitutional Adjudication, Global Constitutionalism 7 (2018), p. 14.

100 *John Rawls*, The Law of Peoples, Cambridge, MA 1999, (discussed in *Mann,* note 99, p. 38.

101 *Mann*, note 99, p. 45.

102 Ibid.

above two circumstances justifies a deviation.[103] Finally, in both cases, Mann argues, the Court would need to explicitly announce any such compromise as a temporary measure to prevent its unprincipled decision becoming ossified as precedent (thus 'idealising' the 'non-ideal').[104]

Mann's non-ideal theory of judicial review successfully reconciles the comparative political science literature on strategic decision-making and the legalist strand in normative constitutional theory. To be sure, this reconciliation is decidedly on the side of normative constitutional theory. It thus does not amount to interdisciplinary synthesis as such. But it is a clear example of normative constitutional theory's capacity to develop against the backdrop of, and be sharpened by, positive political science research. The benefits of this more realistic approach to normative theorising can also be seen in Mann's ability to generate practical prescriptions that go beyond the Utopianism of the injunction to 'be Hercules', the illiberalism of 'strategically maximise', and the vagueness of 'be prudent'. It is thus a model of how interdisciplinary research in comparative constitutional law and politics might be conducted – developing within a particular research tradition but reaching out and critically engaging with other traditions in search of practical insights.

103 Ibid.
104 Ibid, 41.