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Introduction: Pedagogy and Conceptualization of the Field

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

1 THE PROBLEM OF CAPACITY

The study of constitutionalism suffers from an embarrassment of riches. The very qualities that make the field so rewarding for scholars – interdisciplinary foment and dialogue, a subject matter and an audience as broad and varied as the world itself, vast unexhausted possibilities and low-hanging fruit as far as the eye can see[1] – ensure that we lack the capacity to teach everything that ought to be taught. As a result, pedagogy becomes an exercise in triage. What can we afford to pare away, and what is essential? What do we believe the next generation needs most, and why? When push comes to shove and we are forced to prioritize, what do we choose? These are not just questions of classroom time management; they cut directly to the conceptualization and reproduction of the field. Pedagogy is how a field perpetuates itself: the pedagogy of today defines the field of tomorrow. To teach a truncated conception of the field is therefore to limit the field.

"Too much material, not enough time" is a familiar complaint across any number of fields, but the problem of insufficient capacity is especially acute for comparative constitutional studies due to the interaction of four factors: time, content, expertise, and audience. In terms of time and content, instructors already struggle just to cover domestic constitutional law. Putting the constitutional law of every country in the world on the agenda does not make things easier. The interdisciplinarity of the field only compounds the challenge. Scholars have responded to the multidimensionality and complexity of the subject matter by bringing to bear a range of interdisciplinary approaches from political science, history, sociology,

[*] For their invaluable feedback and suggestions on various iterations of the ideas in this chapter, I am indebted to Rehan Abeyratne, Markus Böckenförde, Maartje De Visser, Eric Feldman, Tom Ginsburg, Andrew Harding, Jaakko Husa, Ron Krotoszynski, Mirjam Künkler, Chien-Chih Lin, Yaniv Roznai, Miguel Schor, Larry Solum, and Mark Tushnet; the participants at the 2019 Asian Constitutional Law Forum in Hanoi; the participants at the Comparative Constitutional Law Roundtable at the University of New South Wales in Sydney, especially my discussants, Ros Dixon and Will Partlett; and the workshop on the subject of canon in comparative constitutional law at Universidad del Desarrollo in Santiago, especially the organizers – Sujit Choudhry, Michaela Hailbronner, and Mattias Kumm. Katherine Schroeder and Trevor Wan provided invaluable research and editing assistance.

[1] See Tom Ginsburg, 'The State of the Field,' Chapter 2 in this volume.

anthropology, economics, and so on. Each of these approaches, in turn, is characterized by distinctive research methods and traditions that valorize different types of materials. And this is to say nothing of the materials in other languages that our own limitations hold at bay. The growing availability of translations continues to lower language barriers and expand our access to entire realms of new material.

All of this diversity means that there is even more to teach. At the same time, the time pressure is guaranteed to be worse. Assuming that it is offered at all, comparative constitutional law is almost certain to be an elective that is allotted fewer hours than the mandatory offerings in domestic constitutional law, which are already pressed to their limits by a smaller universe of material.[2] And it is not just the clock on the wall that limits our pedagogical options, but also the extent of our expertise. In the face of a multinational, multidisciplinary, and multilingual field, the range of material can easily outmatch an instructor's expertise. We cannot expect to convey deep knowledge of what we do not know very well. In what other field, for example, are places like Germany or Israel or South Africa so widely discussed by people who do not know the language or have never seen the country? In a profession that supposedly lives and dies by the close reading of primary materials, how are monoglot generalists supposed to teach about foreign legal systems?[3]

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

Consider just a single institutional setting – a comparative constitutional law elective at a US law school. Some of those enrolled may be domestic J.D. students; others may be foreign LL.M. students from a wide variety of professional and legal backgrounds. Still others may be exchange students or visiting scholars who defy easy generalization. Some may have a keen interest in constitutional litigation; some may be aspiring academics; some may be actual judges. Some may be from places abroad where overseas-educated lawyers play a hands-on role in writing new constitutions; others may approach constitutional law as strictly a spectator sport. Some may be interested in learning *from* other countries, others might prefer to learn *about* other countries. What does such a motley assortment of students want or need? Something "useful"? Something "interesting"? Is it possible to generalize about what the class might find either "useful" or "interesting"? Or should we expect that each class will have needs and tastes as diverse as its membership?

Surely they need an overview of the main substantive, methodological, and conceptual debates in the academic literature. Or would they be better served by studying a sampling of

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

[3] See Vivian Grosswald Curran, 'Comparative Law and Language,' in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford University Press, 2019) 681–709 at 684–685 (discussing pedagogical difficulties posed by the translation of legal texts).

topics and jurisdictions that captures the diversity of contemporary constitutionalism? Or perhaps what they need, instead, is to see what lessons other countries hold for their own, or to acquire a solid foundation in the de facto canon of materials that are most widely discussed, or to learn to think like a foreign lawyer, or to acquire basic survival skills for dealing with constitutional issues in unfamiliar environments. The basic pedagogical dilemma is that all of these competing answers are highly plausible. And if we cannot figure out what students need, then we also cannot figure out how textbooks should be designed or evaluated. We require some pedagogical theory or model of what our goals are and how to achieve them.

The good news is that models of this kind already exist. The bad news is that they are rarely articulated, much less critically examined. Section 2 of this chapter identifies and evaluates five competing pedagogical models – namely, *instrumentalism*, *tourism*, *immersion*, *abstraction*, and *representation*. Section 3 uses the contents of this book to illustrate how the representation model might be implemented in textbook form, and what the benefits of such an approach might be. Section 4 concludes by arguing that the challenges of teaching comparative constitutional law call for pedagogical pluralism.

2 FIVE MODELS OF PEDAGOGY: INSTRUMENTALISM, TOURISM, IMMERSION, ABSTRACTION, AND REPRESENTATION

It is impossible to craft a textbook or even a syllabus – to determine how it should be organized, what it should include, what it should omit – without acting on some understanding or model of how the subject should be defined and taught. These models may not be explicit, but they are always there, and they answer a host of basic questions not just about pedagogy, but also about the field itself. What is this subject that we are trying to teach? Can we even decide what it should be called? ("Comparative constitutional law"? "Constitutionalism?" "Comparative constitutional studies?")[4] Who are we trying to teach, and what do they need? What is worth learning?

There exist at least five pedagogical models that offer plausible answers to these questions. We might call them *instrumentalism*, *tourism*, *immersion*, *abstraction*, and *representation*. Each model is defined by a theory of what our pedagogical objectives should be, and a strategy for achieving those objectives in the face of the practical problem of capacity.

All five models offer certain baseline benefits that are inherent to the enterprise of comparative law. Training in comparative law develops critical evaluation and creative problem-solving skills and cultivates the ability to "think like a lawyer" by equipping students with an awareness of other ways of doing things, a deeper understanding of the problems lawyers tend to face, and an expanded set of potential solutions.[5] Comparative legal training is effective in part because it incorporates multiple levels of learning by doing: it forces students

[4] Compare e.g. Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014) at ch. 4 (observing that "comparative constitutional law" is dominated by the "predominantly legalistic" study of "constitutional courts, judicial review, and constitutional rights jurisprudence," and contrasting it with the broader enterprise of "comparative constitutional studies," which encompasses the interdisciplinary study of constitutional design, democratization, "constitutional transformation," "constitutions as political institutions," and judicial behavior), with Mark Tushnet, 'Comparative Constitutional Law,' in Reimann and Zimmermann (eds.), *Oxford Handbook of Comparative Law* (n. 3), 1193–1221, at 1198–1199 (defining "comparative constitutional law" broadly as the study of every governmental system with a constitution, and defining "constitutionalism" narrowly as the branch of "classical and modern liberalism concerned with institutional design and fundamental rights").

[5] Jaakko Husa, 'Comparative Law in Legal Education — Building a Legal Mind for a Transnational World' (2018) 52 (2) *The Law Teacher* 201, at 203–204.

to go beyond absorbing and applying law, to comparing and evaluating law. Moreover, the critical lens of comparative law points inward as well as outward: it produces lawyers who are reflective and self-aware about their own legal systems. Comparison of "us" versus "them" breeds awareness of not only the strengths and weaknesses of our own practices, but also the contingency of those practices.

Beyond these shared benefits, each of the five models has distinctive strengths and weaknesses, and an audience to match. Thoughtful pedagogy must be tailored to the audience, and the audience for an international and interdisciplinary subject like "comparative constitutional law" or "constitutionalism" is bound to vary greatly. Accordingly, there is probably no uniquely correct or superior choice across the board among these models. In a field as rich as comparative constitutional studies, it is unlikely that any course or book can successfully be all things to all people.

2.1 *Instrumentalism*

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

There is an analogous way of approaching the study of constitutionalism. You travel not out of wanderlust, but in search of things that might be valuable to you upon your return home. The point is to learn *from* other countries, not *about* other countries. The topics you study are therefore those that lawyers and judges back home find important, while the countries you consider are those that face constitutional issues and challenges comparable to those in your own country. You engage in comparativism not for the sake of understanding or learning about foreign law, but instead for the purpose of exploring and developing arguments for and against various approaches to domestic constitutional issues. For example, if you come from the United States, then your goal might be to craft constitutional arguments for judicial consumption, and you might accordingly limit your search to other liberal constitutional democracies with active traditions of judicial review. In other words, you are engaged in an instrumentalist form of comparativism. Instrumentalism solves the problem of capacity by supplying a principle of case selection: it pares down the universe of potential materials to those that have some direct parallel in domestic constitutional practice.

The pedagogical goal of this model is to help domestic lawyers identify comparative materials that can be used to probe and critique existing domestic law or to develop and refine comparative arguments for domestic use. In other words, the goal is to improve the ability of students to think and act as domestic lawyers by equipping them with a comparative repertoire that can be brought to bear on domestic issues. The underlying normative stance is that domestic lawyers ought to broaden their horizons and adopt a stance of "engagement"

with foreign law, for the purpose of enriching domestic law.[6] The corresponding pedagogical imperative is to emphasize case law from other jurisdictions on hot-button issues in domestic law.

A telltale sign of this approach is a syllabus or textbook organized around substantive topics that correspond to the preoccupations of a domestic audience. Another sign is the wholesale omission of jurisdictions that do not belong to the right club – for example, countries that lack judicial review or are not liberal democracies. Coverage is limited to a peer group of countries that are seen as sufficiently similar and respectable to serve as sources of inspiration or objects of emulation.[7] Even for countries that make the cut, however, the coverage will be highly selective and map onto domestic debates. Thus, for example, instructors in both the United States and South Korea are likely to spend at least some time on Germany, but they will emphasize different aspects of the German experience. The American instructor might make a point of covering German hate speech jurisprudence but skip over German case law on the prohibition of political parties. For an audience in South Korea – which, like Germany but unlike the United States, has a constitutional court charged with deciding the legality of political parties[8] – the emphasis might be the other way around.

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

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

7 The instrumentalist approach is exemplified by the Calabresi, Silverman, and Braver casebook, which seeks to identify ideas "that might be of relevance to U.S. constitutional law" and to expose an American audience to "good ideas" worth borrowing and "bad things" to be avoided. Steven Gow Calabresi, Bradley G. Silverman and Joshua Braver, *The U.S. Constitution and Comparative Constitutional Law: Text, Cases, and Materials* (Foundation Press, 2016), at vii–viii, 10–11.

Their reasons for limiting their coverage to "the 15 of the G-20 countries that we think provide for independent judicial review," plus Israel and the European Court of Human Rights, appear to be mainly instrumentalist. They start with the G-20 because these countries are, by dint of their "global economic heft," deserving of "special study and attention": what happens in "powerful, wealthy, and very populous continental-sized nations," they assert, is "more important" than what happens in "tiny, powerless emerging nations," ibid. at 9–11, which begs the question of what they mean by "more important" and how this concept justifies ignoring most of the world. If they mean that larger, wealthier countries are "more important" in the sense that American lawyers are more likely to have dealings with big, wealthy countries than with small, developing countries, that is a plausible instrumentalist argument.

However, the authors further limit their coverage to constitutional democracies and make a point of excluding China and Russia, notwithstanding their power, wealth, and size. Their reason for doing so appears to be that "[c]onstitutional democracy is the wave of the future and not Chinese, Russian, or Saudi Arabian authoritarian rule." Ibid. at 6. This assertion is belied by recent history. See e.g. Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018); Freedom House, *Freedom in the World 2021: Democracy Under Siege* (Freedom House, 2021) 1 at 1–3, https://perma.cc/U9H8-RWU7 (noting the "15th consecutive year of decline in global freedom," and reporting that less than 20 percent of the world's population now lives in a free country, the lowest proportion since 1995). Nevertheless, if one assumes counterfactually that authoritarianism faces imminent extinction, then the exclusion of authoritarian regimes becomes justifiable on instrumentalist grounds: it is presumably of limited professional value to study a variety of constitutionalism that will soon cease to exist.

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

with befuddlement from students in China or Japan who struggle to comprehend the degree of controversy surrounding the topic. The more faithful the implementation of an instrumentalist approach, the narrower its appeal.

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

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

2.2 *Tourism*

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

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

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

2.2.1 Popularity

In practice, there are certain sights that people want to see simply because so many other people have seen them. Other sights might in some objective sense deserve at least as much attention, if not more, but these are so popular that they feel obligatory and come to define

what it means to be "well-traveled." There is a shared sense of, and appetite for, the greatest hits. On a bus tour of Europe, Paris is bound to be a stop, and in Paris, the bus will almost certainly stop at the Eiffel Tower and the Champs-Élysées. By contrast, it almost certainly will not stop in the northeastern suburbs for a taste of *la vie quotidienne* in an impoverished postindustrial community, no matter how illuminating or authentic such an experience might be.

This type of tourism is already widely practiced in the world of comparative constitutional law. Students around the world can expect exposure to what has been dubbed an "unofficial canon" consisting of roughly "[t]wo dozen judicial court rulings from South Africa, Germany, Canada, and the European Court of Human Rights alongside a more traditional set of landmark rulings from the United States and Britain and an occasional tribute to India or Australia."[9] It is likely that at least some of the cases in this unofficial canon deserve the attention that they receive and are worthy of canonization in principle as well as practice. It is also true, however, that the most popular materials are not necessarily the best or most important materials. Cases can become ubiquitous for reasons that have little to do with their intrinsic importance or superiority for pedagogical purposes, such as their linguistic accessibility, their prestigious pedigree, or their early adoption.[10] The standard repertoire is thus more akin to a "greatest hits" collection than a true canon.

2.2.2 Merit

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

A thought experiment might help to guide the creation of a genuine canon of materials that are deserving rather than merely popular. We might imagine a hypothetical "well-read lawyer" and ask ourselves what materials such a person ought to have read.[11] Whatever the

[9] Hirschl, *Comparative Matters* (n. 4) at 163; see also e.g. ibid. at 40–41; Sujit Choudhry, 'Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies,' in Sujit Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008) 3 at 8 (observing that the comparative constitutional law literature is oriented around judicial protection of human rights in "a standard and relatively limited set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and to a lesser extent, India").

[10] Path dependence and network effects characterize the adoption of teaching materials and can cause the initial selection of certain materials over others to become entrenched and self-reinforcing. The more widely that certain cases are taught, the more functional and thus valuable that those cases become as points of reference and vehicles for scholarly interaction and discussion. For example, the casebook by Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 3rd ed. (Foundation Press, 2014), has been so widely adopted that some of the cases it includes have probably become canonical in part because of their inclusion, above and beyond their inherent pedagogical value. The act of repeatedly teaching certain cases may also in and of itself enhance the perceived value and importance of those cases: the more that instructors portray certain topics and jurisdictions as important and worthwhile, the more that those topics and jurisdictions may come to be seen as important and worthwhile.

[11] For plausible examples, see nn. 13–16 and accompanying text.

classics happen to be, by this measure, is what belongs in the canon. Who could object in principle to a tourism model of pedagogy, if it is defined thusly? Is the training of well-read lawyers not already at the core of the pedagogical enterprise?

The idea of focusing on "the best" or "the most deserving" materials has obvious appeal. Surely it is the case that, in comparative constitutional law as in any other domain, some things are worth more of our time than others. So why not give those things more time? After all, why would anyone deliberately choose to spend their time covering the "worst" or "least deserving" materials? It is equally obvious, however, that "the best" is diabolically difficult to define, much less judge. What are the "best" materials to study in a field as broad and multidimensional as constitutionalism? Should we choose the most important cases? The most interesting cases? The most revealing cases? The most widely discussed? The most transformative and radical cases, or the most paradigmatic and authoritative cases? Do the definition and weighting of these qualities vary with the audience? How do we evaluate any of these qualities, much less weigh them against each other? As appealing as a merit-based approach may be in principle, the difficulty of these questions suggests that a popularity-based approach has the advantage of being easier to implement in practice.

2.2.3 The Pros and Cons of Tourism

It is not difficult to see the appeal of the tourism model. First, it is an intuitively reasonable response to the problem of capacity. At least in principle, it seems sensible to put together a syllabus or textbook that covers the highlights of the field. The difficulty of determining what are the true highlights in some objective sense may lead instructors in practice to fall back on the most popular materials instead, but generally speaking, the greatest hits are the greatest hits for a reason. Popularity is usually at least a rough proxy for merit.

Second, the tourism model relies on tried-and-true materials with a proven ability to prompt critical comparison and reflection. There are of course other reasons why instructors might keep teaching the same cases year after year, such as a lack of readymade alternatives or sheer laziness, but the repeated use of the same cases does offer at least some evidence of their pedagogical suitability. The wisdom of the crowd can be systematically flawed and incomplete,[12] but it is better than nothing.

Third, this approach offers a gateway to membership in an epistemic community. Proportionality,[13] the basic structure doctrine,[14] the notwithstanding clause,[15] *Grootboom*[16]: all of these are shorthand for key ideas, common points of reference for a far-flung scholarly community, and building blocks of discussion and debate. This standard tourist itinerary enables students to be part of a conversation by exposing them to terminology and knowledge that insiders take for granted. The tourism approach is formulaic, but therein lies one of its strengths: there is real value in knowing familiar formulae.

[12] See e.g. Cass R. Sunstein, *Conformity: The Power of Social Influences* (NYU Press, 2019) at 35–46 (discussing informational cascades); see also n. 10 (discussing path dependence and network effects).

[13] See e.g. *R.* v. *Oakes* [1986] 1 SCR 103; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012); Jud Mathews and Alec Stone Sweet, *Proportionality Balancing and Constitutional Governance* (Oxford University Press, 2019).

[14] *Kesavananda Bharati* v. *State of Kerala* [1973] 4 SCC 225; see Section 1.4 of David S. Law and Hsiang-Yang Hsieh, 'Judicial Review of Constitutional Amendments: Taiwan,' Chapter 9 in this volume.

[15] Canadian Charter of Rights and Freedoms, § 33 (also known as the "notwithstanding clause"); see Section 1.2 of Law and Hsieh, 'Judicial Review of Constitutional Amendments: Taiwan' (n. 14).

[16] *Government of the Republic of South Africa* v. *Grootboom* 2001 (1) SA 46 (CC); see Julieta Rossi and Daniel M. Brinks, 'Social and Economic Rights: Argentina,' Chapter 12 in this volume, at Section 3.2.

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

These benefits come, however, at a price. Like instrumentalism, tourism yields a distorted and unrepresentative picture of the world. This may be fine for actual tourists who are merely out to enjoy themselves or claim bragging rights, but it may pose more of a problem in a classroom setting if the goal is to actually teach people about the world. Those who approach the subject in this mold will probably end up studying "a small number of overanalyzed, 'usual suspect' constitutional settings [and] court rulings."[17] The standard tourist itinerary is skewed toward Western liberal democracies and the common law world in particular. The handful of non-Western countries that do receive a significant amount of attention – mainly India, Israel, and South Africa – cannot be described as "representative" of their respective regions. Entire regions – including most of Asia, Africa, South America, and the Middle East – remain "understudied and generally overlooked."[18] Reliance on the de facto canon of "usual suspects" constructs and reinforces a distinction between core and periphery, the privileged and the marginalized.

As troubling as these omissions are, there is no guarantee that students will learn even about the jurisdictions that *are* included in the standard itinerary. Trying to make sense of a landmark judicial decision in isolation is akin to visiting Egypt for an hour to see the Sphinx: the sight may be striking, but the meaning is lost. Yet this is all too often the modus operandi of the tourism model: students are asked to read famous legal texts with little or no exposure to the context. As a result, they risk coming away with an understanding of neither text nor context. In lieu of a coherent picture of another system, they see only bits and pieces.

Refashioning the standard tourist itinerary into a comparative constitutional law canon solves none of these problems and instead introduces its own vexing challenges. One problem lies in the previously noted difficulty of defining what merits canonization. We cannot reasonably expect to construct a canon based on merit if we cannot agree on what constitutes merit in the first place. To be sure, we may find in practice that we are sometimes able to arrive at a consensus about what is "best" or "most worthwhile" without any need for an explicit, agreed definition. Even if we cannot always articulate why certain materials are worthy, we may still be able to agree that they are worthy. This kind of inarticulate agreement, however, calls for skepticism: it is precisely when we cannot give reasons for our agreement that we are most likely to agree for the wrong reasons. Consensus of this type may rest on questionable assumptions and biases – such as an affinity for wealthy or White or English-speaking countries, or a solipsistic preoccupation with courts that pay homage to our

[17] Hirschl, *Comparative Matters* (n. 4) at 4; see also e.g. ibid. at 211–214; Rosalind Dixon and Tom Ginsburg, 'Introduction,' in Rosalind Dixon and Tom Ginsburg (eds.), *Research Handbook on Comparative Constitutional Law* (Edward Elgar, 2011) 1 at 13 ("It is probably the case that 90% of comparative work in the English language covers the same ten countries, for which materials are easily accessible in English.").

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

own – that go unchallenged simply because alternative perspectives are poorly represented. The collective omissions and prejudices that stem from a lack of diversity should not be mistaken for the collective wisdom of an epistemic community with shared intuitions about merit.

Another problem concerns the impossible tradeoffs surrounding the scope of the canon. Any effort to fashion a canon is likely to run into a Goldilocks problem of being overinclusive, underinclusive, or both. If we err on the side of including everything that arguably deserves canonization, the canon becomes unmanageably large for teaching purposes. Insufficient curation does not solve the problem of capacity but instead passes the buck to individual instructors. On what basis are they to pick and choose from a canon that is far too broad to cover?

Conversely, if the canon – the universe of the worthy – is too small, it will marginalize and exclude in unjustifiable and invisible ways. The content of the corpus may be influential and worthy of study, but it is also nowhere near representative of the range of human experience and wisdom that deserves study. The idea of canon – in the guise of a list of "great works" or a "Western canon" – has already proved treacherous in higher education for this reason.[19]

Much can be learned from the controversy surrounding the "great works" canon in the humanities. At least two of the most serious objections made in that context are ripe for repetition in the context of an equivalent "great cases" canon for comparative constitutional law. The first concerns opportunity cost. The question is not whether traditionally canonical works deserve to be studied in absolute terms, but rather whether they deserve to be studied *in lieu of* other works that have not been similarly anointed by the prevailing tastemakers. There is a difference between saying that Machiavelli is worth reading, for example, and saying that Machiavelli should be read at the expense of reading Mahatma Gandhi or Martin Luther King, Jr. That difference is of decisive importance because – to return to the root problem of capacity – we simply do not have the capacity to cover everything that deserves to be covered.

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

There is no obvious reason why the construction of a "great cases" canon in comparative constitutional law would escape these objections. On the contrary, by reifying a problematic and truncated understanding of what people ought to study, the project of canonization might instead entrench and reinforce some of the worst tendencies of a field already characterized by a poorly justified preoccupation with certain jurisdictions and topics. To be sure, progress has been made as of late to diversify away from the usual suspects,[20] but that is perhaps all the more reason for a dynamic and expanding field to invest its energy in further growth, exploration, and diversification rather than the inherently backward-looking endeavor of canonization.

[19] Compare e.g. Allan Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (Simon & Schuster, 1987) at 62–67, 336–382, with John Guillory, *Cultural Capital: The Problem of Literary Canon Formation* (University of Chicago Press, 1993) at 3–84.

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