

*Volume 52, Issue 2 (Winter 2015)*

*Tax Policy for a Better Tomorrow: Intersectoral and  
Multidisciplinary Connections, a Workshop in Honour  
of Neil Brooks*

*Guest Editor: Tim Edgar, Thaddeus Hwong & Jinyan  
Li*

Article 18

---

# Comparative Matters: The Renaissance of Comparative Constitutional Law, by Ran Hirschl

Anthony Robert Sanguiliano

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

Book Note

---

## Citation Information

Sanguiliano, Anthony Robert. "Comparative Matters: The Renaissance of Comparative Constitutional Law, by Ran Hirschl." *Osgoode Hall Law Journal* 52.2 (2015) : 686-688.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol52/iss2/18>

This Book Note is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

## Book Note

**COMPARATIVE MATTERS: THE  
RENAISSANCE OF COMPARATIVE  
CONSTITUTIONAL LAW, by Ran Hirschl<sup>1</sup>**

ANTHONY ROBERT SANGIULIANO

COMPARATIVE RESEARCH IN CONSTITUTIONAL LAW is ancient, finding expression in the writings of such classical texts as Aristotle's *Politics*<sup>2</sup> and Montesquieu's *The Spirit of the Laws*.<sup>3</sup> It has experienced a revival in recent years that is at least partly attributable to the increased flow of information and decreased emphasis on national boundaries that has accompanied globalization, as well as the political imperatives of state building and transitional justice emerging in the wake of decolonization. Yet, at the same time, it has been dogged by the scepticism of its opponents<sup>4</sup> and, more fundamentally, by a lack of clarity and coherence as to the field's methodological and epistemological foundations.<sup>5</sup>

- 
1. (Oxford: Oxford University Press, 2014) 284 pages.
  2. Aristotle, *Politics*, 2d ed, translated by Carnes Lord (Chicago: University of Chicago Press, 2013).
  3. Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws*, translated by Anne M Cohler, Basia C Miller & Harold Stone (Cambridge: Cambridge University Press, 1989).
  4. Justice Scalia of the Supreme Court of the United States has vociferously argued that the use of foreign jurisprudence to interpret the US Constitution is illegitimate. See *e.g. Roper v Simmons*, 543 US 551 at 607-30, 125 S Ct 1183 (2004).
  5. Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 96:4 Harv L Rev 1225 at 1226-28; Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74:3 Ind LJ 819 at 827-29.

For this reason alone, Ran Hirschl's *Comparative Matters: The Renaissance of Comparative Constitutional Law*<sup>6</sup> is well positioned to make a significant and valuable contribution to the field. It is one of the few full-length monographs dedicated specifically to the ambitious project of exploring and solidifying the analytical framework that ought to ground comparative constitutional inquiry.<sup>7</sup>

The book is divided into two parts. Part one, comprising three of six chapters, attempts to explain patterns of engagement by constitutional actors with foreign constitutional systems by reference to the interplay between three basic factors: politics, necessity, and inquisitiveness. Hirschl's central argument is that to properly understand the impetus behind a polity's encounters with the constitutional law of other communities, it is above all else crucial to attend closely to "the concrete sociopolitical struggles, ideological agendas, and 'culture wars' shaping that polity at that time."<sup>8</sup>

In chapter one, Hirschl investigates the motivations that impel constitutional court judges to interpret the domestic constitution using comparative materials. He finds that a pervasive motivation is to depart from a nation's past by locating affinity between the domestic nation's constitution and the constitution of a nation with a social and political community that the domestic nation wishes to emulate. For example, courts in Israel, Argentina, and India have interpreted their own constitutions by appealing to the constitutional jurisprudence of successful liberal-democratic nations such as the United States, Canada, and Germany to self-consciously inculcate a domestic constitutional identity that harmonizes with liberal-democratic values and to create distance from a history of religious and ethnic strife. In chapter two, Hirschl explores how formerly isolated pre-modern legal systems, including systems of Jewish, Hellenic, and Roman law, were forced to respond to or incorporate the constitutive laws of foreign communities through doctrinal innovation to maintain their survival when confronted with a hostile external world. To conclude part one, in chapter three Hirschl examines the methodological and epistemological innovations in comparative legal scholarship achieved by thinkers in the early modern era. He also argues that the 1982 constitutional revolution in Canada that precipitated the adoption of the *Canadian Charter of Rights and Freedoms*<sup>9</sup> can be explained

---

6. *Supra* note 1.

7. For earlier attempts featured in legal periodicals, see Tushnet, *supra* note 5; Vicki C Jackson, "Methodological Challenges in Comparative Constitutional Law" (2010) 28:3 Penn St Int'l L Rev 319.

8. *Supra* note 1 at 7.

9. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

by the interplay of necessity, inquisitiveness, and politics, again, all within the overarching context of the “concrete sociopolitical struggles, ideological agendas, and ‘culture wars’ shaping that polity at that time.”

Taking these lessons learned from the nature of constitutional engagement in hand, in part two of the book, Hirschl argues for an essentially interdisciplinary approach to constitutional studies that draws on insights from social philosophy, religion, political science, and public law. In chapter four, he contends that a narrowly doctrinal approach to comparative constitutional law is on its own inadequate to fully comprehend the object of the field. Such an approach—although admittedly having some role to play—can nevertheless limit the kinds of questions we can ask and the answers we can expect. What is required is the development of a field of “comparative constitutional studies” that transcends the methodological and disciplinary boundaries between the social sciences and public law.

In the remaining chapters, Hirschl applies the methodology of constitutional studies to intervene in perennial debates that have emerged in the literature. Chapter five discusses the debate between “universalists,” who emphasize the commonalities between political communities that facilitate constitutional comparison, and “particularists,” who emphasize the uniqueness of political communities that frustrates comparison. Chapter six discusses the problem of privileging the constitutional systems of the Global North at the expense of those of the Global South as an impediment to fruitful and novel constitutional discovery. In chapter seven, Hirschl advocates for enhanced use of empirical techniques that have only recently been brought to bear in constitutional studies, including case-selection principles, inference-oriented research, small- and large-N studies, and Bayesian statistical analyses of data sets.

In a real sense, the takeaway from *Comparative Matters* is that it is futile to attempt to silo the field of comparative constitutional law in any particular cognate disciplinary camp. To do so is to obscure rather than illuminate the phenomenon under scrutiny. Hence, Hirschl’s meditations on the foundations of comparative constitutional studies naturally attract a wide-ranging audience, from constitutional lawyers to political philosophers and empirical researchers. Indeed, they ought to do so if the field is to be adequately nurtured and mature into the genuinely humanistic and scientific accomplishment that it aspires to be.