
WHAT SHOULD COMPARATIVE CONSTITUTIONAL HISTORY COMPARE?

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Raymond Grew once observed that, “for many professional historians comparative study evokes the ambivalence of a good bourgeois toward the best wines: to appreciate them is a sign of good taste, but indulgence seems a little loose and wasteful.” This reluctance, Grew continued, stemmed from some of the “admirable if modest qualities” of professional historians—“caution, accuracy, unpretentiousness, and respect for the integrity of documents and for the particular.” But it also “reflect[ed] doubt not so much about comparison as a mode of analysis as about what it is that historians [ought to] compare.”

Almost forty years later, some of these doubts have receded. In many fields, comparative history has flourished; in some, failure to compare has become a significant demerit. It is a good time, it would seem, for constitutional lawyers to catch the wave. But comparative history continues to have critics and questioners. In particular, the question of what to compare, and how, remains open and contested. Perhaps it always will. Even so, it seems prudent, at this early stage in our collective effort to historicize the study of comparative constitutionalism, to reflect on how historians have wrestled with methodological questions over the past half century and more and to offer some preliminary thoughts on how the “lessons of comparative history” might apply to comparative studies of constitutional history.

Part II of this Article offers a brief history of comparative history—its practitioners, its detractors, its latter-day defenders and admonishers. Part III proposes three possible approaches to the comparative study of constitutional history—what I call perspectival histories, thematic histories, and relational histories. Perspectival histories focus on a single jurisdiction; what makes them comparative is the author’s own perspective and intended audience. Thematic histories focus on a single theme across jurisdictions without regard to chronological unity. The theme might be doctrinal, institutional, procedural, or theoretical. Relational histories examine multiple jurisdictions within a single chronological frame. They attempt not merely to

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compare the jurisdictions with one another, but also to identify mutual influences, both reciprocal and external. I believe that some of the best work in our field will be relational; but relational histories, when they are written, will have to build on the foundation of previous perspectival and thematic work.

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I. INTRODUCTION

In 1978, the American Historical Association decided to make comparative history the focus of its annual conference. The organizers chose the theme a bit shamefacedly. To prevent possible misunderstandings, they wrapped the key terms of the conference title in knowing quotation marks.¹ “Comparative history,” as it happened, had an awkward history of its own, and the conference’s conveners felt that awkwardness keenly. As Raymond Grew later put it, “for many professional historians comparative study evokes the ambivalence of a good bourgeois toward the best wines: to appreciate them is a sign of good taste, but indulgence seems a little loose and wasteful.”² In part, Grew explained, this reluctance stemmed from some of the “admirable if modest qualities” of Clio’s professional votaries—“caution, accuracy, unpretentiousness, and respect for the integrity of documents and for the particular.”³ But it also “reflect[ed] doubt not so much about comparison as a mode of analysis as about what it is that historians [ought to] compare.”⁴

Almost forty years later, some of these doubts have receded. In many fields, comparative history has flourished; in some, failure to compare has become a significant demerit. By one recent account, comparative history as a sub-discipline is approaching something of a high-water

1. Raymond Grew, *The Case for Comparing Histories*, 85 AM. HIST. REV. 763, 764 (1980).
 2. *Id.* at 763.
 3. *Id.*
 4. *Id.*

mark.⁵ It is a good time, it would seem, for constitutional lawyers to catch the wave. But comparative history continues to have critics and questioners. In particular, the question of what to compare, and how, remains open and contested. Perhaps it always will. Even so, it seems prudent, at this early stage in our collective effort to historicize the study of comparative constitutionalism, to reflect on how historians have wrestled with methodological questions over the past half-century and more and to offer some preliminary thoughts on how the “lessons of comparative history” might apply to comparative studies of *constitutional* history.

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II. THE “LESSONS” OF COMPARATIVE HISTORY

A. *A (Very) Brief History of Comparative History*

Comparative history has a long history, which I must survey briefly. In the Western world, the field is at least as old as Herodotus and Polybius, and its early modern practitioners include some truly towering figures: Montesquieu and Machiavelli, Vico and Voltaire, William Robertson and Adam Smith. In the nineteenth and early twentieth centuries the list is even more imposing: Tocqueville, Marx, Weber. To be sure, many of these thinkers were not historians, or not primarily historians. But the comparative approach has also been touted and tested by some of the supreme historians of all time—by Lord Acton in the last half of the nineteenth century, by Marc Bloch in the first half of the twentieth. Among more recent historians of the United States, the call to compari-

5. Philippa Levine, *Is Comparative History Possible?*, 53 HIST. & THEORY 331, 331 (2014) (noting that “[t]he prospect of the comparative is gaining broader appeal”).

6. I do not mean to suggest a hierarchy with relational histories at the summit. In one sense, the three approaches are of equal value. But I do think that the central work of *comparison* requires that we work to prepare the groundwork for relational histories.

son has been sounded by C. Vann Woodward and Carl Degler, both of them presidents of the American Historical Association.

The historians just named realized that their peers in the historical guild were skeptical. And they thought they knew why. Bloch observed that,

[i]t is no doubt because they have been too easily persuaded that 'comparative history' is a chapter of the philosophy of history or of general sociology, and these are disciplines which the historian—according to his cast of mind—either reveres or greets with a sceptical smile, but in general takes good care not to practise; for what he requires of a method is that it should be a tool, in ordinary use, easy to manipulate, and yielding positive results.⁷

But this, Bloch added, was precisely what the comparative method offered.

Not everyone was convinced; but some historians turned to comparison in an effort to answer some of the compelling questions of the age. Why, for instance, did socialism hold so little appeal for American workers? Why had Germany not developed a viable parliamentary democracy in the nineteenth century—why, in other words, had it arrived at modernity so belatedly and so badly?

These questions, and others like them, hinted, however faintly, at a pair of notions—modernization and American exceptionalism—that informed a great deal of comparative work in the period after the second World War. In time, comparative history's connection with these notions became a source of significant criticism. Earlier still, the comparative approach had come under fire in scorching criticisms of three of the twentieth century's most audacious comparative projects: the oracular pessimism of Oswald Spengler, the sweeping typologies of Pitirim Sorokin, and the majestic universalism of Arnold Toynbee. As Philippa Levine summarized, Toynbee's "attempts to universalize and synthesize a grand narrative of 'civilization' would come to symbolize all that was considered problematic about comparative history."⁸ Four decades ago, Raymond Grew observed that the ghosts of Spengler, Sorokin, and Toynbee continued to hover round and haunt the comparative method.⁹ Perhaps they linger still.

In the third quarter of the twentieth century, criticism of Toynbee merged with criticism of so-called modernization theorists, the most prominent of whom were sociologists like S.N. Eisenstadt and Seymour Martin Lipset. The modernization theorists sought, or purported to seek, to account for the different ways and different speeds through which societies arrived at modernity. Work on modernization was ambitious in

7. MARC BLOCH, *A Contribution Towards a Comparative History of European Societies*, in *LAND AND WORK IN MEDIEVAL EUROPE* 44, 44 (J.E. Anderson trans., Harper & Row Publ'rs 1969) (1967).

8. Levine, *supra* note 5, at 332.

9. Grew, *supra* note 1, at 764.

scope but not always impressively executed. The bill of particulars leveled against the modernization theorists was long.

Their work, critics complained, was teleological.¹⁰ Whether writing about the comparative history of “civilization,” like Toynbee, or of “modernization,” like the later school, these writers tended to define the process they were describing in terms of the goal toward which it was moving.¹¹ And that goal, moreover, was stated in highly parochial terms. The modernization theorists did their most significant work in and around the mid-1960s—a high water mark of Cold War “complacency toward American society, and the expansion of American . . . interests throughout the world.”¹² Modernization, claimed a prominent critic, was defined in terms of the United States’ own development.¹³ The notion was “Western-centered, reformist, and bourgeois”; it was fraught with a “fundamental ethnocentrism.”¹⁴ What’s worse, it was unmoored from empirical reality. Its practitioners were beset by an unfortunate “tendency to mistake concept for fact.”¹⁵ They were American exceptionalists who preferred drawing models to examining the real world. They did “remarkably little,” one critic concluded, “to stimulate or facilitate the actual comparative study of societies.”¹⁶

Fair or not, the criticism stuck, and “comparative history” became, in many quarters, a hiss and a byword. But not in all quarters. The journal, *Comparative Studies in Society and History*, which, in 1973, published the critique from which I just quoted, continues to publish distinguished comparative work. Some historians thought comparison might cure, rather than cause, some of the ills of modernization theory. In 1968, C. Vann Woodward, a distinguished historian of the American South, edited a volume entitled *The Comparative Approach to American History*.¹⁷ In his introduction, Woodward drew attention to “[t]he striking paradox” between America’s “historical parochialism” and its “cosmopolitan involvement.”¹⁸ That paradox lay at the heart of exceptionalism, which Woodward proposed to subject to “the test of comparison.”¹⁹

In recent decades, that test has been pursued by several gifted historians, both in the United States and elsewhere. This work has flourished most copiously with respect to a handful of topics salient, or apparently salient, across societies: slavery, racism, and apartheid; feminism and

10. See, e.g., Dean C. Tipps, *Modernization Theory and the Comparative Study of Societies: A Critical Perspective*, 15 *COMP. STUD. SOC’Y & HIST.* 199, 204 (1973).

11. *Id.*

12. *Id.* at 208.

13. *Id.* at 211 (“[T]he nature of modernization theory reflects a particular phase in the development of a single society, that of the United States.”).

14. *Id.* at 211, 216.

15. *Id.* at 219.

16. *Id.* at 218.

17. *THE COMPARATIVE APPROACH TO AMERICAN HISTORY* (C. Vann Woodward ed., 1968).

18. *Id.* at 3.

19. *Id.* at 346–48; see also Carl J. Guarneri, *Reconsidering C. Vann Woodward’s The Comparative Approach to American History*, 23 *REVIEWS AM. HIST.* 552, 554 (1995) (book review).

women's movements; economic history and labor movements; political movements of Right and Left; prostitution and eugenics; memory and imperialism.

Always there have been critics who insist that comparison is vulnerable, even conducive, to a handful of fatal *-isms*: nationalism, ethnocentrism, universalism, presentism, determinism—even, in earlier times, racism and imperialism.²⁰ Always there have been defenders who insist that nothing inherent in the comparative approach itself fosters such ills. Comparative history, say its champions, has given aid and comfort to bad causes only when practiced badly.²¹ The same is true of many other brands of history, and other strands of learning. Done well, comparative history can undercut the evils it was once thought to promote. Many able historians have followed Woodward's lead in using comparison to challenge American exceptionalism.²² The late Benedict Anderson, one of the most admired comparative historians of recent times, sought to undermine nationalism by subjecting nationalism itself to a comparative approach.²³ The cure for the fatal *-isms*, many contemporary comparatists agree, lies not in avoiding comparison, but in comparing well.

B. Prescriptions from Comparative Histories

And there's the rub. Fortunately, perhaps, there is no shortage of prescriptions from comparative historians regarding how to approach the comparative approach. Some of these exhortations are practical—how to get the job done. Others are ethical—how to serve the right causes and combat the wrong ones. Still others are a mixture of the two. I start with some basic practicality.

Beginning at least with Marc Bloch, comparative historians have encouraged one another to steel themselves against a great deal of work. Comparison requires patience and immense reading. Read widely in other fields, Bloch urged, and write clearly for those working in other

20. See COMPARATIVE AND TRANSNATIONAL HISTORY: CENTRAL EUROPEAN APPROACHES AND NEW PERSPECTIVES (Heinz-Gerhard Haupt & Jürgen Kocka eds., 2009); George M. Fredrickson, *From Exceptionalism to Variability: Recent Developments in Cross-National Comparative History*, 82 J. AM. HIST. 587, 588–89 (1995); Grew, *supra* note 1, at 764–70; see generally Guarneri, *supra* note 19; Akira Iriye, *The Internationalization of History*, 94 AM. HIST. REV. 1 (1989); Levine, *supra* note 5; Michael McGerr, *The Price of the "New Transnational History,"* 96 AM. HIST. REV. 1056 (1991); Philipp Ther, *Beyond the Nation: The Relational Basis of a Comparative History of Germany and Europe*, 36 CENT. EUR. HIST. 45 (2003); Tipps, *supra* note 10; Benedict Anderson, *Frameworks of Comparison*, 38 LONDON REV. OF BOOKS 15 (Jan. 21, 2016), <http://www.lrb.co.uk/v38/n02/benedict-anderson/frameworks-of-comparison>.

21. See, e.g., Levine, *supra* note 5, at 347.

22. See, e.g., THOMAS BENDER, *A NATION AMONG NATIONS: AMERICA'S PLACE IN WORLD HISTORY* (2006); CARL N. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* (1971); see generally DAVID BRION DAVIS, *SLAVERY AND HUMAN PROGRESS* (1984) (comparing slavery and emancipation internationally).

23. See, e.g., BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 4–6 (2d ed. 1991); BENEDICT ANDERSON, *THE SPECTRE OF COMPARISON: NATIONALISM, SOUTHEAST ASIA, AND THE WORLD* (1998).

fields.²⁴ Similar points have been made more recently. Akira Iriye, a transnational historian, has directed historians to ask how their scholarship will “translate” in other parts of the world.²⁵ What historians do, she insists, should matter to distant readers.²⁶

Part of being patient, Bloch suggested, is starting small. Bloch cited the aphorism of Fustel de Coulanges that one day’s worth of synthesis depends on years of analysis.²⁷ What’s more, Bloch added, “‘analysis’ can only be transformed into ‘synthesis’ if it has had the latter in view from the beginning and has been deliberately designed to serve that purpose.”²⁸ Comparative historians must see themselves as part of a broader community that will, through the accumulated efforts of its members, tell a broader story.

In this regard, it is significant to note that many comparative historians—as well as comparatists working in political science, anthropology, and other disciplines—have insisted repeatedly that work focused on a single case study can be comparative.²⁹ After conducting an exhaustive overview of the first twenty volumes of *Comparative Studies in Society and History*, Raymond Grew observed that the vast majority of articles focused on a single case—and rightly so, Grew thought.³⁰ The comparison comes in the author’s outlook and intended audience; it comes through the employment of “common terms and recognizable categories.”³¹

Grew thought the use of established categories and the inquiry into general problems were particularly important. “[C]omparison is most enlightening,” he wrote, “when the choice of what to compare is made in terms of general and significant problems, the elements compared are clearly distinguished, and attention is paid to the intricate relationships between the elements compared and the particular societies in which they are located.”³² Grew held up for emulation the work of Jacob Burckhardt, R.R. Palmer, and Fernand Braudel—“studies whose scope was not determined by categories of comparison but that used a framework already familiar and acceptable and also large enough to include space for comparative analysis.”³³

One of the most enduring practical suggestions among comparative historians is not to hyperventilate over method. Fifty years ago, William Sewell wrote that “[t]he choice of the phenomena to be explained is the

24. BLOCH, *supra* note 7, at 72–75.

25. Iriye, *supra* note 20, at 2.

26. *Id.* at 9.

27. BLOCH, *supra* note 7, at 72.

28. *Id.*

29. Grew, *supra* note 1, at 777 n.34 (citing William H. Flanigan & Nancy H. Zingale, Presentation at the Am. Hist. Ass’n: The Comparative Method in Political Science (Dec. 28, 1978) & E.A. Hammel, Presentation at the Am. Hist. Ass’n: The Comparative Method in Anthropological Perspective (Dec. 28, 1978)).

30. *Id.* at 775.

31. *Id.* at 777.

32. *Id.* at 773.

33. *Id.* at 766–67.

responsibility of the historian, not of the comparative method.”³⁴ Much more recently, Philippa Levine noted that comparative history is less a systematic method than a heuristic device.³⁵ Benedict Anderson made a similar point in a retrospective about comparison. “It is important to recognise,” he wrote, “that comparison is not a method or even an academic technique; rather, it is a discursive strategy.”³⁶ Raymond Grew was blunter still. “[T]here is no comparative method in history,” he declared.³⁷ “There are not even general rules, except those of logic, and they apply differently according to one’s purpose, as to whether it is better to compare cases that are similar or contrasting, neighboring or distant, synchronic or diachronic.”³⁸ What, then, gave the field its unity? Its general outlook. Grew wrote,

To call for comparison is to call for a kind of attitude—open, questioning, searching—and to suggest some practices that may nourish it, to ask historians to think in terms of problems and dare to define those problems independently, and to assert that even the narrowest research should be conceived in terms of the larger quests of many scholars in many fields.³⁹

Comparison was not a method, but a perspective, a turn of mind, an aspiration. Admittedly, Grew added, “[t]o call for comparison . . . says almost nothing about how to do any of this well.”⁴⁰

Grew’s counsel in the latter regard—that the value of historical comparison depended “on the quality of the discernment, of the research, and of the general statements that result”⁴¹—sounds a bit like A.J. Liebling’s famous advice for writers: “The only way to way to write is well, and how you do it is your own [ahem] business.” But Grew did call on comparatists to operate at what he called “a kind of middle range:”⁴² to strive “to see wholes and compare parts,”⁴³ and to “look at other cases” in order “to see other outcomes.”⁴⁴ This advice, like much of the practical advice I have encountered, is quite vague. But to me this suggests, not despair, but a kind of ecumenism—a broad methodological greenhouse for our neophyte field.

A more concrete suggestion, one that appears frequently from Bloch onward, is to work together—both in the sense of writing as part of a community of comparatists and in the sense of direct collaboration

34. William H. Sewell Jr., *Marc Bloch and the Logic of Comparative History*, 6 HIST. & THEORY 208, 213 (1967).

35. Levine, *supra* note 5, at 346 (citing Katarina Friberg et al., *Reflections on Trans-national Comparative History from an Anglo-Swedish Perspective*, HISTORISK TIDSKRIFT 717, 731 (2007)).

36. Anderson, *supra* note 20.

37. Grew, *supra* note 1, at 776.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 771.

42. *Id.* at 773.

43. *Id.* at 771.

44. *Id.* at 769.

and co-authoring. In the latter regard, many historians praise the work of one of my mentors, Jay Winter, who spearheaded collaborative projects resulting in a superb memorial museum of the first World War, a remarkable comparative study of capital cities at war, and, most recently, one of the first truly global histories of the first World War.⁴⁵ None of these would be possible for any scholar working alone.

Comparative historians tend to grow more specific in their prescriptions when they assert the moral impetus of their project, which for many is to use comparison to undercut notions of national particularity. Some comparatists have insisted that nations and nation-states remain crucial to understanding the world as it is and as it has been,⁴⁶ but many others have called for comparative historical studies to bury latent nationalism and to nip “incipient universalisms.”⁴⁷ How is this to be done? One response is to focus on relationships, transfers, and interactions—to pay close attention to cultural issues, with an eye toward mutual influence, both external and reciprocal.⁴⁸ Rather than comparing separate entities—too often *national* entities—these historians aspire to write something variously styled “*Verflechtungsgeschichte*,” “*histoire croisée*,” or “entangled history.”⁴⁹

Such history, its paladins maintain, should never privilege one of the case studies. It should be what Philippa Levine calls a “propositional” comparative approach—“comparisons *of* rather than comparisons *to*.”⁵⁰ Others favor histories that combine an international with a cross-national comparison, or that choose units of analysis both above and below the level of the nation-state.⁵¹ Still others assert the primacy of the periphery. Natalie Zemon Davis has noted, with approval, a trend toward “effacing fixed center points.”⁵² There has been, moreover, a general effort among comparatists to situate what are frequently Euro- and Amerocentric stories in the context of what is happening elsewhere.⁵³ The goal, for many, is to move toward histories of global integration.⁵⁴

45. See CAPITAL CITIES AT WAR: PARIS, LONDON, BERLIN 1914–1919 (Jay Winter & Jean-Louis Robert eds., 1999); 1 THE CAMBRIDGE HISTORY OF THE FIRST WORLD WAR: GLOBAL WAR (Jay Winter et al. eds., 2014).

46. See George M. Fredrickson, *From Exceptionalism to Variability: Recent Developments in Cross-National Comparative History*, 82 J. AM. HIST. 587, 590 (1995); McGerr, *supra* note 20, at 1061–66.

47. See Levine, *supra* note 5, at 332–34, 337; Ther, *supra* note 20, at 47–52.

48. See COMPARATIVE AND TRANSNATIONAL HISTORY, *supra* note 20, at 2; Levine, *supra* note 5, at 339; Ther, *supra* note 20, at 69–71.

49. COMPARATIVE AND TRANSNATIONAL HISTORY, *supra* note 20, at 2.

50. Levine, *supra* note 5, at 340.

51. See, e.g., Ther, *supra* note 20, at 72.

52. Natalie Zemon Davis, *Decentering History: Local Stories and Cultural Crossings in a Global World*, 50 HIST. & THEORY 188, 191 (2011).

53. See, e.g., JÜRGEN OSTERHAMMEL, THE TRANSFORMATION OF THE WORLD: A GLOBAL HISTORY OF THE NINETEENTH CENTURY (Patrick Camiller trans., 2014).

54. Kristina Spohr Readman, *Contemporary History in Europe: From Mastering National Pasts to the Future of Writing the World*, 46 J. CONTEMP. HIST. 506, 507 (2011).

Let me close this section with four prescriptions offered by Benedict Anderson at the close of a long and distinguished comparative career.⁵⁵ First, as noted earlier, comparison is a discursive strategy, not a method, and it makes a great deal of difference whether you are looking for similarities or differences.⁵⁶ Second, the most instructive comparisons are those that surprise.⁵⁷ Third, “longitudinal comparisons of the same country over a long stretch of time are at least as important as cross-national comparisons.”⁵⁸ And fourth, “it is good to think about one’s own circumstances, class position, gender, level and type of education, age, mother language etc when doing comparisons”—but also to remember that “these things can change.”⁵⁹

III. THE OUTLOOK FOR COMPARATIVE CONSTITUTIONAL HISTORY

Many of the suggestions I have just reviewed will be familiar from methodological discussions within comparative law (including comparative constitutional law) and other disciplines. Some of the applications for comparative constitutional history should be obvious. Others I will return to as I propose three basic approaches to the comparative study of constitutional pasts. I emphasize that this is a basic list, not an exhaustive one. I do not intend to outline a complete program—only to help us get started.

And we need to get started. The most striking aspect of current comparative constitutional historiography is its scarcity. Sixty-four years ago, Klaus Epstein observed “that the study of comparative constitutional history is still in its infancy.”⁶⁰ His observation still seems current. In surveying the field one encounters frequent complaints that there is not much to survey. “Despite frequent calls for comparisons,” sighed one observer, “the scholarly record is surprisingly meager.”⁶¹ Historians who have explicitly engaged in writing “comparative constitutional history” have often worked in the medieval and early modern periods, and, for the most part, they did their work decades ago.⁶² There have been strik-

55. See Anderson, *supra* note 20.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Klaus Epstein, *A New German Constitutional History*, 34 J. MOD. HIST. 307, 308 (1962) (reviewing ERNST RUDOLF HUBER, *DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789* (1957)).

61. Manfred Berg, *German Scholarship on American Constitutional History*, 54 AMERIKASTUDIEN [AM. STUD.] 405, 414 (2009). For an exception, see AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY (George Athan Billias ed., 1990).

62. See, e.g., G.N. CLARK, *THE SEVENTEENTH CENTURY* (1929); G. GRIFFITHS, *REPRESENTATIVE GOVERNMENT IN WESTERN EUROPE IN THE SIXTEENTH CENTURY: COMMENTARY AND DOCUMENTS FOR THE STUDY OF COMPARATIVE CONSTITUTIONAL HISTORY* (1968); OTTO HINTZE, *STAAT UND VERFASSUNG: GESAMMELTE ABHANDLUNGEN ZUR ALLGEMEINEN VERFASSUNGSGESCHICHTE* (1962); ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957); HEINRICH MITTEIS, *THE STATE IN THE MIDDLE AGES: A*

ing exceptions, to be sure. R.R. Palmer's *The Age of Democratic Revolution* has been praised as one of the twentieth century's most successful works of comparative history, and Palmer himself described his work as "a comparative constitutional history of Western civilization at the time of the French and American revolutions."⁶³ But Palmer used the term "constitutional" capaciously; he didn't emphasize formal provisions, and he had few followers.

The comparative field seems slenderer still if one focuses on constitutional justice. There are two obvious explanations for this. First, constitutional adjudication is, in most parts of the world, a rather recent phenomenon. Second, and partly as a result, professional historians are rarely trained to pay much attention to it. Even as daring a synthesizer as Tony Judt—who seemed, in *Postwar*, to have world enough and time for almost everything—barely mentioned constitutions and never mentioned constitutional courts.⁶⁴ If constitutional justice is as important as comparative constitutional lawyers like to think—and I, as one of them, think it is—then it is high time that historians started paying attention to it, and it is past time for constitutional lawyers to start historicizing their own field.

This work, however, has only barely begun. When, as a graduate student, I expressed to my dissertation advisor my interest in writing about the German Federal Constitutional Court, he promptly asked me to survey the Court's historiography. A few days later I returned to explain, a bit abashedly, that it didn't appear to have one. In all my searching I turned up a single survey—jaunty and brisk—and a collection of essays about the Court's most famous case.⁶⁵ Eight years later, the state of the field remains largely unchanged, with a few additional case studies and the world-historical exception of my own first book.⁶⁶

COMPARATIVE CONSTITUTIONAL HISTORY OF FEUDAL EUROPE (H.F. Orton trans., 1975) (North-Holland Medieval Trans., vol. 1). What all of these books have in common is that they are quite old.

63. R.R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: THE CHALLENGE*, at v (1959).

64. See TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2005).

65. See UWE WESEL, *DER GANG NACH KARLSRUHE: DAS BUNDESVERFASSUNGSGERICHT IN DER GESCHICHTE DER BUNDESREPUBLIK* [THE ROAD TO KARLSRUHE: THE FEDERAL CONSTITUTIONAL COURT IN THE HISTORY OF THE FEDERAL REPUBLIC] (2004); *DAS LÜTH-URTEIL AUS (RECHTS-)HISTORISCHER SICHT: DIE KONFLIKTE UM VEIT HARLAN UND DIE GRUNDRECHTSJUDIKATUR DES BUNDESVERFASSUNGSGERICHTS* [THE LÜTH JUDGMENT IN (LEGAL-) HISTORICAL PERSPECTIVE: THE CONFLICTS SURROUNDING VEIT HARLAN AND THE FUNDAMENTAL RIGHTS JURISPRUDENCE OF THE FEDERAL CONSTITUTIONAL COURT] (Thomas Henne & Arne Riedlinger eds., 2005).

66. See, e.g., ANSELM DOERING-MANTEUFFEL ET AL., *DER BROKDORF-BESCHLUSS DES BUNDESVERFASSUNGSGERICHTS 1985* (2015); see also JUSTIN COLLINGS, *DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 1951–2001* (2015). Oliver Lepsius has taken the lead of a working group of young scholars determined to study constitutional adjudication historically. The book on the *Brokdorf* decision is their first product. One should also mention Michaela Hailbronner's superb book, *Traditions and Transformations: The Rise of German Constitutionalism*, which deftly combines historical and theoretical perspectives. MICHAELA HAILBRONNER, *TRADITIONS AND TRANSFORMATIONS: THE RISE OF GERMAN CONSTITUTIONALISM* (2015).

I mention the German example, not (only) to advertise my book, but also to stress how much low-hanging fruit there is to be picked in the historiography of constitutional justice. If a Court as remarkably influential and with as rich a scholarly literature as the German FCC has generated as slender a historiography as it has, what of the other constitutional tribunals in the world? Where are the great histories of the French Constitutional Council, the Italian Constitutional Court, the Constitutional Court of South Africa, the European Court of Human Rights, the European Court of Justice, the Supreme Court of Canada, the Supreme Court of India, the Supreme Court of Israel? Where are the histories of the courts on the “periphery” of global constitutionalism? Even where histories of these courts exist, they tend to be slender surveys. And where more solid surveys have been written, there are still wide fields to explore within the broader account. Obviously the history of constitutional justice does not exhaust the category of constitutional history, and I hope that much of what I will say hereafter will apply to other areas of constitutional history as well. But because so little has been done (outside the United States) to historicize constitutional justice itself, that will be the major focus of my concrete proposals. I will be talking, then, not only about our field as a branch of comparative history, but as a central subject of contemporary history, or *Zeitgeschichte*.

A. “Perspectival” Histories

My first proposal is that historians and comparative lawyers begin the work of offering thick constitutional histories—especially, perhaps, thick histories of constitutional justice—that focus on a single jurisdiction. Such histories will be comparative thanks to the author’s unique perspective and intended audience. They will be comparative in the sense that the masterpiece of one of the founders of comparative history was comparative. I was surprised and puzzled when, as a first-year graduate student, I was assigned to read Tocqueville’s *Democracy in America* in a course called “Classics of Early Modern European Historiography.”⁶⁷ The book struck me as undoubtedly a classic, but neither early modern, nor European, nor historiographical.

The assignment makes more sense today. I now recognize quite clearly what was opaque to me then—namely, that *Democracy in America* is, among other things, a work of *comparative* history. George Fredrickson, an American historian, has called Tocqueville the “godfather of cross-national comparative history involving the United States.”⁶⁸ Jean-Claude Lamberti, a French historian, observed that *Democracy in America* was “from beginning to end [] based on comparison of France and

67. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds., trans., Univ. of Chicago Press 2002) (1835).

68. Fredrickson, *supra* note 20, at 592.

the United States.”⁶⁹ Very few of these comparisons are explicit. They did not need to be. To Tocqueville’s contemporary French readers, they were obvious. They constituted the book’s *raison d’être*. The comparison, in Tocqueville, is the product of perspective. A visitor from someplace else would have written a very different book. Initially at least, much comparative constitutional history will need to be comparative in the same way in which *Democracy in America* was comparative.

Some of this is sure to happen unintentionally and perhaps even unconsciously. When Florian Meinel reviewed my history of the German FCC in the *Frankfurter Allgemeine Zeitung*, his caption read: *Aus Amerikanischer Perspektive* (“From an American Perspective”). The title of the review, *Selbstverständlich macht Karlsruhe Politik* (roughly: “Karlsruhe is Obviously Political”), also underscored what seemed to a German reviewer peculiarly American about the book.⁷⁰ I had taken it for granted, Meinel observed, that the FCC is a political actor and needs to be inserted into the political history of the Federal Republic.⁷¹ I had written about the FCC, Meinel concluded, much as an American historian would have written about the Supreme Court.⁷²

This, on reflection, is obviously true—so true that I hardly thought about it when I wrote the book. It is enlightening for present purposes because even though the book rarely pauses for overt comparisons, it is a comparative work through and through. Indeed, I think it is fair to say, my very research question was a comparative one. In the book’s introduction, I wrote:

This is a book about how the German Constitutional Court came to possess such extraordinary power, and why so many Germans are grateful that it does. How the Court became so mighty and why so few resist its strength are questions, I contend, that can be answered only by telling the Court’s story and by situating that story in a broader historical frame.⁷³

I tried to answer those questions in the historical narrative that followed. But it is unmistakable, on looking back, that my questions about the popular reception of the German FCC were really also questions about the U.S. Supreme Court. They were also questions about constitutional justice more broadly. Meinel is surely correct that I was writing as an American. But I was also writing as a comparative constitutional historian; and I was writing, at least in part, for other comparative constitutional historians—all six of them, as Bruce Ackerman once told me.

69. JEAN-CLAUDE LAMBERTI, *TOCQUEVILLE AND THE TWO DEMOCRACIES 2* (Arthur Goldhammer trans., 1989).

70. Florian Meinel, *Selbstverständlich macht Karlsruhe Politik*, *FRANKFURTER ALLGEMEINE ZEITUNG* (Ger.), Mar. 4, 2013 (reviewing COLLINGS, *supra* note 66).

71. *Id.* (author’s translation).

72. *Id.*

73. COLLINGS, *supra* note 66, at xxxi.

This autobiographical detour brings us back to the venerable forecast of Marc Bloch. Comparative constitutional history, like comparative social history, will need, in some respects, to begin small—with careful histories of single jurisdictions by scholars operating either outside those jurisdictions or within them, but as part of a broader community of comparatists. (It also brings us back to Benedict Anderson’s observation that longitudinal comparisons within a single society are at least as important as comparisons across societies.) When the time for synthesis comes, as I hope it will, the synthesizers will have to rely on scores of single-case studies—what I have called “perspectival histories.”

B. Thematic Comparison

Perspectival histories will not exhaust our field, nor should they define it. The salutary urge to compare across jurisdictions is to be welcomed, and perhaps the most natural way to do that—in constitutional history, as in comparative history more broadly—is to search for common problems and themes. As noted earlier, many of the most prominent works of comparative history focus on problems or themes that arose in different settings and in different parts of the world, the most prominent examples being the histories of imperialism, slavery, gender, and labor.⁷⁴ Most previous comparative constitutional scholarship has proceeded thematically, and the burden of the historical turn will simply be to historicize the thematic approach. The possibilities, of course, are innumerable. As Akira Iriye said of transnational history, “[t]he list of ‘internationalizable’ topics is endless.”⁷⁵ I pull from my shelf the *Oxford Handbook of Comparative Constitutional Law* and find, in the table of contents, no fewer than sixty-four topics ripe for historical treatment.⁷⁶

But historicizing thematic comparison presents problems. If there is a cornucopia of possible themes, there is also a cornucopia of potential case studies. How does one choose among them? One response is not to distinguish, but simply to sweep broadly across the globe and track the chosen theme wherever it appears (or does not appear). Whatever the virtues of this approach for the lawyer or the political scientist, it presents formidable obstacles for the historian. Indeed, it would seem to undercut one of the signal contributions of historical treatment: thick, nuanced, diachronic narrative and analysis—a task possible, for most mortals, only across a narrow range of case studies. For most of us, what to include, and what to leave out, becomes a question of pragmatic necessity.

I have confronted this necessity in my current book project, which began as a paper presented at the first incarnation of this conference.

74. See *supra* text accompanying note 20.

75. Iriye, *supra* note 20, at 3.

76. THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW vii–xii (Michael Rosenfeld & András Sajó eds., 2012).

The book studies constitutional justice as a forum of collective memory, looking specifically at the ways in which the constitutional courts of Germany, South Africa, and the United States have engaged, respectively, with the legacies of Nazism, apartheid, and slavery. Whenever I discuss my work with colleagues, I am asked, almost immediately, the same question: “[w]hy these three cases and not others?” I readily admit that my coverage will be incomplete. But I also contend that my choices are not illogical. In some respects, they even try to be representative. I am looking at what might be described as one first-generation court (the U.S. Supreme Court), one second-generation court (the German *Bundesverfassungsgericht*), and one third-generation court (the Constitutional Court of South Africa). I am looking, moreover, at one North American court, one European court, and one court from the “global South.” All three have produced a vast jurisprudence that engages, repeatedly and extensively, with the so-called “burdens of history.” All three have engaged with those burdens in very different ways. They also happen to be courts with whose jurisprudence and history I was previously familiar and who publish decisions in languages I can read.⁷⁷ I hope my decision is logically defensible. But *some* decision seems unavoidable.

That necessity brings us back to Raymond Grew’s *dictum* that the only rules of the comparative method are “those of logic, and they apply differently according to one’s purpose, as to whether it is better to compare cases that are similar or contrasting, neighboring or distant, synchronic or diachronic.”⁷⁸ It is my purpose to compare cases that are contrasting, distant, and diachronic. A different historian with a different theme or a different purpose would make different choices—and rightly so. The proof of any thematic comparison will be in the narrative pudding; the persuasiveness will reside in the product itself. I recommend, therefore, considerable latitudinarian tolerance in the choice of cases and chronologies. Thematic comparison, like the other modes of comparison I am describing, is an approach, not a method. The success of that approach cannot be judged *ex ante*. Liebling’s credo prevails once more.

C. “Relational” History

Another awkward element of my three choices is that they are all *national* cases. Again, I plead necessity. In the modern world, public memory has frequently been a national phenomenon—“imagined communities” have been imagined at the national level.⁷⁹ In the realm of constitutional justice, public memory seems to have been an almost exclu-

77. I had originally planned to include Italy as a separate case study, but it ultimately struck me as too much of an outlier. The Italian Constitutional Court’s invocations of fascism are comparatively quite rare.

78. Grew, *supra* note 1, at 776.

79. The term, of course, is Benedict Anderson’s. See ANDERSON, *IMAGINED COMMUNITIES*, *supra* note 23. For Anderson, the phrase “imagined community” was the very definition of the nation. *Id.*

sively a national phenomenon. I have not encountered sustained engagements with the past in the jurisprudence of *supra*- or subnational constitutional tribunals.

I can also plead entrenched disciplinary habit. Most comparative constitutional studies operate on the national plane, the most prominent exceptions (and increasingly large ones) being the tribunals of the “two Europes”—the Court of Justice of the European Union and the European Court of Human Rights. Perhaps this should change. In any case, the consistent criticism by professional historians of nation-centered narratives presents a challenge to comparative constitutional historians. That challenge is intensified by those same historians’ critiques of universalist approaches. Not only is the national framework the dominant framework of comparative constitutional studies, but that national framework is also often linked, explicitly or implicitly, to a kind of normative triumphalism; the end goal of normal constitutional development as something that could be characterized roughly as liberal democratic constitutionalism—the simultaneous embrace of human rights, democracy, and the rule of law that Mattias Kumm has christened “the trinitarian grammar of the constitutionalist project.”⁸⁰ Countries and courts that have accepted this grammar are welcomed with open arms into the “global constitutional community.” Countries and courts that have not yet arrived are seen as works in progress, or as works in need of progress. Countries that hold back in some particulars are derided, softly or sternly, as pathological, perverse, or (in a pejorative sense) exceptional. In such accounts, “liberal democratic constitutionalism” plays something of the role that “modernity” played for the comparative historians and social theorists during the Cold War. And the criticism applied to modernization theories—that modernity is “a notion grounded in European experience that relegates non-European societies to the ‘waiting room of history’”⁸¹—might apply to comparative constitutionalism as well. To prevent that, Kumm has recently called on comparative constitutional scholars to be skeptical of progress narratives, to “[t]ak[e] ‘the dark side’ seriously.”⁸² Historians can help in that important project. It should be the business of comparative constitutional historians to problematize and complicate both the triumphalist universalism and the national particularism that might otherwise creep into comparative constitutional studies. The best antidote to progress narratives is a closer look at the facts. As Orwell suggested, archives exist to prevent people from lying about history.⁸³

80. Mattias Kumm, *Taking “the Dark Side” Seriously: Constitutionalism and the Question of Constitutional Progress. Or: Why it is Fitting to Have the 2016 ICON-S Conference in Berlin*, 13 INT’L J. CONST. L. 777, 777 (2015).

81. Monica Juneja & Margrit Pernau, *Lost in Translation?: Transcending Boundaries in Comparative History*, in COMPARATIVE AND TRANSNATIONAL HISTORY: CENTRAL EUROPEAN APPROACHES AND NEW PERSPECTIVES 110 (Heinz-Gerhard Haupt & Jürgen Kocka eds., 2009) (internal citation omitted).

82. Kumm, *supra* note 80, at 777.

83. See GEORGE ORWELL, 1984 (1948).

Comparative historians, as suggested earlier, have pointed out a portion of the way forward. I incorporate many of their suggestions in the following proposal of what I call “relational” constitutional comparison. A relational constitutional history focuses on multiple constitutional jurisdictions over the same period of time, “stressing . . . shared ideas and narratives” but also “breaking assumed continuities.”⁸⁴ Several historians see such an approach as the most powerful corrective to both universalist and nationalist tendencies.⁸⁵

Seeing the way forward will require coming to grips with the seemingly unavoidable use of nation-states as our unit of analysis. The nation, as it happens, has been the most significant forum of modern constitutional action. In the nineteenth century, the link forged between nation and constitution was powerful, both emotively and politically. In many respects that link has endured. All the same, it poses problems for comparative historians. “The tenacity both of national histories,” writes Philippa Levine, “and of the association of comparative history with those national histories goes a long way toward explaining why comparative history still has, in some circles, a bad name.”⁸⁶ But the problem of the nation-state also presents opportunities. Before highlighting some of those opportunities, it is also worth repeating that, among professional historians, focus on the nation-state has also been forcibly defended.

That defense has taken several lines. One is to note that comparative history can serve as an antidote to the dominance of traditional national histories,⁸⁷ just as Vann Woodward hoped fifty years ago that comparative history could counter claims of American exceptionalism.⁸⁸ Earlier still, Lord Acton and Marc Bloch both thought comparison could help “overcome the national particularism built into European historiography.”⁸⁹ A second line of defense is to insist that national differences remain crucial to understanding the world. “One might wish that it were otherwise,” writes George Fredrickson, “[b]ut historians have to confront the world as it has actually existed rather than as they would like it to have been.”⁹⁰ Nations and nationalities are not facts of nature; but they are potent forces of history, and historians can ignore them only at a cost to accuracy and understanding.⁹¹ What is more, Fredrickson concludes, “using the American nation as a unit of comparison does not require endorsing American exceptionalism.”⁹² Michael McGerr has put the point

84. Levine, *supra* note 5, at 337 (internal citations omitted). Levine used this language to describe comparative history more generally and to praise its power to undercut incipient universalisms. *Id.* But the phrase seems to apply especially to relational histories.

85. *Id.*

86. *Id.* at 333.

87. *Id.* at 334.

88. See THE COMPARATIVE APPROACH TO AMERICAN HISTORY, *supra* note 17, at ix–xi.

89. Grew, *supra* note 1, at 770.

90. Fredrickson, *supra* note 20, at 590.

91. *Id.*; see also McGerr, *supra* note 20, at 1062.

92. Fredrickson, *supra* note 20, at 604.

even more sharply, accusing many historians of going out of their way to “avoid[] the realities of nationalism and national power.”⁹³ “Lost in this dismissal of exceptionalism, difference, comparative history, and national history,” McGerr concluded, “is any consideration of evidence for or against American exceptionalism and distinctiveness.”⁹⁴ There is nothing inherently pernicious about uncovering genuine difference. As Carl Degler once suggested, one compares neither to praise nor to condemn, but to understand.⁹⁵

This defense has obvious importance for constitutional historians. For the reality, as noted earlier, is that much of the most momentous constitutional development since the second World War—and not only since then—has unfolded at the national level. Many constitutional courts might aspire to membership in a cosmopolitan community of constitutional values, but they remain embedded in national political communities. Understanding constitutional courts as historical institutions is one of the principal burdens of our discipline. Such understanding will escape us unless we are deeply sensitive to national contexts. Using the nation-state, then, as a major—though certainly not exclusive—unit of analysis seems both important and unavoidable.

But if we cannot ignore the nation-state as a unit of analysis, neither should we ignore criticisms of such use. Such criticisms, with their attendant prescriptions, point to fruitful possibilities for comparative constitutional history. The basic criticism is summarized by Benedict Anderson—namely, “that using the nation and nation-states as the basic units of analysis fatally ignored the obvious fact that in reality these units were tied together and crosscut by global political-intellectual currents such as liberalism, fascism, communism and socialism, as well as vast religious networks and economic and technological forces.”⁹⁶ One response, hinted at earlier, is to approach national constitutional history from the perspective of these external forces. “[N]ational history,” writes Akire Iriye, “[can] best be understood when . . . examined from without as well as from within.”⁹⁷

Another response is to combine the nation-based approach with others. Philipp Ther, for instance, calls on comparatists “to choose units of analysis beneath the level of the nation and the nation-state.”⁹⁸ Some comparative constitutionalists have already begun doing this; a prominent example being the recent work of Mila Versteeg and Emily Zackin, which challenges traditional accounts of American exceptionalism by fo-

93. McGerr, *supra* note 20, at 1066.

94. *Id.* at 1062.

95. Carl N. Degler, *In Pursuit of an American History*, 92 AM. HIST. REV. 1, 7 (1987).

96. Anderson, *supra* note 20.

97. Iriye, *supra* note 20, at 9.

98. Ther, *supra* note 20, at 72.

cusing on American *state* constitutionalism.⁹⁹ In the other direction, comparatists have called for positioning national accounts in a trans- or supranational setting.¹⁰⁰ Ther insists that national perspectives should be constantly informed by what is happening elsewhere.¹⁰¹ Comparatists, he maintains, must be attuned to mutual influences.¹⁰² Other historians argue that the national unit of analysis is less problematic than the tendency to privilege a small set of national cases. Natalie Zemon Davis's call for "effacing [] center points" was meant as a corrective.¹⁰³

I think it is fair to say that, as a discipline, comparative constitutional law has traditionally orbited around several such center points—Karlsruhe, Washington, Strasbourg, and Luxembourg, among others. That focus has prompted an appropriate reaction and a salutary diffusion of attention across other parts of the globe. But, with the exception of the U.S. Supreme Court, even the traditional center points of constitutional justice remain vastly under-historicized. And even the historiography of the U.S. Supreme Court remains exquisitely parochial. Historians of the U.S. Supreme Court note the existence of foreign constitutional courts only, if at all, to chronicle the intramural spats concerning citations to foreign law during the first decade of the twenty-first century.¹⁰⁴ I know of no systematic effort to write the history of the U.S. Supreme Court in a cross-national or comparative context.¹⁰⁵

The first step, as suggested earlier, will be to write the history of points both on the center and on the periphery. The next step will be to situate those stories in relationship one with another, and as part of a shared story. Central to that shared story will be the participants' own sense of sharedness—what Ther calls the "historicity of the comparison."¹⁰⁶ Relational histories should avoid privileging any one case study above the others. They should also stress that the outcome in each case was open. If "[t]o look at other cases is to see other outcomes,"¹⁰⁷ it is also to be reminded that there is a range of possible outcomes in each individual case. This, as Thomas Nipperdey once remarked, is the enduring application of Ranke's much-maligned (and misunderstood) aphorism about each epoch of history being *unmittelbar zu Gott*.¹⁰⁸ There was noth-

99. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641 (2014).

100. For a sweeping example of this perspective, see OSTERHAMMEL, *supra* note 53.

101. Ther, *supra* note 20, at 63, 66–67.

102. *Id.* 63–65.

103. Zemon Davis, *supra* note 52, at 191.

104. See LUCAS A. POWE JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 331 (2009).

105. Future historians of the Court might emulate the transnational perspective of Thomas Bender. See BENDER, *supra* note 22. For obvious reasons, that perspective will be richer for the period following 1945.

106. Ther, *supra* note 20, at 68.

107. Grew, *supra* note 1, at 769.

108. THOMAS NIPPERDEY, *NACHDENKEN ÜBER DIE DEUTSCHE GESCHICHTE: ESSAYS [REFLECTIONS ON GERMAN HISTORY]* (1983) (Ger.) (author's translation).

ing inevitable about the global spread of constitutional justice after the second World War, and there is nothing inevitable about the endurance of the institution in the twenty-first century. Nor need one assume an essential affinity and equivalence among the card-carrying members of the “global community of courts.”¹⁰⁹ My hunch is that the historicization of global constitutionalism is likely to unearth quite a few surprises, not all of them happy ones. But, as Benedict Anderson admonished in his comparatist’s testament, the best comparisons are those that surprise.¹¹⁰

In any case, historical treatment of global constitutionalism is a mammoth project that can no longer be delayed. It will require all hands on deck and all oars in the sea. Any attempt at comprehensive synthesis probably lies many years down the road. At all events, global synthesis will have to await an outpouring of perspectival, thematic, and middle-range relational histories. What might some of those middle-range histories look like?

Here, we go back to Marc Bloch. Bloch took his cues from historical linguistics, which, he said, was divided between universalists and comparatists.¹¹¹ The former, in his view, ranged widely through time and space looking for universal human traits expressed through language.¹¹² The latter, by contrast, were more modest, and therefore more useful.¹¹³ The comparatist looked for “neighbors” engaged in a dynamic process of mutual influence and exchange.¹¹⁴ Historians, Bloch thought, should do the same.¹¹⁵

The picture for comparative constitutional historians, however, is a bit more complicated. For one thing, Bloch thought the comparative method required including *all* the neighbors—every language (or society) descended from a common ancestral stem.¹¹⁶ That ambition poses practical and conceptual problems for comparative constitutional studies. In our case, there are too many neighbors, and not all of the neighbors are physical neighbors. Germany, Israel, and South Africa are hardly geographical neighbors, and their legal systems are, at best, distant cousins. But the relationship among their constitutional courts is much closer. They are all, in a significant sense, part of the same story. The same could be said if we are to add the constitutional courts of Italy and Austria, Canada and France, Spain and the United States, to say nothing of courts in Asia and Africa or Latin America and Eastern Europe. The history of global constitutionalism is a global history, one that we are probably not ready to write. But the boundaries of middle-range relational

109. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 191 (2003).

110. Anderson, *supra* note 20.

111. See BLOCH, *supra* note 7, at 45–48.

112. See *id.* at 46–47.

113. See *id.* at 47–48.

114. See *id.*

115. See *id.*

116. See *id.* at 48.

history cannot be determined by the reach of relationships. Those relationships reach across the globe.

Again, we are left to pick and choose, with little more than logic to guide us. But logic, I suggest, may be aided, if not circumscribed, by geography. I don't mean to insist rigidly that early efforts in relational history be geographically bounded, but it might be a good place to start—not least because constitutional courts in geographical proximity are often embedded in societies through which pass common social, political, cultural, and economic forces. It is important that relational constitutional histories never lose sight of these extra-legal influences. Otherwise we run the risk of writing a very arid sort of *Ideengeschichte*.¹¹⁷

Some constitutional jurisdictions, of course, have been much more strongly influenced by distant exemplars than by geographic neighbors. The decisions of the South African Constitutional Court, to take one example, cite much more frequently to the jurisprudence of Germany, Canada, the two Europes, and the United States than to that of any other African jurisdiction. In writing a relational history of South African constitutional justice, it would make sense to ditch geography. But it would be nearly impossible, given the current state of the historical literature, to include very many other jurisdictions. I might propose, as a rule of thumb, that a relational history ought to compare relative geographic neighbors or else limit the objects of inquiry to two jurisdictions or three. Beyond that, the account risks being uprooted from its real-world social and political settings or of taking a couple decades to write.

The call for a relational perspective has been one of the most persistent and powerful issued by comparative historians in recent years. Philipp Ther insists that all histories of Europe should integrate a relational basis, and he notes that historians from smaller nations have done this better than historians from Germany and France.¹¹⁸ I don't think it an exaggeration to say that all constitutional histories—including perspectival and thematic histories—ought to incorporate, explicitly or implicitly, something like a relational basis. This will require of comparative constitutional historians a “serious commitment to interdisciplinarity,” and it will require that we work locally and comparatively at the same time.¹¹⁹ It will require that we be patient—with our vast source material and with each other. It will require collaboration—sometimes the overt collaboration of co-authored projects or edited collections, but more often the collaboration of conversation and community. It will require a lot of hard work and some temerity. At stake is nothing less than the history

117. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 119 (1984) (criticizing historians who “sometimes write the driest possible *Ideengeschichte* of doctrinal concepts evolving and dissolving over time, without paying nearly enough attention to the applications to which these doctrines were put in everyday practical reasoning or to the specific controversies or political events that suddenly opened up the doctrines to question”).

118. Ther, *supra* note 20, at 69.

119. See Levine, *supra* note 5, at 343, 345–46.

of global constitutionalism, one of the most striking and influential phenomena of our international *Zeitgeschichte*—a phenomenon that professional and popular historians have hardly noticed and that comparative constitutional lawyers have only begun to historicize. The field is a vast one, ready to harvest.

IV. CONCLUSION

As is surely obvious by now, my most immediate audience in these brief reflections has been myself. I tried my hand at writing perspectival history in my first book. I am now at work on a second book that takes a thematic approach across jurisdictions widely diverse in time and space. Someday, though the prospect is a daunting one, I hope to be part of a broader effort—perhaps a collaborative effort—to write a portion of the history of global constitutionalism on an integrated, relational basis. That effort will require a great deal of preparatory work, and I have little to offer in the way of foolproof prescriptions for how that work is to be done. I offer, as it were, only blood, tears, trial, and error. Perhaps mostly error. But it is better to be up and doing than to strive in vain for *ex ante* methodological certainty. And better to learn method by doing than to discover, with one of the Elizabethan poets, that “Whilst timorous knowledge stands considering, / Audacious ignorance hath done the deed.”¹²⁰ This is history that needs to be written, and it can be ours to write.

120. See Samuel Daniel, *Musophilus*, in *POEMS AND A DEFENCE OF RYME* lines 490–91 (Arthur Colby Sprague ed., Harv. Univ. Press 1930).