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Proportionality & Comparative Constitutional Law versus Studies

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The doctrine of proportionality has received sustained attention from comparative constitutional scholars. Yet it is an area where courts, and scholars, have made limited use of empirical or inter-disciplinary approaches to constitutional comparison. The article calls for a change in this practice as part of a broader call for greater dialogue between scholars and practitioners of conceptual and more empirical forms of constitutional comparison.
Constitutional law, comparative constitutional law, comparative constitutional studies, empirical comparison, proportionality, legitimacy, necessity, comparative practice

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Introduction

The doctrine of proportionality is one of the most studied topics in comparative constitutional law.[1] Constitutional scholars across the world have explored different countries' approaches to proportionality, and the similarity and differences among these various approaches.[2] Comparative scholars have documented the diffusion of proportionality across borders, and its subtle transformation and shifts in that process of diffusion.[3] And constitutional theorists have explored the normative foundations of the doctrine, in particular the degree to which it is best understood as a substantive approach to rights and democratic constitutionalism, or rather a purely procedural approach to the justifiability of certain limitations on constitutional commitments. [4]

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[1] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2014); MOSHE ELIYA-COHEN & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (2013); Moshe Eliya-Cohen & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463 (2011); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012); MATTIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY (2012); Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. & ETHICS OF HUM. RTS. 142 (2010); Francis G. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 1 (Evelyn Ellis ed., 1999); Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789 (2007).

[2] *See, e.g.,* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007); Xenophon Contiades & Alkmene Fotiadou, *Social Rights in the age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 10 INT'L J. CONST. L. 660 (2012); Moshe Eliya-Cohen & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263 (2010); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999); Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 DUKE J. COMP. & INT'L L. 291 (2012).

[3] *See, e.g.,* JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013); Stone Sweet & Mathews, *supra* note 1; WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 287 (2005).

[4] *Compare* Robert Alexy, *Constitutional Rights and Proportionality*, 22 REVUS 51 (2014); KLATT & MEISTER, *supra* note 1; Virgilio Afonso Da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 OX. J. LEG. STUD. 273 (2011); Jackson, *supra* note 1; Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574 (2004); Gregoire C.N. Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CANADIAN J. LAW &

Despite this, debates about proportionality have been largely untouched by the recent shift in the field of comparative constitutional law – toward a greater focus on empirical, interdisciplinary approaches to the study of constitutional law, or what Ran Hirschl has called "comparative constitutional studies."[5] This divide between more doctrinally- and empirically-focused forms of comparison also runs in both directions: inter-disciplinary scholars have largely ignored the significance of different approaches to proportionality in large-n studies of constitutional practice.[6] And more traditional, conceptual, and theoretical scholarship has overlooked the potential for empirical approaches to help ground and inform a more normatively attractive version of proportionality analysis.

This article seeks to challenge this disciplinary divide by calling for a closer connection between doctrinal/conceptual and empirical scholarship generally – and in the specific context of doctrines of proportionality. In doing so, it does not purport to provide a definitive account of how these connections might be made. Rather, it attempts to show the plausibility of making such connections – by reference to two examples: first, the potential for notions of necessity to be more strongly informed by attention to foreign legislative practices, and evidence of their effects; and second, the potential for notions of "legitimacy" to be connected to general constitutional patterns among other constitutional democracies.

Comparison of this kind raises inevitable methodological challenges, including difficulties regarding the scope of comparison, the level of generality at which various countries' legislative practices should be considered, and issues of causal inference. Courts, however, can address these difficulties by distinguishing between "thin" and "thick" modes of empirical comparison, an awareness of the benefits of inter-disciplinary engagement when engaging in thicker forms of comparison, and appropriate procedural rules for resolving empirical uncertainty or disagreement.

There is also already precedent for such an approach in several courts' approach in a range of countries. The argument in the article, therefore, is simply that this existing form of comparative reference should be made more consistent and systematic in the application of doctrines of proportionality – in much the same way that consideration of state practice is a consistent part of the approach of the European Court of Human Rights (ECtHR) under the European Convention, and the 'margin of appreciation' doctrine.[7] The two contexts are clearly distinct, and the rationale for comparison quite different across the two contexts.[8] But there is also value to broad and consistent attention to foreign constitutional practice in both settings: in a national context, comparison of this kind may ultimately lead to an approach to proportionality that is either more or less deferential to legislative constitutional judgments. Whether this is true will depend largely on the actual contours of foreign legislative practice, and the procedural rules courts adopt to resolve uncertainty or disagreement about the effectiveness of legislative alternatives. But the mere process of comparison can promote a more reasoned and considered approach by judges to complex, open-ended questions about democratic necessity and legitimacy.

The article makes these arguments by reference to examples of comparative engagement by courts in the Anglo-American world – i.e. Canada, New Zealand, South Africa and Australia – in assessing the proportionality of campaign finance and advertising regulation, and restrictions on

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JURISPRUDENCE 179 (2010); T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465 (2005); Kai Moller, *Balancing and the Structure of Constitutional Rights*, 5 INT'L J. CONST. L. 453 (2007); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468 (2009).

[5] RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW (2014).

[6] *See, e.g.,* Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575 (2016).

[7] *See* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2005); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012); Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 EUR. L.J. 80 (2011).

[8] *See infra* notes 60-61.

prisoners' access to the franchise. It also provides examples of similar reasoning in cases involving abortion, sexual privacy and sex work. These are all constitutional systems in which courts generally make open and consistent use of comparative sources, but uneven use of comparative constitutional *practice* in the application of doctrines of proportionality. They thus help demonstrate the potential scope for greater conceptual-empirical constitutional dialogue in this context. Nothing, however, ultimately turns on the particular countries or cases selected: they are simply examples of a more general argument, and easily could be replaced with examples from Europe, Asia, Latin America or other parts of Africa.

The remainder of the article is divided into five parts. Part I surveys the idea of proportionality as a more or less a "generic" feature of democratic constitutional practice worldwide, and the degree to which it has attracted extensive conceptual attention from constitutional scholars, yet little attention from empirical or inter-disciplinary scholars.[9] Part II outlines the potential for a closer connection to be drawn between the two strands of the field – or between doctrinal/conceptual and empirical approaches in the application of notions of necessity under a test of proportionality. Part III explores the potential for such a connection to be made in the context of notions of necessity and legitimate state purposes under a doctrine of proportionality, and the precedents for such an approach in existing practice. Part IV considers the parallels, as well as differences, between this kind of empirical approach to comparison and the margin of appreciation in European human rights law, while Part V offers a brief conclusion.

I Proportionality: Doctrine and Theory

At its core, the idea of proportionality involves four basic questions: an inquiry into the *legitimacy*, *suitability* and *necessity* of a legislative impairment of rights, and an assessment of the relative benefits and costs of the law from a constitutional perspective ("adequacy in the balance" or proportionality *stricto sensu*).[10]

Of course, the application of these tests varies by country and context. As the doctrine of proportionality has travelled, it has inevitably taken a somewhat different form across countries.[11] Thus, in assessing legislative purpose, some courts, such as the German Federal Constitutional Court, simply ask whether the purpose is "legitimate" within a broader constitutional framework; whereas others, such as the Supreme Court of Canada (SCC), ask whether it is sufficiently "important" to satisfy the requirements of section 1 of the *Charter.* Similarly, in assessing the question of necessity, some courts insist on a notion of strict "narrow tailoring" of legislation,[12] while others suggest that there is somewhat greater flexibility in the notion of "minimal impairment," or that a law impair rights as little as possible.[13] Almost all courts, however, ask whether the legislature is advancing a purpose consistent with basic commitments to constitutional democracy, and whether there is some

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[9] *Compare* David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

[10] Matthias Klatt & Moritz Meister, *Proportionality – A Benefit to Human Rights? Remarks on the I-CON Controversy*, 10 INT'L J. CONST. L. 687 (2012); Stone Sweet & Mathews, *supra* note 1; Cohen-Eliya & Porat, *Proportionality and the Culture of Justification*, *supra* note 1; Jackson, *supra* note 1. For the suggestion that despite differences there is a commonality in approaches, *see also* FRANCISCO URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 8 (2017).

[11] *See, e.g.,* Anne Carter, *Proportionality in Australian Constitutional Law: Towards Transnationalism*?, 76 ZAÖRV 951(f 2016). *Compare* also Gunter Frankenburg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 INT'L J. CONST. L. 563 (2010) (on how legal borrowing and transplantation inevitably involves processes of this kind).

[12] *See* the U.S. Supreme Court on proportionality: Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in* Heller: *The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367 (2009); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517 (2007). See discussion in Jackson, *supra* note 1; Stone Sweet & Mathews, *supra* note 1, at n.9.

[13] *See, e.g.,* the Supreme Court of Canada in R v. Butler, [1992] 1 S.C.R. 452 (Can.) (explaining and applying the Canadian necessity test).

plausible, more narrowly tailored response to the legislative object in question.[14] They also apply some version of a balancing test, or proportionality *stricto sensu*.[15]

Constitutional theorists disagree as to the normative attractiveness of a four-stage test of this kind. Scholars such as Robert Alexy defend proportionality as an approach that ''maximizes'' or ''optimizes'' the *substantive* protection given to constitutional rights.[16] Scholars such as Mattias Klatt and Moshe Cohen-Eliya and Iddo Porat emphasize its procedural virtues, as a device that promotes a form of ''Socratic contestation'' or public reasoning-giving in a democracy,[17] or allows citizens to ''require governments [to] provide substantive justification for all their actions.''[18] Others suggest that it is a more procedural approach, which simply provides a useful structure for constitutional balancing.[19]

Other scholars, however, criticize proportionality doctrines as effectively arbitrary or irrational in nature; as promising a form of ''balancing'' that involves the weighing of incommensurables;[20] and as promising a form of maximization that gives insufficient weight to legal procedural values, or commitments to individual procedural justice.[21] Others distinguish between strong and weak forms of an incommensurability critique,[22] and ordinal versus cardinal approaches to weighing different values or principles,[23] or point to the possibility of resolving complex balancing questions by reference to an account of the relative ''weight'' or social importance of various purposes or values.[24]

This article, however, attempts to bracket these questions, and ask *how* courts should apply a test of proportionality. How a court applies a test will, of course, inevitably affect the normative attractiveness of the test itself.[25] But it is a question that can be analyzed separately from debates about the desirability of the test, as a matter of first principle. In most countries, the doctrine of proportionality is also firmly entrenched in current constitutional practice, so that there is clear value to scholarship that focuses on how, not simply whether, it should apply across different contexts. The argument of the article in this context is also ultimately quite simple – it is that the application of the doctrine of proportionality should be more consistently informed by the insights of comparative constitutional studies – i.e. the insights to be gained from an appropriately empirically-oriented, inter-disciplinary approach to the study of constitutional law.

In some cases, empirical engagement of this kind may lead courts to adopt a *less* deferential approach to questions of proportionality, and in others, a *more* deferential approach. For a test of

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[14] *Compare* URBINA, *supra* note 10.
[15] *Id*. Stone Sweet & Mathews, *supra* note 1.
[16] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2009). *Compare also* DAVID BEATTY, THE ULTIMATE RULE OF LAW (2004).
[17] *See, e.g.,* Kumm, *The Idea of Socratic Contestation*, *supra* note 1; Kumm, *Constitutional Rights as Principles*, *supra* note 4.
[18] Cohen-Eliya & Porat, *Proportionality and the Culture of Justification*, *supra* note 1. *See also* COHEN-ELIYA & PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE, *supra* note 1.
[19] *Compare* Adrienne Stone, *Proportionality in Australian Constitutional Law: Between Substance and Method* (unpublished manuscript, 2017) (on file with author); Vicki Jackson, *Pockets of Proportionality: Choice and Necessity, Doctrine and Principle, in* COMPARATIVE JUDICIAL REVIEW ch. 18 (Rosalind Dixon & Erin Delaney eds., 2018).
[20] *See, e.g.,* GREGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009); Tsakyrakis, *supra* note 4.
[21] *See, e.g.,* URBINA, *supra* note 10.
[22] *See, e.g.,* Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813 (1993).
[23] Da Silva, *supra* note 4, at 276; Jackson, *supra* note 1, at 1356-57. *See also* T.R.S. Allan, *Law, Democracy, and Constitutionalism: Reflections on Evans v. Attorney General*, 75 CAMBRIDGE L.J. 38 (2016).
[24] *Compare* BARAK, *supra* note 1. For a useful criticism, *see also* Gregoire Webber, *Proportionality: Constitutional Rights and Their Limitation*, 2 PUBLIC L. 433, 436 (2013).
[25] *Compare* URBINA, *supra* note 10.

necessity, greater comparison seems more likely to lead to a more intense form of proportionality review, whereas for legitimacy, it would seem to encourage greater deference. The ultimate effect of comparison, however, will depend entirely on the specific context – that is, the actual pattern of global legislative practice in a given context (i.e. whether it is similar or different to national law), and the procedural rules a court adopts in applying such an approach. The benefit to comparison, in contrast, is that it has a consistent capacity to encourage courts to adopt a more deliberative and considered approach to complex and open-ended questions of this kind.[26]

II Proportionality: From Comparative Constitutional Law to Studies

As the field of comparative constitutional law has grown and matured, it has developed a rich and internally diverse set of approaches. One set of approaches are 'conceptual' in nature: they focus on understanding the content of constitutional concepts by identifying areas of commonality and difference in the application of these concepts across countries. Ran Hirschl calls this mode of comparison ''concept description through multiple description'' and suggests that it has a critical place in the comparative constitutional law field.[27]

Other related approaches also include various forms of doctrinal, deliberative and dialogic (or reflective) comparison: constitutional courts and appellate lawyers sometimes look to foreign constitutional decisions as a source of guidance for the development of new constitutional doctrines, or a guide to potential arguments for or against a particular constitutional outcome.[28] Constitutional lawyers, judges and scholars may also engage in other forms of ''reflective'' comparison: they may engage with foreign constitutional practices as a means of reflecting more deeply and critically on their own constitutional system and its operation.[29] Sometimes reflection of this kind may confirm the importance of certain features of the domestic constitutional system, as part of a national constitutional tradition. But in other cases, it may encourage a more critical view of those features, which encourages greater debate and openness to change within the existing system.

Hirschl in particular, however, argues for the importance of a second set of approaches, which are more interdisciplinary and causally-oriented in nature. He labels these approaches as involving the idea of "comparative constitutional *studies*." Others, however, have referred to this kind of comparative practice as ''empirical'' or ''functional'' in nature. The basic idea behind comparison of this kind is that foreign countries offer a form of global democratic laboratory: they have adopted both constitutional and ordinary laws and policies that are often quite different to those in a domestic legal system, and there is thus a broad opportunity to learn from the lessons or experiences of those systems, when thinking about new constitutional and legislative choices domestically.

Approaches of this kind could also be applied in a wide variety of contexts. They could be used to inform initial constitutional design choices, at the stage of constitutional drafting, or subsequent decisions about the design of proposed constitutional amendments or ordinary legislation. They could also be potentially applied to guide the application of a wide variety of constitutional doctrines.

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[26] *Compare* VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2013) (discussing the benefits of comparative engagement generally).

[27] HIRSCHL, *supra* note 5.

[28] *See* Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985); Vicki Jackson, *Constitutional Comparisons, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Rosalind Dixon & Melissa Vogt, *Comparative Constitutional Law and the Kable Doctrine, in* JUDICIAL INDEPENDENCE IN AUSTRALIA ch. 8 (Rebecca Ananian-Welsh & Jonathan Crowe eds., 2017).

[29] Jackson, *Constitutional Comparisons*, *supra* note 28; Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819 (1999); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT. L. J. 192 (2003); Mark Tushnet*, The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999).

To date, however, there has been quite limited "dialogue" between conceptual and empirical approaches to constitutional comparison: few constitutional scholars who work on the conceptual side of this divide have engaged with empirical constitutional insights; and few empiricists have taken seriously the importance of formal doctrinal variation across countries.[30] This is also a missed opportunity for both sides of the field. For empiricists, it means that what they are measuring may be affected by certain forms of doctrinal variation, which if observed, could go a significant way toward explaining their results.[31] And for conceptual scholars, it means a missed opportunity for increased deliberative structure in the application of otherwise quite open-ended, subjective constitutional concepts.[32]

Of course, any comparison of this kind raises potential problems of comparability or cross-national difference: no two countries are the same, and what works in one country may not work in another, and vice versa. Indeed, policies that ''succeed'' in one country may often do so only because of a range of supporting conditions, which are largely absent, and not open to replication, in other countries.[33] It will thus often be quite dangerous for a country to ''borrow'' even the most successful laws or policies of another country, at least without close attention to potential system-level contextual differences.[34]

Further, in assessing the apparent impact of a particular policy elsewhere, courts will need to distinguish between evidence that shows a mere correlation between a particular policy and various outcomes and a true causal relationship. The causal effect of various constitutional or legislative policy choices cannot simply be observed by looking at what happens in a society after those choices are made. There are too many other potential confounding effects or variables that may explain these outcomes. Thus, to understand the *effect* of these choices, constitutional lawyers and judges must adopt either one of two different approaches: either they must rely on the implicit judgments of a large number of foreign legislators about the relative effectiveness or success of a particular legislative model, or consider the available social science evidence as to the effectiveness of domestic legislative practices.[35] Inter-disciplinary engagement of this kind will generally be more reliable than more indirect, second-order approaches to questions of causation. But it may also over-tax the institutional resources or capacities of certain courts. And in some cases, there may simply be no clear social science evidence on a question – the evidence available may be incomplete, preliminary, or reveal disagreement, or conflicting findings on the effects of various policies.

Almost all these limitations, however, can be addressed via a mix of appropriate judicial modesty and procedural innovation on the part of courts. First, courts can choose to rely on either ''thicker'' or ''thinner'' forms of empirical comparison, depending on the context and available evidence: Where thick forms of comparison seek to understand the effects of foreign legislative choices, thinner forms of comparison focus solely on the *existence*, or non-existence, of certain legislative regimes in another country. They thus avoid almost all of the issues of causation and comparability that plague thicker forms of comparison.

Second, courts can adopt a variety of procedural rules in response to problems of disagreement, or uncertainty, under thicker, more causally-oriented forms of comparison. For instance, they may decide to vary the weight afforded to foreign social science evidence, depending

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[30] A leading large-n empirical study by Chilton & Versteeg, *supra* note 6, for example, measures the impact of constitutional rights without attempting to consider the degree to which they are subject to limitation in relevant countries. To do so might be extremely difficult, but still worthy of note and debate.

[31] *Id*.

[32] Even the strongest defenders of proportionality acknowledge that it leaves open considerable evaluative judgment of this kind, *see supra* notes 1-4.

[33] *Compare* federalism as package deals: Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 273 (2001). *See also* Tushnet, *supra* note 29.

[34] *Id*.

[35] *Compare* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009).

on the degree – or duration – of consensus among foreign experts (with the conclusions of a larger number of experts, over a longer period of time, being afforded more weight, and the conclusions of a smaller number of experts, over a lesser period of time, less weight).[36] Or they may choose to vary the burden of proof, or persuasion, in relation to evidence of foreign legislative alternatives to a problem: for example, they might decide to hold that the plaintiff, or petitioner, is required to show that foreign legislative alternatives are more effective (based on some kind of civil standard or burden of justification). Or they might require the petitioner to prove only the existence of those alternatives, and require the state to carry the legal burden of showing that those alternatives are not in fact equally effective. Each of these rules will have quite different impacts on the strength or intensity of judicial review, but provide an equally effective way of responding to the potential for disagreement, or uncertainty, among social scientists.

III Necessity, Legitimacy & National Practices

To illustrate, this part considers two possible ways in which the doctrine of proportionality might benefit from greater attention to cross-country empirical insights: first, by greater attention to foreign legislative practices in the application of a requirement of necessity; and second, by greater attention to global legislative practices in the application of a test of legitimacy.

A The Case for More Empirical Comparison

Assessing the necessity of any legislative measure is an inherently difficult evaluative exercise: it requires a court to determine whether a particular legislative objective could be achieved via different means – i.e. means that have a lesser impact on constitutional rights or norms. And this involves determining whether there are other plausible legislative approaches to a particular problem, and what the likely effectiveness of those approaches would be. Similarly, determining whether laws advance a *legitimate* government purpose often raises complex questions regarding the relationship between law and morality. Is it legitimate, for example, for the state to adopt laws that give effect to shared public morality? Or is the state restricted to laws capable of justification based on norms of public reason, or some kind of harm principle?

One way in which courts may attempt to answer these questions is by a turn to domestic constitutional history or practice, and/or political theory.[37] But another is to engage in broad forms of empirical comparison: ''Thin'' forms of empirical comparison, for instance, can help a court identify the range of *logically plausible* responses to a particular regulatory problem. Thicker forms of comparison may also go further, and help a court determine the likely effectiveness of those alternatives, domestically.

Whether this is true will depend largely on the evidence available as to the effectiveness of regulatory regimes in other jurisdictions. As Part I notes, the mere fact that a foreign jurisdiction has adopted or retained a particular policy does not by itself indicate that such a policy is effective. Indeed, in some cases the policy may be substantially *less* effective than the one adopted domestically, and for a court to suggest otherwise would clearly involve the over-enforcement of a doctrine of proportionality. But if there is compelling evidence that legislation elsewhere does in fact achieve its objectives, even though it is more narrowly tailored than domestic legislation, this might strengthen a conclusion that domestic law is in fact unnecessary, or not sufficiently narrowly tailored. Conversely, if there is evidence that it is ineffective, this might bolster a conclusion that the broader forms of regulation found domestically are in fact necessary.

Empirical forms of comparison may also help a court identify broadly shared understandings of legitimacy in democratic society. If few constitutional democracies worldwide retain legislation regulating particular conduct, this may suggest that a large number of democratic legislators across the globe have formed the view that legislation of the relevant kind is no longer appropriate in a democratic society. Conversely, if a significant number of constitutional democracies *retain*

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[36] *Compare* Posner & Sunstein, *supra* note 35.

[37] *See, e.g.,* JOHN RAWLS, A THEORY OF JUSTICE (2009).

regulations on particular conduct, this may indicate that a large number of democratic legislators have formed the view that legislation of this kind *is* consistent with basic requirements of democratic legitimacy. For this to be true, arguably one of two conditions must be met: either there must actually be some deliberation, between courts or legislators, on an international plane about the minimum requirements of freedom and democracy,[38] or legislators and courts in different countries must reach at least somewhat independent decisions about the compatibility of relevant legislation with domestic understandings of freedom and democracy.[39] In one case, the epistemic reliability of comparative constitutional practices depends on a process of argument, or contestation; whereas in another, it depends on a form of ''many minds'' or ''law of large numbers'' logic, whereby the probability of a normatively ''correct'' answer will increase, as the number of decision-makers also increases. But in either case, the existence of equivalent foreign legislative provisions may provide valuable information for domestic judges about the content of notions of ''freedom and democracy'' or liberal legitimacy in a particular context.

Comparison of this kind is not the same as reliance on binding *international law* as a norm that may inform the scope of legitimate state purposes under the first limb of a proportionality inquiry. German law in particular recognizes a clear distinction in this context between 'absolute' state duties, which necessarily imply that the state is acting legitimately when seeking to fulfil those duties, and relative duties, where the legitimacy of the state's purpose is more open to question.[40] Several other jurisdictions, including Canada and South Africa, have also recognized binding international law norms as a potential factor to be considered in assessing both the legitimacy *and* importance of various legislative objectives.[41] But while overlapping with such norms, transnational constitutional practices are clearly distinct from such norms: they represent widespread practices among constitutional democracies, not necessarily practices that have any claim to obedience as a matter of either treaty or customary international law.[42]

B Existing Precedent

Courts around the world do in fact already adopt an approach of roughly this kind in some cases. Campaign finance cases provide one good example. In Canada, in *Harper*, a Canadian case on the validity of limits on third party electoral advertising in federal elections, both the majority and minority placed express reliance on comparative practices as relevant to the question of minimal impairment. Chief Justice McLachlin and Justice Major, in their dissenting judgment, held that the limits in question were disproportionate in part because of their absolute effect (which was effectively to prevent individuals from advertising their views during an election campaign), and in part because the spending limits imposed were ''significantly lower than [in] other countries that have also imposed citizen spending limits.''[43] Justice Bastararche, in contrast, held that it was inappropriate to rely on the relevant foreign laws cited by the majority in this context: they targeted different categories of advertising, across a different time period, and were thus not a valid source of comparison, or evidence of a lack of minimal impairment domestically.

In Australia, in the *ACTV Case*, several judges also referred to foreign legislation regulating electoral advertising as directly relevant to judgments about the proportionality of Commonwealth legislation imposing an advertising black-out period in the lead up to elections and substituting a

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[38] Jeremy Waldron, *Foreign Law and the Modern Ius Gentium,* 119 HARV. L. REV. 129 (2005)

[39] Posner & Sunstein, *supra* note 35. *See* Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008); Dixon & Vogt, *supra* note 28.

[40] *See* Cohen-Eliya & Porat, *Proportionality and the Culture of Justification*, *supra* note 1; Grimm, *supra* note 2.

[41] *See, e.g.,* Prince v President of the Law Society of the Cape of Good Hope, 2001 (2) SA (S. Afr.). 388; United States v. Burns [2001] 1 S.C.R. 283 (Can.). *See further* Rosalind Dixon & Theunis Roux, *Making Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa* (unpublished manuscript) (on file with author).

[42] Any reliance on international legal sources for this purpose will thus simply tend to be *evidentiary* in nature.

[43] Harper v Canada (AG), [2004] 1 S.C.R. 827, [35] (Can.).

free-advertising model for existing political parties. Chief Justice Mason noted the fact that many foreign countries banned paid electoral advertising, at least during certain periods or in certain media.[44] Justice Brennan likewise noted the degree to which other constitutional democracies imposed limits on political advertising, and the wide variation in the nature of the limits imposed in this context.[45] The Chief Justice, however, also emphasized the ''sweeping'' nature of the ban on advertising under Australian law, and the degree to which it favored incumbent political actors in this context.[46]

The same pattern applies for cases involving the regulation of reproductive and sexual freedom and judgments by courts as to the legitimacy of states' legislative purposes. In *Morgentaler*, for example, a case involving a challenge to Canadian laws restricting access to abortion outside certain hospital settings, members of the SCC explicitly cited comparative constitutional case law in support of the idea that it was open to Parliament, under section 1 of the *Charter*, both to seek to promote and protect fetal life *and* women's life and health. Justice Wilson, in her concurring opinion, held that the protection of fetal life was a ''perfectly valid'' and legitimate legislative objective, and that it was also legitimate and appropriate for the state to accord different weight to this objective, based on the relative stage of development of the fetus.[47] In doing so, she also noted that this was ''consistent with the position taken by the United States Supreme Court'' and the abortion policy in the UK, France, Italy, Sweden, the Soviet Union, China, India, Japan and most of the countries of Eastern Europe.[48] Justice Estey likewise noted that the 'decision of the Canadian Parliament' to prioritize women's life and health in allowing access to abortion in certain circumstances was 'reflected in legislation in other free and democratic societies'.[49]

Or consider the reasoning of Justices O'Regan and Sachs in *Jordan*.[50] By sharply distinguishing between clients and sex-workers, Justices O'Regan and Sachs held that existing prohibitions on prostitution in South Africa imposed unfair discrimination based on sex. However, while finding that the historical reason for such limitations was suspect, they held that this did not mean that the state lacked a legitimate ongoing justification for regulating commercial sex. In reaching this conclusion, they also relied explicitly on comparative practices in this area, noting that ''nearly all open and democratic societies condemn commercialised sex,'' thereby suggesting that within certain bounds, the ongoing regulation of commercial sex expressed a legitimate state purpose, or legitimate form of ''legislative choice.''[51]

Conversely, in the *National Coalition I Case* in South Africa, Justice Ackermann pointed to comparative practices as *supporting* the conclusion that the state lacked any legitimate purpose in seeking to restrict consensual intercourse between consenting adult men. The relevant limitation on the right to privacy, equality and dignity, Justice Ackermann held, was invalid in part for lack of any legitimate legislative purpose: ''[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.''[52] Further, in reaching this conclusion, he suggested that ''nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom … would lead me to a different conclusion. In fact, on balance, they support such a conclusion,'' because in many countries ''there has been a definite trend towards decriminalization.''[53]

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[44] Australian Capital Television Pty Ltd v Commonwealth (1992) 177 C.L.R. 106, [20]-[22] (Austl.).
[45] *Id.* at [9].
[46] *Id.* at [53]-[56].
[47] R v. Morgentaler [1988] 1 S.C.R. 30, 181-82 (Can.).
[48] *Id.* at 182-83.
[49] *Id.* at 126.
[50] S v. Jordan, 2002 (6) SA 642 (S. Afr.).
[51] *Id.* at [91].
[52] National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1999 (1) SA 6, [35] (S. Afr.).
[53] *Id.* at [35]-[37].

Empirical engagement of this kind, however, remains uneven – and inconsistent – across countries and cases. The argument the article seeks to make in this context, therefore, is simply that the current form of empirical comparative engagement by domestic courts should be both systematically more consistent and broad-ranging in cases involving the application of a doctrine of proportionality.

Take cases on prisoners' access to the franchise. In *Sauve I*, the first Canadian case to adjudicate the issue of prisoner disenfranchisement, the SCC simply held that the relevant law was ''drawn too broadly'' and failed to ''meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the S. 1 jurisprudence of the Court.''[54] In doing so, it did not issue further reasons, or make any explicit reference to comparative constitutional practices.[55]

Similarly, in *Sauve II*, in striking down Parliament's disenfranchisement of prisoners serving a sentence of two or more years, the majority likewise simply noted that if there was a rational connection between the legislation and its aims, ''the class denied the vote – all those serving sentences of two years or more – [was] too broad, catching many whose crimes are relatively minor and cannot be said to have broken their ties to the community.''[56] Only Justice Gonthier in a dissenting judgment, engaged in any systematic comparison of foreign regimes with less severe restrictions on felon voting. His honor noted that in the U.S. nearly all states disqualified from voting in state and federal elections those convicted of a felony, usually for the life of their sentence, often during parole, and sometimes on a permanent basis;[57] in Europe, there was a broad range of practices regarding felon disenfranchisement; and in countries such as Australia, New Zealand, and the UK, there were a range of restrictions on voting by convicted offenders: Australia banned voting in federal elections for those serving a sentence of five years or more; New Zealand disenfranchised prisoners serving a life term, a term of imprisonment greater than three years, or in preventative detention; and the UK disenfranchised all prisoners, except those on remand, convicted of contempt, or in prison for default in complying with another sentence.[58] On this basis, he also concluded that the plaintiffs had failed to show a lack of minimal impairment in the relevant Canadian legislation: both Canadian provincial and international practice, he suggested, supported the conclusion that there were ''a variety of rational and reasonable'' ways to balance competing rights and legislative policy interests in this area. Indeed, he suggested that a comparison to other democratic systems revealed that there was no single or dominant legislative response, and that if anything Canada's approach was at the less restrictive or more ''moderate'' end in terms of disenfranchisement.[59] The majority, however, made no reference to this analysis.

Similarly, in selecting particular countries for comparison, domestic courts have often focused on countries with significant historical ties or commonalities, rather than a broader democratic constitutional universe. This may be appropriate for certain kinds of final forms of ''borrowing,'' or forms of what Sujit Choudhry has called genealogical comparison, which attempts to gain insights about the proper revolution of shared constitutional concepts from the way in which they have evolved in other constitutional systems sharing the same constitutional heritage.[60] But for more empirical or ''functional'' forms of comparison, the potential universe of comparison is generally much broader, and includes all countries with broadly similar democratic constitutional traditions and policy challenges.

So, for instance, in felon disenfranchisement cases, courts in countries such as Australia and New Zealand have tended to focus primarily on case-law and developments in other Commonwealth

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[54] Sauve v. Canada (AG), [1993] 2 S.C.R. 438 (Can.).
[55] The decision was given orally.
[56] Sauve v. Canada, [2002] 3 S.C.R. 519, 553 per McLachlin CJ (Can.).
[57] *Id.* at 588-89.
[58] *Id.* at 591-92.
[59] *Id.* at 593-94.
[60] Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 INDIANA L.J. 819 (1999).

constitutional systems. In *Roach,* for example, the Chief Justice of Australia (Chief Justice Gleeson) noted that by imposing a blanket ban on voting by prisoners, Commonwealth legislation failed to give effect to a distinction between serious and non-serious offenses.[61] In drawing that distinction, he also drew explicitly on Canadian and UK precedents, thereby implicitly drawing on *legislative* practices in those countries as evidence of the possibility of a more narrowly tailored legislative solution in Australia.

Likewise in *Taylor*, a New Zealand case finding inconsistency between prisoner disenfranchisement provisions and Section 12 of the New Zealand Bill of Rights, the New Zealand High Court suggested that it ''was noteworthy that although comparable legislative measures have been enacted in other, cognate, jurisdictions, they have been subsequently struck down'' by courts in those countries, and cited Canadian, European, South African and Australian case-law as supporting the idea that a blanket ban on prisoner voting was not in fact compatible with requirements of proportionality.[62] The most extensive attention J. Ellis gave, however, was to the reasoning of the High Court of Australia in this context, and *not* to the existence of other democratic systems with more selective or less severe restrictions on voting by prisoners. Similarly, in electoral spending cases such as *Harper*, while purporting to conduct a global survey, the SCC also largely focused its attention on UK electoral laws.[63]

IV Empirical Comparison v A Margin of Appreciation

In many ways, the idea of comparison of this kind is similar to the role played by national legislative practices under the "margin of appreciation" doctrine in European human rights law.[64] The margin of appreciation doctrine was first endorsed by the ECtHR in *Handyside*,[65] and since then, the Court has consistently held that the ''width'' or breadth of the margin afforded to a national legislature under the doctrine will vary according to a number of criteria, including notably the degree to which there is a general European legislative consensus in a particular area. Where no such consensus exists, the Court has held, the margin of appreciation applied to domestic legislative decisions will generally be quite wide; whereas if a consensus exists, the margin of appreciation will be significantly narrowed to reflect this consensus.[66]

Take cases before the ECtHR involving the voting rights of prisoners, and restrictions on campaign finance laws. In *Hirst*, a case involving a challenge to UK laws banning prisoners from voting, the Court noted that there was ''no common European approach'' to the problem, and thus that the margin of appreciation owed to states in this context was quite wide. It also noted that the restrictions the UK imposed on prisoners' right to vote in this context were less-far reaching than in some other states, and that this was a factor supporting the validity of UK laws in this context.[67] But equally, it noted that only a minority of states (i.e., at most 13) imposed blanket bans on voting by prisoners, and thus that the margin owing to states in this context was not ''all-embracing." Similarly, in *Scoppola v. Italy*, the Court noted that arrangements between European states varied considerably in this context, and that only 19 states had no limitation on voting by prisoners, while

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[61] Roach v. Electoral Commissioner (2007) 233 CLR 162, [13]-[19] (Aust.).
[62] Taylor v Attorney-General [2014] NZSC 1630, [14]-[15] (New Zealand).
[63] Harper v Canada (AG), [2004] 1 S.C.R. 827, 891 per Bastarcarche J (the Chief Justice and Major J rely on the higher ratio of advertising spending limits for citizens to political parties in Britain compared to Canada).
[64] *See, e.g.,* Matthew Saul, *The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments*, 15 HUM. RTS. L. REV. 745 (2015); Jan Kratochvil, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETHERLAND Q. HUM. RTS. 324 (2011); Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 14 CAMBRIDGE YEARBOOK EUR. LEGAL STUD. 381 (2012).
[65] For the earlier endorsement of the doctrine by the Commission, see also Cyprus v UK (1958-59) 2 Y.B.E.C.H.R.; Lawless v Ireland, Eur. Ct. H.R. Ser. B., 1960-61; discussion in Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT'L & COMP. L. Q. 638, 639 (1999).
[66] Hutchinson, *supra* note 65, at 640.
[67] Hirst v. United Kingdom (No 2), Eur. Ct. H.R. 681, [81](2005).

24 imposed restrictions of varying degrees. It also noted that many states imposed broader, more blanket-like prohibitions on prisoner voting than Italy, and on this basis, held that there was no violation of Article 3 in the circumstances.[68]

Conversely, in *Soyler v Turkey*, the Court noted that the restrictions imposed in Turkey were ''harsher and more far-reaching than those applicable in the United Kingdom, Austria and Italy,'' all of which had been examined by the Court on previous occasions.[69] Further, it noted that unlike provisions in Italy, Turkish law was ''indiscriminate in its application'' to all convicted offenders, and did not take account of ''the nature or gravity of the offence, the length of the prison sentence, or …circumstances of the convicted person,'' or provide a defined list of offenses leading to disenfranchisement, and as such fell ''outside any acceptable margin of appreciation'' under Article 3.[70] In each case, the Court thus relied on state practice to inform the legitimate scope of the margin of appreciation owing to states under Article 3, *and* to inform more empirically oriented notions of narrow tailoring or necessity.

Likewise in the campaign finance context, in a case involving a challenge to UK laws restricting all forms of political advertising on television and radio, the Strasbourg Court surveyed the practices of 34 states, and found that 19 states prohibited paid political advertising in some form.[71] The Court noted a trend away from complete or total prohibitions in this context, or that an increasing number of states ''allow[ed] the broadcasting of advertisements of a certain social interest nature from certain bodies,'' and only seven imposed similarly absolute forms of prohibition to the UK. For the minority, this was also sufficient to sustain a finding of invalidity: ''the disregard of less restrictive alternatives,'' the dissenting judges held, was ''surprising, given relevant European experience to the contrary'';[72] whereas for the majority, the background variation in European state practice meant that states were entitled to a relatively broad margin of appreciation in this area, or at least one ''somewhat wider than that normally afforded to restrictions on expression on matters of public interest.''[73]

Of course, at a European or international level, the margin of appreciation doctrine has two interrelated rationales or functions: it allows space for democratically-elected legislators to play a role in making judgments about public morality and empowers national decision-makers (whether legislative or judicial) in judgments about proportionality. This, in turn, helps address general concerns about the democratic legitimacy of judicial review, as well as specific concerns about the capacity of international courts to judge local attitudes and conditions.[74]

In a domestic context, the rationale for empirical comparison is quite different. There is no concern about deference to national constitutional decision-makers.[75] There is also no straightforward relationship between comparison and commitments to deference toward *legislative* constitutional judgments. A more comparative approach to questions of legitimacy may ultimately encourage greater deference by courts to legislative constitutional judgments. But a comparative approach to questions of *necessity* may readily lead to either a more or less deferential approach to legislative constitutional judgments: as Part I notes, whether this is the case will depend largely on actual legislative practices elsewhere, the evidence available as to their effectiveness, and the

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[68] Scoppola v Italy (No 3) (Application no. 126/05, May 22, 2012), [101]-[102], [107]-[109].
[69] Soyler v Turkey (Application no. 29411/07, September 17, 2013), [38].
[70] *Id.* at [41], [47].
[71] Animal Defenders International v United Kingdom, Eur. Ct. H.R. 362, [71]-[72] (2013).
[72] *Id.* at [14] (dissenting).
[73] *Id.* at [123].
[74] George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705 (2006). *Compare also* Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149 (2013).
[75] *Compare* S v. Makwanyane, 1995 (3) S.A. 391, [109] (CC) (Chaskalson P) (suggesting that "the margin of appreciation allowed to national authorities by the European Court must be understood as finding its place in an international agreement which has to accommodate the sovereignty of the member states. It is not necessarily a safe guide as to what would be appropriate [under] our Constitution").

procedural rules courts adopt for resolving uncertainty as to evidence of their effectiveness. It will also be influenced by how courts characterize the nature of those practices: the more general or abstract the level at which foreign practices are understood, the more support they will tend to give to existing domestic legislative practices or arrangements. Whereas, the more specific or concrete the level at which they are identified, the less direct support they will provide.

This kind of slipperiness means that it is clearly unrealistic to think about the idea of empirical comparison as a true constraint on domestic judges. Instead, it is best understood as a form of psychological or behavioral check, which encourages judges to rethink their own potential biases, or tendency to overestimate the representativeness of their views of democratic necessity or legitimacy.[76]

In this sense, the idea of empirical comparison of this kind is quite close to the idea of ''transnational anchoring'' that Landau and I have argued for in the context of the ''unconstitutional constitutional amendment'' (UCA) doctrine.[77] A doctrine of this kind is an increasingly common feature of the constitutional jurisprudence of many countries worldwide.[78] It also has important potential to protect basic commitments to constitutional democracy, in the face of threats of democratic backsliding, or what David Landau has called ''abusive constitutional practices.''[79] Yet it also poses dangers to thicker conceptions of democracy, which emphasize the role of representative institutions (such as legislatures) in determining constitutional meaning.[80] For such a doctrine to be democratically legitimate, therefore, Landau and I have argued that it should be carefully tailored to protecting only the minimum requirements of electoral democracy – i.e., not extend to protecting *all* existing aspects of a democratic constitutional order, which particular constitutional judges may regard as legitimate, but only the ''democratic minimum core'' of a democratic constitution.[81] To ensure this, we further argue that the scope of such a doctrine should be closely tied to transnational constitutional practices. We thus suggest that where the overwhelming majority of constitutional democracies worldwide recognize a particular practice, as part of their legislative or constitutional arrangements, this could legitimately be considered strong support for the application of such a doctrine to prevent the repeal of such arrangements, domestically; whereas if there was greater variation among countries, in a particular area, this should indicate the need for greater caution on the part of domestic judges, before deciding that particular existing constitutional arrangements in a country are in fact fundamental to democracy, and protected by an UCA doctrine.

A doctrine of this kind, we further suggest, can also serve as a potentially important check on individual judges' conceptions of the minimum requirements of democracy – or provide a form of

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[76] It may also mean that a norm of transnational anchoring works best where judges apply it in a way that leans toward more concrete rather than abstract forms of comparison. It may not be possible to insist that legislative practices must be considered at the absolute most concrete level possible: indeed, doing so may have a somewhat mechanical quality and ignore the sociological dimension to how legislative practices are understood. But there is clearly value to applying the doctrine in as concrete a way as possible, if it is to have meaningful effect.

[77] *Id.*

[78] *See, e.g.,* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017); Rosalind Dixon, David Landau & Yaniv Roznai, *Doctrinal Capture and the Unconstitutional Constitutional Amendment Doctrine* (unpublished manuscript, 2017) (on file with author).

[79] David Landau, *Abusive Constitutionalism*, 47 U.C.D.L. REV. 189 (2013). *See also* Dixon, Landau & Roznai, *supra* note 78.

[80] Given such a doctrine, often the only means by which the political branches can override courts is by appointing new, more sympathetic judges, or proposing the whole-scale replacement of the existing constitution.

[81] *See* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015).

''transnational anchor'' for the making of otherwise quite subjective, contested judgments about the minimum requirements of democracy in a particular setting.[82]

Conclusion

Comparative constitutional scholarship to date has tended to have a strongly normative or deliberative focus and pay far less attention to empirically focused forms of constitutional comparison.[83] The same is true for comparative constitutional engagement by courts. In calling for a more systematic attention to comparative legislative practices as part of courts' approach to the proportionality doctrine, the article is thus in some modest way part of a much broader project – i.e. a project of encouraging scholars and courts to give increasing attention to the insights to be gained from empirically focused forms of comparison more generally.

Any empirical comparison of this kind will raise a number of potential methodological difficulties: the issues of comparability and causation noted in Part I, the issues of scope noted in Part II, and issues of evaluative judgement on the part of courts when deciding how best to characterize foreign legislative practices. Clearly, if one is to take these methodological concerns seriously, no empirical comparison can say definitively whether there is a more narrowly tailored response to a particular legislative policy problem, or whether a particular legislative objective is legitimate. At most, it can provide one additional argument or consideration in making judgments of this kind.

Empirical comparison of this kind also takes many more hours than more limited, deliberative or reflective forms of comparison. For that reason, it may be inappropriate in some cases – for example, where courts have very limited time or resources, or are under particular time or resource pressures. Many constitutional scholars and lawyers, however, may be too quick to reject the benefits of empirical forms of comparison in this context. Comparison of this kind often challenges our skills, and sense of disciplinary comfort, as lawyers. It also involves crossing a deep disciplinary divide – between more conceptual and inter-disciplinary approaches to constitutional studies. Yet it is a form of comparison that offers lawyers and judges important additional insights in making some of the most difficult and contested judgments required under a written constitution. It is thus a form of legal, scholarly and judicial labor that seems well worth the price.

[82] In some countries, where global norms have some degree of popular democratic support, reliance on such norms may also help judges increase the sociological or *perceived* legitimacy of their judgments about questions of this kind. *Compare* David Landau & Rosalind Dixon, *Constitution-Making and Constitutional Design: Constitution-Making and Breaking: Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859 (2015).

[83] HIRSCHL, *supra* note 5.