Introduction: Politics and the Constitution — the Ties that Bind

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One of the perplexing oddities of contemporary constitutional studies is the disciplinary divide and consequent lack of communication between constitutional law — arguably the most overtly political branch of law, public or private — and the social sciences, in particular political science, scholarship on constitutions and constitutionalism.

Maintaining the disciplinary divide between constitutional law and other closely related disciplines that study various aspects of the same constitutional phenomena artificially and unnecessarily limits our intellectual horizons. It restricts the kind of questions we ask as well as the range of answers we may provide. A court- or text-centric approach — focusing on constitutional provisions, high-court jurisprudence, or modes of reasoning alone, without taking into account the social and political context within which constitutional law and courts evolve, operate, and affect — risks impeding the development of constitutional studies as an ambitious, coherent, and relevant area of inquiry.[1] The future of constitutional studies, I suggest, lies in relaxing the sharp divide between constitutional law and the social sciences, in particular political science.

As in many other academic and vocational fields adamant about protecting their disciplinary turf, resistance persists among key actors within the constitutional domain against accepting the notion that constitutional law is, at least

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1 I develop this argument in greater length, in Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014).

to some extent, a species of politics, albeit one with a distinct dialect, symbolism, and interpretive hierarchy. Consider, for example, social science work on judicial behaviour. Whereas the prevalent view in law schools in North America (and even more widespread in Europe, where legal formalism reigns supreme) privileges legal doctrine, an overwhelming body of evidence suggests that extrajudicial factors play a fundamental role in constitutional-court decision-making patterns. Constitutional courts and judges may speak the language of legal doctrine, but consciously or not, their actual decision-making patterns correlate with policy preferences and attitudinal tilts, and sometimes reflect strategic considerations vis-à-vis their political surroundings, national and international audiences, and the public as a whole.

Fifty years after the pioneering work of Glendon Schubert, Walter Murphy, Robert Dahl, and Robert McCloskey, theories of judicial behaviour and decision-making have now reached a new level of analytical sophistication and empirical robustness, such that they can no longer be ignored by anyone who professes to master the constitutional domain. Unfortunately, very little of this scholarship has found its way into constitutional-law course syllabi. While not all of the discoveries produced by the social-scientific study of judicial behaviour are equally germane to explaining decision-making patterns of constitutional courts and judges, insights from political science, social psychology, behavioral economics, and network and organizational theory are increasingly relevant to the study of constitutional courts, their jurisprudential output and modes of reasoning and operation.

The social sciences have also influenced heavily the study of constitutional design and constitution-making. Virtually all the grandmasters of 20th-century constitutional-design literature are political scientists by education or by vocation.[2] The same holds true with respect to more recent empirical work on constitution-making, where interdisciplinary scholars such as Tom Ginsburg lead the way. Here, social science research methods have been deployed to examine supposed "common knowledge truths" in constitutional theory, such as the endurance of national constitutions, the efficacy of constitutional amendment rules, or the actual involvement of "the people" in constitution making.[3] Social

2 Arend Lijphart, Donald Horowitz, Juan Linz, Alfred Stepan, Giovanni Sartori, and Jon Elster, to mention a few names that come to mind.

3 See e.g. Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009).

science research is also prominent in the in-depth constitutional "ethnographies" that explore constitutional development as part of broader collective identity formation and nation-building processes (c.f. social scientists Kim Scheppele, Mark Graber, Keith Whittington, Gary Jacobsohn, or Peter Russell).

This is not a coincidence. Constitutional design as an intellectual enterprise has at least as much to do with social and political realities as with legal or constitutional principles. The root causes of ethnic, religious, or linguistic strife in any given setting are, more often than not, social, economic, and political; constitutional design is often invoked as a proposed remedy for such discord. Likewise, constitutional innovation or stagnation is often reflective of broader processes that have little to do with constitutional language per se. For example, the development of the so-called "dialogue" thesis, as well as "weak-form" and "commonwealth" models of judicial review, may not be fully understood without considering Canada's long-standing Westminster-style government prior to the introduction of the *Constitution Act, 1982*.[4]

What is more, a given nation's legal constitution does not always mirror that nation's political constitution. In Canada, for example, a curious gap exists between the polity's long-standing commitment to a relatively generous version of the Keynesian welfare-state model and the exclusion of subsistence social rights from the purview of rights provisions and jurisprudence. A similar trend is evident in the Nordic countries, where a long-term commitment to social welfare and egalitarianism does not stem from American-style high-voltage constitutionalism, but from deeply engrained social norms and cultural propensities.

Political-constitutionalism elements are also reflected in the status of religion and secularism in various countries. American and Indian constitutional jurisprudence, for example, advance strict separation of church and state; yet the U.S. and India are frequently mentioned as the two most religious polities in the world, as measured by how significant religion is in public discourse and in private lives.

The political-constitution aspect is also reflected in the area of formal and informal amendments or in cases where procedurally lawful constitutional amendments are deemed unconstitutional by courts (or the court of public

4 See e.g. Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013).

opinion) since they run against deeply engrained aspirations, ideational platforms, and political values that often precede and supersede the plain constitutional text. The *de facto* political constitution also plays a role in explaining variance in voluntary judicial reference to foreign sources. The stark difference between the controversy in the United States over reference to the constitutional jurisprudence of others, and the Canadian antidote — open engagement with constitutive laws of others — cannot be understood solely by intra-constitutional factors. It is linked to America's culture wars and vision of its central place in the world, just as it is linked to Canada's openness to the world, sense of "soft power," and its commitment to multiculturalism, inclusiveness, and diversity as trademarks of the new Canadian ideational platform of the last four decades.

The difference between legal constitutionalism and political constitutionalism are acknowledged by critical constitutional theorists, from the left and right, who disapprove of what they regard as excessive reliance on constitutionalism and judicial review at the expense of democratic political deliberation.[5] However, the deeply rooted sociological and political dimensions of that distinction remain beyond the purview of canonical constitutional discourse with its traditional text- and court-centric analyses.

Related to this is what Tom Ginsburg termed the "seventh-inning problem": a fan who arrives at the baseball field just before the seventh inning begins and leaves when it concludes. "Focusing too much on court cases in the constitutional 'game,'" Tom Ginsburg suggests, "has precisely the same structure as the baseball fan who watches only one late inning. It means that we miss many of the most important questions — where does constitutional order come from? Who are the parties and what are they really fighting about? How does the court have the power it does? And what is the impact of the decision on real outcomes? These questions can only be examined by broadening our temporal and conceptual frame."[6] Not only is such a seventh-inning snapshot unrepresentative of the entire game from a descriptive, "captain's log" standpoint, but it also obscures the deep origins or reasons behind what we see, as well as the consequences that ensue. In other words, what happens prior to or after a court ruling is important not just for "setting the record straight" but

5 See, e.g., Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Mark S Harding & Rainer Knopff, "Constitutionalizing Everything: The Role of '*Charter* Values'" (2013) 18:2 Rev Const Stud 141.

6 Tom Ginsburg, "Comparative Constitutional Law: The Seventh Inning Problem" *University of Maryland Digital Commons* (February 2012), online: <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1140&context=schmooze_papers>.

also for understanding the place of a given court case in a broader causal story that has a social context and root causes that predate a court case and may or may not be affected by it.

Current newspaper headlines offer ample additional examples of why a more contextual or holistic understanding of constitutional battles would be timely. It is obvious, for example, that politics is one of the main driving forces behind the recent constitutional wars in the United States (the so-called "Obamacare" reform or the appointment of a new Supreme Court Justice following the death of Antonin Scalia); Poland (where a newly elected populist right-wing government attempts to reconfigure and limit the jurisdiction of the Polish Constitutional Tribunal); Brazil (where the opposition has launched, and the Supreme Court reviewed an impeachment process against elected President Dilma Rousseff); or in Thailand (where the Constitutional Court has repeatedly backed the army and the old elites in their efforts to oust elected prime ministers Thaksin Shinawatra and later Yingluck Shinawatra). One could easily extend that list to include fierce politically driven constitutional struggles elsewhere — from Hungary, Turkey and Romania, to Venezuela, Pakistan and Egypt. In all of these instances, a court-centric approach or doctrinal analysis of constitutional law seems inherently limited.

I would also argue that the value of the study of constitutional jurisprudence — absent study of its actual capacity to induce material, on-the-ground change, either independently or in association with other factors — is limited. Decision compliance and implementation, whether speedy or protracted, is part of the constitutional enterprise and must be treated as such. In that respect, studies show considerable variance in the demonstrable application of constitutional-court decisions. Here, too, social science research may help assess the impact of constitutional law at both the macro and micro levels. In the real world, a constitutional court ruling is not the final word, however important or groundbreaking the ruling may be. The strict distinction between jurisprudence and implementation seems somewhat artificial, and based on academic disciplinary boundaries that the real, intermingled world does not reflect or accept.

This does not detract from the power of doctrinal analysis per se. Comparative constitutional-law professors hold a clear and undisputed professional advantage in their ability to identify, dissect, and scrutinize the work of courts and to critically assess the persuasive power of a given judge's opinion. Understanding jurisprudence on its own terms or explicating modes of judicial reasoning and interpretation has traditionally been the domain of law profes-

sors. No one is better positioned to trace the relationship between patterns of convergence or persisting divergence in constitutional jurisprudence across polities, or to advance the research on how constitutional courts interact with the broader, transnational legal environment within which an increasing number of them operate. However, theorizing about the constitutional domain of a broader world requires closer engagement with and openness towards disciplines that study the broader context with which constitutions and constitutional institutions constantly and organically interact.

Many of the doctrinal biases commonly reflected in the legal analysis of constitutional law and courts are also mirrored in social science — in particular, political scientists' lack of serious attention to legal doctrine and the role of legal reasoning: judgments are often treated as merely post-hoc rationalization, and as little more than professional dialect that thinly covers what is "really" going on.[7] Most leading political-science departments in North America devote limited attention to public law and courts as an independent area of research. In Canada, public law has been largely subsumed by the "Canadian politics" sub-field, akin to the U.S. where it has been incorporated into "American politics." Such a deficiency is alarming considering the ever-increasing significance of constitutional law and courts, regional and transnational human rights regimes, and international tribunals to politics and policy making worldwide.[8] How many political scientists in Canada have actually read the full text of, not merely commented on, the recent landmark Supreme Court rulings on the right to die with dignity,[9] on extending federal protection under section 91(24) to the Métis,[10] on judicial appointments to the Supreme Court,[11] and on a government-proposed Senate reform (the latter two rulings addressing the amending formula enshrined in Canada's constitution head on)?[12] Far less can they be expected to consider developments on other continents, be they landmark rulings on German constitutional sovereignty (e.g. the German Federal Constitutional Court ruling in the Lisbon Treaty case), on the place of

7 See, e.g., Barry Friedman, "Taking Law Seriously," (2006) 4:2 Perspectives on Politics 261.

8 See, Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," (2008) 11 Annual Review of Political Science 93; Martin Shapiro & Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002); Björn Dressel ed, *The Judicialization of Politics in Asia* (Milton Park, UK: Routledge, 2012); Javier Couse et al, eds, *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2013).

9 *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] SCR 331.

10 *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 395 DLR (4th) 381.

11 *Reference re Supreme Court Act*, 2014 SCC 21, [2014] SCR 433 [*Supreme Court Reference*].

12 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

Hindu nationalism in political campaigns (for example, the Supreme Court of India rulings in the "Hindutva" cases), or on the constitutionality of breaching presidential term limits in Bolivia (for example, the Constitutional Court of Bolivia's ruling that President Evo Morales could run for a third term even though the Bolivian constitution includes a two-term limit).

One area of constitutional law particularly neglected by political science is that of electoral processes, an area in which deep-rooted constitutional rules commonly affect political outcomes. Likewise, political scientists tend to downplay or overlook the significance of constitutional jurisprudence that addresses issues such as voter registration rules, candidate eligibility, party and platform legitimacy, limits of campaign financing, electoral district boundaries, election-day procedures, ballot recounts, (the *Bush v. Gore* scenario is now anything but an outlier in comparative constitutional politics) and, increasingly, the validity of changes to constitutionally entrenched term-limits and the legality of regime change.

Political scientists also discount the pertinence of constitutional law when it comes to matters such as restorative and transitional justice (where constitutional courts and international tribunals have become crucial decision-making bodies); the so-called "war on terror" (where constitutional rights provisions and their judicial interpretation are said to counterbalance governments' trigger-happy policies); secession and devolution (where, from Quebec, to Scotland, to Catalonia, politics *and* constitutional law jointly govern the terrain); or the European debt crisis (where supreme and constitutional courts throughout the continent have issued landmark rulings on the legitimacy of various austerity measures and bailout plans initiated by struggling governments or imposing supranational technocrats).[13] The volatility of constitutional wars on a broad range of issues — from hotly contested social policies to the scope of judicial intervention in high politics — suggests that nowadays, anyone who overlooks comparative constitutional law and courts does so at his or her own peril.

As Aharon Barak, former President of the Supreme Court of Israel, noted, "The world is filled with law; anything and everything is justiciable." The ever-increasing political significance of constitutional law and constitutional courts is one of the hallmarks of 21st-century government. Yet the inexplicable disciplinary divide between law schools and political-science departments, in conjunction with perceptions of the constitutional sphere as non-autonomous,

13 See Cristina Fasone, "Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective" (2014/15) EUI Working Paper Law.

render full grasp of constitutional rulings, or even awareness of their existence and acknowledgment of their importance, virtually unattainable for most political scientists.

A political science Ph.D. student interested in any of these topical subjects would need to enroll in a comparative constitutional law course at a nearby law school in order to grasp the full significance of constitutional discourse on any and all of these issues, and indeed to many others. The need for scholars of comparative politics to understand constitutional vocabulary and its comparative practice and implications may equal the urgency for comparative constitutional law scholars to appreciate the social and political context within which the constitutional realm is embedded and operates. It is unfortunate that many (though admittedly not all) of the leading departments of political science in Canada and elsewhere overlook this plain truth. By so doing, they cede the constitutional arena to legal scholars, who in turn rely all too often on the case-law method of instruction at the expense of understanding constitutional law in its broader social and political setting. This regrettable situation has much to do, I suspect, with various training, vocational, and sociology of knowledge factors. However, as engrained as these factors may be, in virtually all leading universities and research institutes around the world, conventional disciplinary barriers in other areas in both the sciences and humanities are giving way to new, interdisciplinary areas of research (e.g. ecology, neuroscience, religious and ethnic diversity). The time has come to consider a similar move in constitutional studies.

The contributions to this symposium issue, all written by intellectually curious young scholars of Canadian and comparative constitutional law, signal an important step in that direction. Politics and constitutional law, their collective voice suggests, are intertwined domains that affect each other in various intricate ways that are seldom acknowledged by doctrinal analyses. Timothy Kuhner offers a critical take on party-finance law in the United States, and argues that it has promoted concentration of power and control of democracy by economic elites ("plutocracy") and party elites ("partyocracy"). Michael Pal explores the role of electoral management bodies, whether statutory or constitutionally enshrined, in contemporary constitutional democracies, and suggests that these election-monitoring bodies may be conceptualized as an emerging fourth branch of government. Vanessa MacDonnell considers that, unlike the conventional understanding of constitutional practice in the Charter era, some variant of British-style parliamentary sovereignty continues to subsist in Canadian constitutional law. Cristina Fasone undertakes a comparative exploration of what she terms "parliamentary obstructionism" (e.g. excessive

filibustering) and how it hinders the constitutional role and legitimation of legislatures, and advocates for judicially enforced constitutional limitations of this practice. Kate Glover argues that Canada's constitutional imagination and, in particular, its understanding of the constitutional character of the Supreme Court, is richer and less definitive than the account offered in the majority opinion in the *Supreme Court Act Reference*.[14] Richard Albert sheds light on the often overlooked temporal dimension of constitutional amendments — the timeframe within which a formal constitutional amendment must be approved — and probes the trade-offs between political brinkmanship and contemporaneity in amendment ratification.

Taken as a whole, the articles included in this collection extend a timely invitation for Canadian constitutional scholars and political scientists alike to engage more closely with each other's insights and methodologies. It is a welcome invitation not only because of constitutional law's key role in regulating politics, but also because the complex symbioses of today's world admit neither constitutionalism-free political systems nor apolitical constitutional law.

14 *Supreme Court Reference, supra* note 11.