

# Is a Science of Comparative Constitutionalism Possible?

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## I. Patterns

In recent years, scholars of comparative constitutionalism have taken an interest in global patterns that relate to legal phenomena. Their attempt has been to understand variations and make generalizations in law-like terms across cultures. The aim has been, in other words, to develop a kind of science of comparative constitutionalism, where one can construct casual narratives that are cross-national. Such efforts are familiar to social scientists; critiques of them are equally well-known.<sup>1</sup> Yet, in the field of comparative constitutional law, the performance of large-scale statistical work that transcends national boundaries and provides us with findings about the workings of different legal measures has been subject to little interrogation. As such work continues to grow and as the study of comparative constitutionalism steadily matures, it is important to consider the forms and limits of the comparative science of constitutionalism.

At the heart of the science of comparative constitutionalism are claims about causation. Standard examples in the study of causation typically describe an action and an outcome. For example, if I throw a pottery bowl across the room, it will break. The counterfactual thought is that if I had not thrown the pottery bowl, it would not have broken. The theory at work here is the counterfactual theory of causation. A large part of the present outpouring of positivist scholarship in comparative constitutional law rests on a theory of counterfactual dependence to present a case of causal relations.<sup>2</sup> A relation between a specific legal development (say, the prohibition on torture) and a phenomenon (in this case, the practice of torture) is presented to make a causal claim. One might claim, for example, that the prohibition on torture has not impacted the practice of torture. This seems simple enough and we are all familiar with counterfactual reasoning. We routinely use such reasoning in our lives in the course of making decisions and exercising choices. But how should such a theory be deployed in the study of legal phenomena?

We can approach this question by considering some recent positivist literature in comparative constitutional law. Let us stay with the torture example and turn to a noteworthy study on constitutional torture provisions, revealingly titled “The Failure of Constitutional Torture Prohibitions”.<sup>3</sup> In the study, the authors observe that even though the prevalence of torture provisions in domestic constitutions has increased substantially over the past few decades, there has been no assessment of how this legal development has impacted the practice of torture. The analysis undertaken is meant to remedy this lack of attention, and it is sophisticated in several respects. The authors express some sensitivity to the problem of endogeneity. They acknowledge, for example, that countries with a better record on rights may well be less likely to adopt a prohibition on torture, and thus ratification of specific treaties may well be endogenous to the practices prevalent within states.<sup>4</sup> They also attend to the problem of false negatives and false positives by focusing on transitioning democracies. The logic behind this diachronic thought is that the “combination of not-yet-exemplary rights records, possibilities for local advocacy, and good intentions may make transitioning democracies more likely to change their behavior because of constitutional torture

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<sup>1</sup> My interest lies in studies similar to those that Alasdair MacIntyre once scrutinized in his notable assessment of the comparative science of politics. As readers will immediately notice – not least of all in my title – my work draws on MacIntyre’s contribution in important ways. See Alasdair MacIntyre, “Is a Science of Comparative Politics Possible?”, in *Against the Self-Images of the Age: Essays on Ideology and Philosophy* (New York: Schocken Books, 1971), 260-279.

<sup>2</sup> I use the term “positivist” because, strictly speaking, the work with which I am concerned need not be quantitative. Its key feature is that it is a Martian’s view. The Martian sees through the telescope and sees what we do. But does the Martian *understand* it?

<sup>3</sup> Adam S. Chilton and Mila Versteeg, “The Failure of Constitutional Torture Prohibitions”, 44 *Journal of Legal Studies* 417 (2015).

<sup>4</sup> *Ibid.*, at 430.

prohibitions”.<sup>5</sup> Accounting for the usual concerns in such ways, the authors study data on torture practices and conclude that there has been no reduction in the rates of torture. This is a dramatic conclusion – a major legal development, the authors tell us, has made no difference to reality.

Let us keep this conclusion in mind as we turn to a second study of a similar kind. In this case, the focus is on the relationship between courts and constitutional rights.<sup>6</sup> In particular, the authors consider the existence of independent courts and arrive at the conclusion that the presence of such courts does not result in an increase in the respect that governments demonstrate toward rights. In other words, judicial institutions do not have much ability to protect rights, a conclusion that calls into question much of the classic literature in constitutional theory that puts forth a case for judicial review.<sup>7</sup> After presenting this equally dramatic conclusion, the authors posit with a range of possible explanations for such a result. These include the thought that courts might receive pushback from political branches if they present a challenge to government, that courts lack the institutional capacity to adequately address certain kinds of rights-based challenges, and so forth.

For us to grasp the problem with contributions of this kind, let us stay with this second study. Here, courts are studied *qua* political culture but they are not studied *qua* courts. The key control is whether or not the country under study has a court: “We ... explore whether this relationship between de jure and de facto rights is different in countries that have an independent judiciary equipped with the power of judicial review (a ‘Constitutional Court’)”.<sup>8</sup> But such a framing is, of course, entirely compatible with courts actually enjoying a great deal of influence. By way of an illustration, imagine the following scenario. There are two groups of people in Manhattan. The first group goes to Alcoholics Anonymous and the second group does not. Both groups drink the same quantity of alcohol. Given the equivalence in their consumption of alcohol, would it be accurate to assert that Alcoholics Anonymous makes no difference because the group that does not go to Alcoholics Anonymous drinks the same amount of alcohol as the group that does? Clearly such a conclusion would be erroneous. What the authors have overlooked is that the facts in the study as they have been presented are fully consistent with the possibility that, in countries where courts are needed, they perform extremely well – perhaps, in such countries, courts make it possible to *maintain* the inevitable gap between a constitutional text and the social reality and that they do not allow the gap to widen.

The first study that we considered – the study on torture – suffers from the same failing. The fact that torture has become more widely prohibited across the world and the fact that torture rates remain the same does not mean that such prohibition has had no impact. This is because it may well be that during the same period that torture became legally prohibited, it also became more socially acceptable. If this is true, then it could mean that the practice of torture had far greater acceptability; and, if there had been no legal prohibition on torture, torture rates would have increased substantially. In such a scenario, the prohibition on torture has made a major difference precisely because it has maintained the torture rate and has not allowed it to increase. The error, in cases like this, lies in failing to see that culture may also be shifting. The analysis offered cannot measure this change. Indeed, given that the study focuses on transitioning democracies, this is hardly a farfetched suggestion. In moments of radical political transition, there are also radical cultural and social shifts that are taking place. The facts as they are presented are compatible with the conclusion that the prohibition on torture succeeded in preventing the infliction of pain from rising in the face of dramatic shifts taking place in society.

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<sup>5</sup> *Ibid.* at 440.

<sup>6</sup> Adam S. Chilton and Mila Versteeg, “Courts’ Limited Ability to Protect Constitutional Rights”, 85 *University of Chicago Law Review* 293 (2018). See also Adam S. Chilton and Mila Versteeg, “Do Constitutional Rights Make a Difference”, 60 *American Journal of Political Science* 575 (2016).

<sup>7</sup> This is because if courts cannot do very much, then we might wonder why they should exist at all. Of course, non-instrumentalist arguments for judicial review do exist. See, for example, Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014), at 191-224. But if the outcomes generated by courts are indeed without consequence, then such process-based calls for review are unlikely to be persuasive.

<sup>8</sup> Adam S. Chilton and Mila Versteeg, “Courts’ Limited Ability to Protect Constitutional Rights”, at 313.

A third study – focused on constitutional amendment rules – underlines this very point.<sup>9</sup> Here the authors begin with the widely held concern that the American Constitution is, as a formal matter, extraordinary difficult to amend.<sup>10</sup> But does this fact actually reflect the reality of constitutional practice? That is to say, is the formal procedure for amending America’s Constitution, to use a standard example, the reason why the text has not been changed as easily as some other constitutions? What is the right way to measure constitutional flexibility? Departing from the conventional answers to this question – answers that stress the textual requirements needed to amend a constitution – the authors turn to the idea of an amendment culture. Using a cross-national database, they “develop a proxy for amendment culture and show empirically that this does a better job of explaining patterns of amendment within constitutional systems than do any of the indices or variables on offer”.<sup>11</sup>

Taking into account a number of variables relating to amendment procedures (such as the stages involved in passing an amendment), the authors are able to predict the probability of amendments. What is important is their interest in the broader political culture. As they put it, “we regress the amendment rate on a set of amendment procedure variables as well as on a host of factors that should predict political reform more generally”.<sup>12</sup> Thus, it is the defining feature of their study that they “take into account social and political factors that are likely to put pressure on countries to amend the constitution”.<sup>13</sup> A measurement of amendment culture is undertaken through a proxy – they “operationalize amendment culture as the rate at which a country’s previous constitution was amended”, the idea being that “attitudes toward amendment will be expressed through amendment practices, and that these attitudes will endure in the form of norms that outlast any particular set of institutions”.<sup>14</sup> The ultimate interest of the study lies, of course, in determining the relative importance of amendment procedures and amendment cultures, and the conclusion validates the authors’ investment in the latter: “The best predictor of constitutional amendment rates, it turns out, is what we have called an amendment culture, as measured by the frequency in the country’s previous constitution”.<sup>15</sup>

Is such a study that emphasizes amendment cultures over institutional procedures persuasive? The authors are keen to show that “attitudes about amendments matter”, and they are eager to demonstrate the limitations of schematic studies of constitutional orders that do not pay due attention to the cultural forces that shape political behavior and generate institutional outcomes.<sup>16</sup> The inattention toward culture is, without question, a mistake, but it is unclear whether such a study helps to remedy matters. The authors think of culture as something that persists (though they often observe that it can change). By definition, there must be something other than the structure of a constitutional system that is shaping outcomes; as they observe, “barriers to amendment are not merely institutional.”<sup>17</sup> But the key mistake here appears to be that, in an attempt to understand the relationship between cultural attitudes and procedural rules, there is no recognition of the fact that the nature of procedure rules may well be part of existing cultural attitudes.<sup>18</sup> The study does not show that structural constraints are of little relevance, quite simply because

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<sup>9</sup> See Tom Ginsburg and James Melton, “Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenge of Measuring Amendment Difficulty”, 13 *International Journal of Constitutional Law* 686 (2015).

<sup>10</sup> On the implications of this fact for American constitutional theory and practice, see David Singh Grewal and Jedediah Purdy, “The Original Theory of Constitutionalism”, 127 *Yale Law Journal* 664 (2018).

<sup>11</sup> Tom Ginsburg and James Melton, “Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenge of Measuring Amendment Difficulty”, at 687.

<sup>12</sup> *Ibid.*, at 695.

<sup>13</sup> *Ibid.*, at 696.

<sup>14</sup> *Ibid.*, at 708.

<sup>15</sup> *Ibid.*, at 709.

<sup>16</sup> *Ibid.*, at 712.

<sup>17</sup> *Ibid.*, at 699.

<sup>18</sup> The authors seem somewhat aware of the problem I describe, but mention it in passing in the conclusion to the paper, even though it raises fundamental concerns for the entire study: “Note that our measurement choice allows amendment culture to vary over time, and so is not simply a reflection of unobserved national features that are fixed.

the constraints may shape culture and the dispositions that people hold. In other words, human beings absorb the constitutional culture; structure is not independent from culture. And because of this fact, it may well be that if the constitutional rules did not make the text difficult to amend, something else might have done so, which in turn hardly means that the amendment procedure is of little significance.

In the concerns that I have raised here, I have resisted focusing on matters such as the validity of the proxies used or the accuracy of the data that is deployed, even though reservations may be raised in this regard. Instead, I have tried to draw attention to a more serious issue, one that is not captured merely by suggesting that the analyses are imperfectly performed. The more fundamental objection is that there is an attempt to measure things that cannot actually be measured. This is brought into sharp focus by a recent essay on constitutional efficacy.<sup>19</sup> Here, the authors begin with the thoughtful observation that the efficacy of constitutions changes over time, and they critique the assumption within constitutional theory that constitutional efficacy is broadly constant. Their specific focus is on rights – that is, on whether rights become more or less effective with the passing of time. The study considers two possible effects of age. The first is a maturation effect, where “the gap between the demands of the constitution and social reality shrinks over time”, a result that “could be because norms grow to be more venerated with age”.<sup>20</sup> With veneration, the authors observe, enforcement is likely to increase, and thus we are likely to witness greater compliance. In contrast, the second effect of age might be “a drift or even decay of constitutional norms as society shifts away from norms that once made sense”, and it is some shared understanding rather than the content of provisions themselves that seems to matter.<sup>21</sup>

The authors acknowledge that both these processes can occur simultaneously. Over time, some aspects of a constitution may mature while others may decay; and how we assess a constitution would be an aggregate of how its different provisions are performing. Rather than make conclusions about entire constitutions, they consider individual provisions to assess maturation and provide an empirical account of the efficacy of constitutional rights over time. But notice how this framing of the matter at hand misses the key point that veneration and decay can occur for the same thing at the same time. If this is the case, then one simply cannot get a measurement of veneration versus decay, and one cannot assess maturation. What the analysis can reveal is an overall story – say, over time there was slightly more veneration rather than decay – but it cannot capture the dynamic that is being undertaken because it cannot tell us how the forces influencing veneration and decay interact with one another at any given point. To provide a concrete example, the British monarchy may well be an institution around which there is both veneration and decay, and to understand why the monarchy survives, one would need an account of how the competing forces are interacting with one another at any given moment.<sup>22</sup> Here, even though one is attempt to tell a causal story, there is in fact no causal account on offer. Consider the following paragraph:

The point is that gaps between text and practice – the usual way of approaching the question of whether rights “work” – are a poor indicator of constitutional efficacy because gaps do not indicate when or how a constitution makes a difference. Frequently, constitutional changes reveal the extent of a problem that previously was thought to be much smaller and so can motivate improvements. Methodologically, then, as an alternative to looking at gaps, we might instead see whether there was political and social mobilization around the constitution, which would indicate a causal mechanism. For example, if interest groups

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It may be that amendment culture *is* shaped by institutions, but with significant lags. We leave it to further work to specify the precise relationship between amendment culture and institutional factors.” *Ibid.*, at 712.

<sup>19</sup> Zachary Elkins, Tom Ginsburg and James Melton, “Time and Constitutional Efficacy,” in Tom Ginsburg and Aziz Huq ed., *Assessing Constitutional Performance* (New York: Cambridge University Press, 2016), at 233-267.

<sup>20</sup> *Ibid.*, at 234.

<sup>21</sup> *Ibid.*, at 235.

<sup>22</sup> Bertrand Russell, of course, had one explanation for the survival of the monarchy, ironically enough in his classic essay on causation: “The law of causality, I believe, like much that passes muster among philosophers, is a relic of a bygone age, surviving, like the monarchy, only because it is erroneously supposed to do no harm.” Bertrand Russell, “On the Notion of Cause”, 13 *Proceedings of the Aristotelian Society* 1 (1912 - 1913), at 1.

demanded enforcement of the constitutional right to housing, or if the government initiated a housing program in response to a court order, then one might say that the constitution has made a difference, assuming that the government program actually reduced homelessness. Thus, to say a constitution matters, one looks not only to the outcome of a reduction in the gap between text and practice but also to the channels by which it did so. *Mechanisms are essential to understand efficacy*, as they are for any causal study. Our chapter aspires to push scholars to the level of mechanism analysis, though we recognize our own current gap in promise and delivery.<sup>23</sup>

The goals outlined in this paragraph are laudable ones, except that they depart in important ways from the analysis that is offered. It is precisely the *mechanisms* regarding the gap between text and practice that are impossible to study through a positivist lens. If one wants an account of how the separation between text and practice at any given point, then one would need an account of the relationship between the forces shaping veneration and decay at a particular point – how those forces interacted with one another, and the reasons why some forces have triumphed over others.<sup>24</sup> Without an account of this, it is not clear how one can arrive at the conclusion that the authors reach. They conclude that there is a “relatively small” maturation effect, conditional on regime type and judicial independence, and that this small effect is “remarkably stable across groups of rights”.<sup>25</sup> But such a conclusion is entirely consistent with a reality where rights have an enormous amount of causal significance, but are, on balance, having limited impact because their power is being counteracted by other forces.

Whether legal measures can make any real difference is similarly posed in a study on judicial independence.<sup>26</sup> In this case, the authors observe that the past few decades have witnessed greater sensitivity to judicial independence, and that this has manifested in new constitutions containing explicit provisions that intend to protect the independence of the judiciary (such as security of tenure, remuneration, and so forth). Given this changed landscape, they pose the question of whether the rise in de jure judicial independence has led to a rise in de facto judicial independence. Does the presence of formal legal protections in the case of judicial independence result in judges in fact being more independent? Here, the conclusion is slightly less skeptical than those arrived at in the abovementioned studies. The authors conclude that “de jure judicial independence is correlated with de facto judicial independence, but the effect is limited to those provisions that are self-enforcing as a result of competition between the executive and legislative branches”.<sup>27</sup>

The broad insight in this study is that many forms of de jure protections that constitutions might provide to make possible judicial independence do not lead to de facto changes on the ground, and the study allows us to capture the difference between protections that do make a difference (those that focus on the appointment and removal of judges) and those that do not. But should we be persuaded that this insight is accurate? To answer this, we must consider two separate observations made by the authors. The first is the observation that countries might find it tempting to formalize judicial independence when the judiciary

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<sup>23</sup> Zachary Elkins, Tom Ginsburg and James Melton, “Time and Constitutional Efficacy,” at 238-239.

<sup>24</sup> It is worth noting, as an additional matter, that the examples in the excerpted paragraph are themselves unconvincing. In the case of interest groups seeking enforcement of a right, for instance, one cannot unreflectively assert that the constitution has made a difference. Such a factor may be neither necessary nor sufficient but merely evidential – in other words, it might simply be evidence for the fact that some phenomenon is occurring but it does not establish a causal relationship. Consider the case of measles. White spots may always be present in cases of measles, and may be evidence for the fact that measles is present, but one cannot claim, on the basis of that alone, that measles causes the spots. Rather, the existence of the spots may simply be evidence for the presence of measles. Similarly, one should not assume that merely because interest group litigation of a certain kind is present in situations involving welfare rights that such litigation has caused such rights to be enforced.

<sup>25</sup> Zachary Elkins, Tom Ginsburg and James Melton, “Time and Constitutional Efficacy,” at 263.

<sup>26</sup> See James Melton and Tom Ginsburg, “Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence”, *Journal of Law and Courts* 187 (2014).

<sup>27</sup> *Ibid.*, at 209.

already has credibility; and, thus, “we might observe constitutionalization of de jure independence after increases in de facto independence”.<sup>28</sup> In other words, they note that it “would not be surprising to find a reciprocal relationship between de jure and de facto independence”, and they register their interest in observing the correlation at work.<sup>29</sup> The second observation is a reply to the potential concern that “some unobserved factor may be causing any correlation that we find between de jure and de facto judicial independence”.<sup>30</sup> They proceed to state that,

For instance, deference toward the judiciary may be a societal norm, which prompts constitutional drafters to create strong protection for the judiciary’s independence and politicians to respect the judiciary’s independence in practice. We cannot rule out this possibility in the analysis below, but our emphasis on the specific mechanisms of appointment and removal suggests that there is something about these particular attributes of de jure judicial independence. If a third factor was causing both stronger formal protections and de facto independence, one might expect that all of the formal protections that we identify would be equally correlated with practice.<sup>31</sup>

Both these observations are intended to insulate the authors from the potential criticism that there is no correlation to be observed – that is, from the claim that provisions relating to judicial independence in a constitutional text do not make any difference at all to the reality of judicial independence on the ground. Even though the bulk of their conclusions are consonant with this thought, the observations are meant to defend the narrow set of instances where they find that de jure protections do indeed matter (instances, as we observed, relating to the selection/removal of judges). But what if we do not raise this expected objection to their analysis, but instead address the large chunk of situations where they find that de jure safeguards have no impact. What if we turn our attention to situations where they “find that none of the de jure attributes have an independent and statistically significant effect on de facto judicial independence when control variables are included”.<sup>32</sup> Here, yet again, we have an analogous situation to that observed in the abovementioned studies. The impact of de jure protections might well have been extraordinary, but, in specific societies, their presence might have had to contend with factors that made a de facto change difficult. One reason why such a hypothesis is far from implausible is because the factors that enable de facto independence are complex and varied – a matter underlined by the fact that we can have de facto independence with de jure dependence, and we can have de jure independence with de facto dependence. In the United Kingdom, for example, judges were appointed by the Lord Chancellor with no political restrictions until the Constitutional Reform Act, 2005, but there were no serious concerns about a lack of judicial independence in the country. As regards de jure powers, an important feature associated with them in more or less liberal democracies is that they are often not used. The Queen’s veto is, of course, a classic example.<sup>33</sup>

For us to adequately grasp what is going wrong in such studies, we must interrogate the counterfactual theory that is being utilized. Simply put, counterfactual accounts rest on the idea that an outcome does not obtain if a particular action is not performed. But such a simple description is not, of course, enough for a causal theory to be successful. If, for example, we assert that the non-performance of

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<sup>28</sup> *Ibid.*, at 209.

<sup>29</sup> *Id.*

<sup>30</sup> *Ibid.*, at 194.

<sup>31</sup> *Ibid.*, at 194-195.

<sup>32</sup> *Ibid.*, at 203. This finding is the one that they use to “reconcile” an existing body of literature that reports the opposite result with “the common perception that parchment barriers are insufficient to create judicial independence in practice”. *Ibid.*, at 189. For the alternative viewpoint that Melton and Ginsburg address, see Bernd Hayo and Stefan Voigt, “Explaining De Facto Judicial Independence”, 27 *International Review of Law and Economics* 269 (2007).

<sup>33</sup> Notably, it was not even exercised in the recent controversial prorogation of Parliament. See *Cherry/Miller (No 2)*, [2019] UKSC 41. The impact of the non-use of *de jure* powers is, of course, an interesting matter. See Adrian Vermeule, “The Atrophy of Constitutional Powers”, 32 *Oxford Journal of Legal Studies* 421 (2012).

X act by A means that Y event does not occur, then our assertion is incomplete. This is because, for our account to work, it additionally needs to be the case A does not perform some other action that brings Y about. As it has been observed, in an example were “Suzy throws a rock at noon, breaking a bottle”, the analysis “must be supposing that in the relevant counterfactual situation in which Suzy is not, at noon, throwing a rock at the bottle, she is not doing anything else that would lead to a bottle-breaking: she is not starting to run up towards the bottle to level a kick at it; she’s not throwing some other object at it; she’s not shooting her slingshot at it; etc.”<sup>34</sup> There can be causation without any counterfactual dependence; and there can be counterfactual dependence without a causal event occurring.<sup>35</sup> As Michael Moore once put the matter in plain and simple terms, “causation is distinct from counterfactual dependence”.<sup>36</sup>

The abovementioned example of Suzy and the bottle appeals to the phenomenon of *redundant causation* – a situation that is typically understood to be one “where there is more than one event that is, in some sense, enough for the effect that occurs”.<sup>37</sup> Widely regarded to be one of the trickiest issues in the philosophy of causation, the phenomenon of redundant causation calls into question the validity of numerous straightforward counterfactual causal accounts that seem, on the face of it, to be plausible. There can, as one might imagine, many ways for phenomena to occur. For example, there may be cases involving common causes; and, there may be situations of preemption, of both early and late kinds, and there may be cases of over-determination.<sup>38</sup> And there can also be omissions that result in causation, a fact that reminds us that our interest cannot only lie in whether the performance of X act by A is enough for the occurrence of Y event by itself, but also in actions that can interfere and intervene in the causal account.<sup>39</sup>

For present purposes, let us keep matters simple, and note that sometimes an outcome can obtain even if the action that we associate with the outcome is not performed. Richard Tuck provides us with a helpful example in this regard by asking us to consider “the case of a policeman who shoots and kills a bank robber, and does so a split second before one of his colleagues would have done so”.<sup>40</sup> Here, Tuck observes, “The first policeman caused the robber’s death – if his action did not do so, what did? But if this policeman had not fired, the robber would still have been killed”.<sup>41</sup> The basic upshot of this is that, if we are to retain some notion of the idea of causation, then an easy counterfactual story may not do all the work that is required. An act can have a causal role to play in the generation of an outcome even if, in the absence of the act, a counterfactual narrative does not give way to a different outcome.

What this reminds us of is that when we think about actions – when we attribute causality – we are thinking about sufficiency.<sup>42</sup> A person who performs an action asks whether or not his or her action will bring about the outcome that he or she desires – that is, whether his or her action will be *sufficient* to bring out this outcome. Our interest is not in *necessity*. Even if an outcome might have come about in some other way, and therefore the act in question was not necessary to bring about the outcome, a causal relationship is established if the action was enough for the outcome to occur. Simply put, causation takes places when our actions are adequate for something to happen. The emphasis on sufficiency rather than necessity makes it very difficult to explain matters in entirely counterfactual terms because causal theories that rest on

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<sup>34</sup> L.A. Paul and Ned Hall, *Causation: A User’s Guide* (Oxford: Oxford University Press, 2013), at 49-50.

<sup>35</sup> See Michael A. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (New York: Oxford University Press, 2009), at 410-425.

<sup>36</sup> *Id.*, at 426.

<sup>37</sup> Paul and Hall, *Causation*, at 70.

<sup>38</sup> See, *ibid.*, at 70-172.

<sup>39</sup> See, *ibid.*, at 193.

<sup>40</sup> Richard Tuck, *Free Riding* (Cambridge: Harvard University Press, 2008), at 51.

<sup>41</sup> *Id.*

<sup>42</sup> See Richard Tuck, *Free Riding*, at 57-60. For Mill’s account of causation – and his emphasis on sufficiency over necessity, on which Tuck draws upon, see John Stuart Mill, *A System of Logic, Ratiocinative and Inductive* (Indianapolis: Liberty Fund, 2006 [1843]), at 306-314.

counterfactual foundations operate within the framework of necessity.<sup>43</sup> They incorporate the element of necessity.<sup>44</sup>

The examples that we have studied relate to the problem of redundant causation in an interesting way. In ordinary cases of redundant causation, we are dealing with situations where an outcome would have come about even if one did not act – and the key point here, as we have noted, is that despite this fact, we still regard it to be a case of causation. The first policeman shooting the robber is a case of redundant causation because, if he did not shoot him, the robber would have died because of an action by the second policeman. In our examples, however, the facts are somewhat different. Here, the cases do not involve the same outcome being generated regardless of whether or not one acts, but instead relate to the same absence of an outcome. In these situations, which are a mirror of the classic studies on redundant causation, it does not follow that there is no causal role being played by the law or the legal institution because it may well be that the persistence of the phenomenon is occurring now because of new phenomenon or because of some additional existing phenomenon. It may well be that there are other barriers to a torture free society apart from the law, and it may well be that by legally prohibiting torture we have brought one important barrier. There could be new and other barriers involved in bringing about an end to torture.

Such cases, as Moore observes in *Responsibility and Causation* – that is, “cases (of more than one sufficient condition for an effect” – “bedevil the counterfactual theory of causation, because if each of two or more conditions is sufficient for *e* than none of such conditions is (individually) necessary for *e*”.<sup>45</sup> As one can easily notice, situations like this “present no equivalent problem for a sufficiency theorist; that each condition is sufficient is enough to count it as a cause, irrespective of the fact that such condition is not necessary”.<sup>46</sup> It is hardly fantastic to suppose that an outcome such as end of torture may well be conditional on other things also taking place. Inverting the standard examples, then, we might say that even if the legal prohibition on torture was not sufficient to end torture, it does not follow that it had no impact. If in the case of the policeman and the robber, the sufficiency of an action was enough to establish the presence of a causal relationship, in the examples that we have considered, the fact that something (such as a legal measure) was not sufficient to bring about an outcome is not enough to establish the absence of a causal relationship. In other words, the error lies in thinking that because something is not sufficient to generate a particular outcome, it is also not necessary. The overall mistake is thus to suggest that because the prohibition on torture has not ended the practice of torture, then the practice of torture would have persisted in the same way had there been no prohibition on torture.

Attention to sufficiency rather than necessity forces us to think carefully about the precise mechanisms by which an action takes place in any instance. We need to understand *how* processes occur –

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<sup>43</sup> As Moore observes: “The crucial notion in the sufficiency theory of causation is that of sufficiency. Idiomatically, the idea is that a cause is something that guarantees its effect will follow (and in that sense a cause ‘makes’ its effect happen). This stands in marked contrast to the counterfactual theory of causation, where the crucial notion is that of necessity (a cause is something necessary for the effect to occur, i.e. without which the effect would not have occurred).” Moore, *Causation and Responsibility*, at 474.

<sup>44</sup> The determination of legal responsibility is, of course, a somewhat different matter to the determination of the workings of a factual phenomenon, but even here it is worth underlining Hart and Honoré’s important observation that “for the exposition of the law we need the idea that a cause may be merely sufficient for the occurrence of an effect that has happened, and that there are genuine cases of causal overdetermination”. H.L.A. Hart and Tony Honoré, *Causation in the Law* (2nd edn., Oxford: Oxford University Press, 1985), at xlii. To attribute a causal role to one’s conduct, the emphasis is on the conduct being “normally a necessary element in a complex set of conditions together sufficient to produce it”. *Ibid.*, at xlvii. See also *ibid.*, at 109-114. The reason why an assessment of phenomena is different from assessments of legal responsibility is at least partly because the latter is not only concerned with whether an event takes place but also with the specific agent that is involved. The individuation of the inquiry is brought into sharp focus in challenges involved in the established of proof. By way of an illustration one might consider, for example, the issue of probabilistic liability. See Sandy Steel, *Proof of Causation in Tort Law* (Cambridge: Cambridge University Press, 2015), at 290-369.

<sup>45</sup> Moore, *Causation and Responsibility*, at 474.

<sup>46</sup> Moore, *Causation and Responsibility*, at 474.

how, for example, the level of torture in practice remains the same even after torture has been legally prohibited (assuming, as we have done, that the measurement of the practice of torture is accurate). One might ask, at this stage, why we would care about how processes take place. Why should it matter to us how torture rates are persisting in practice despite changes on the law books? Should we not merely be concerned with the outcome that is generated, namely the fact that the rate of torture remains the same? This is a fundamental and worthy question, though it invites a relatively simple response: the reason we value the knowledge of the processes by which an outcome comes about, in cases such as this, is precisely because it is required for us to bring about an outcome that we care about. To put the point plainly, unless we have some understanding of how torture is working in society, and what legal and extra-legal forces are involved in its practice, we cannot hope to eliminate torture. So we should care about the processes – the question of *how* – if we actually hope to achieve the outcome.<sup>47</sup>

## II. Practices

Thus far, we have focused on the relationship between the presentation of particular facts and the drawing of particular conclusion. The facts in and of themselves, I have tried to suggest, do not necessarily support the conclusions that are provided, and the facts can often just as easily be deployed to support a different set of conclusions. The analysis that is presented in the scholarship that I have tried to critique makes it impossible for us to choose between very different conclusions that follow from the same set of facts. I should now like to take the critique of the positivist approach to comparative constitutional one step further. I want to investigate the very collation of cross-cultural facts and consider their intelligibility.

To perform such an investigation, let us consider a somewhat different genre of scholarship that focuses on constitutional texts. To see the challenge with merely *reading* constitutions and coding them without any contextual understanding, consider one small point regarding a paper that presents “an empirical account of the global evolution of formal constitutionalism” by using “a comprehensive new data set covering the rights-related content of all national constitutions in the world over the past six decades”.<sup>48</sup> The study of rights leads to the following conclusion: 90 percent of the difference among constitutions can be explained by two variables: comprehensiveness and ideology. In some cases, “constitutions are succinct and tend only to contain relatively generic rights, while others also encompass less commonly encountered, relatively esoteric provisions”.<sup>49</sup> Secondly, while some constitutions are “relatively libertarian”, others are “more statist in character”.<sup>50</sup> The authors further observe that rights are becoming more pervasive; that the explicit power of judicial review is spreading; and that the character of rights is becoming more generic. Finally, the authors use the data to place constitutions in a relative position to one another; by seeing the rights and duties that they recognize, they can be placed alongside an ideological spectrum.

But this mapping of rights variation – in particular, the forming of a relation of content with ideology – is simply impossible to perform without actually interpreting the constitutional text. How can we know what content a right has, the kind of role that it envisages for the state, without actually interpreting the right? Without know what a right means, one cannot assert that while some constitutions “epitomize a common law tradition of negative liberty”, others “presuppose and enshrine a far-reaching role for the state in all aspects of life...”.<sup>51</sup> The variable used during coding is binary (a constitution either contains a particular right, say the right to free speech, or it does not contain a particular right). But this surface level analysis masks more than it reveals. Constitutions can contain similar expressions but radically different

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<sup>47</sup> This concern with causation may be raised even in non-comparative contexts. Rosenberg’s controversial study *The Hollow Hope* is, I think, vulnerable to such a concern. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2<sup>nd</sup> edn., Chicago: University of Chicago Press, 2008). Of course, though, the concern is far greater in a comparative context because causal forces in different societies are likely to be different.

<sup>48</sup> David S. Law and Mila Versteeg, “The Evolution and Ideology of Global Constitutionalism”, at 1170.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

rights. Indeed, on certain occasions, the specific intention will be to ensure that expressions that appear similar in fact mean something very different. Here, even the smallest textual differences than alter matters.

Consider the qualifications in the study. The authors do not code limitation clauses, observing that “Limitation clauses that purport to limit the scope of rights in a constitution, often in a boilerplate or blanket manner, were not coded for a variety of reasons”.<sup>52</sup> But limitation clauses may result in an entirely different right. Indeed, during the founding of India’s Constitution, to use but one example, the constitutional text was drafted to include a variety of limitation clauses not to *limit the scope of rights* but rather to define the right and to ensure that the right is not understood in ways in which it was understood in the United States, where the text did not include such limitation clauses.<sup>53</sup> If the drafters of constitutions engage in the task of constitution-making knowing the context within which the text will operate, then they will naturally attend to the question of how the provisions that they are writing will be interpreted. The textual similarity on the face of both constitutional texts hides crucial differences, differences that are both lost and potentially mischaracterized when reduced to a binary variable. What is ultimately likely to ensue in the characterization of constitutional texts, if interpretation is not independent of content, is some degree of circularity: how one codes will determine the outcome. If one is a libertarian, or rather seeing matters through a liberation lens, then one will discover a libertarian constitution.

The question of interpretation is thrown into sharp relief by two further studies. The first is a study of “sham constitutions”.<sup>54</sup> Here, the authors proceed from the clearly observable fact that constitutions often guarantee a great deal on paper but deliver very little in practice. Countries can claim several protections and rights in their constitutional text, but their political reality may consist of political repression and suppression. Given this fact, could we measure the gap between constitutional guarantees in theory and in practice? The authors draw upon the same dataset in the abovementioned study – one that “covers the rights-related provisions of every constitution in the world over the past sixty years” – and “assign scores and rankings to countries that reflect the extent to which they actually uphold the rights found in their countries”.<sup>55</sup> Moreover, they “identify the constitutions rights that are more often violated in practice, the regions where sham constitutions are most common, and variables that predict the occurrence of sham constitutionalism”.<sup>56</sup>

These are ambitious goals, but they may be a great deal more ambitious than the authors realize. As per the study, attention to the interpretation of a constitution is a different matter than attention to the content of a constitution.<sup>57</sup> But to measure “sham constitutions”, one needs to know what a constitution says. What the authors appear to miss is that they might well be measuring variances in interpretation rather than gaps in performance. A careful reading of their own data suggests the plausibility of such a supposition. In assessing which rights are likely to be violated, they contrast women’s rights, the prohibition against torture, the right to a fair trial, and so on, where they find that compliance rates are low, with guarantees such as “a constitutional bar against the death penalty” which were “fully honored by over three-quarters of the countries that promised them”.<sup>58</sup> Though this authors note this, they do not probe the fact that the one crucial difference between guarantees against torture and guarantees against the death penalty is that the latter has no interpretive looseness: you are either dead or alive. The fact that the death penalty is an instance of near perfect compliance may well indicate that the problem here is not the gap between theory and practice but rather differences in interpretation.

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<sup>52</sup> *Ibid.*, at 1189.

<sup>53</sup> See Madhav Khosla, *India’s Founding Moment: The Constitution of a Most Surprising Democracy* (Cambridge: Harvard University Press, 2020), at 55-63. See generally Grégoire C. N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (New York: Cambridge University Press, 2010).

<sup>54</sup> David S. Law and Mila Versteeg, “Sham Constitutions”, 101 *California Law Review* 863 (2013).

<sup>55</sup> *Ibid.*, at 871.

<sup>56</sup> *Id.*

<sup>57</sup> See *ibid.*, at 875-876.

<sup>58</sup> *Ibid.*, at 912.

The distracting away of the problem of interpretation is captured even by simple observations in the study. Consider the following statement: “In substance, it is clearly a form of sham constitutionalism for a regime to pay lip service to the values of the global community by including only the world’s most popular in its constitution, only to gut those rights of meaning in the name of constitutional interpretation”.<sup>59</sup> But, here, the authors have the matter backwards. The issue in this example is not the gutting of rights in the name of interpretation but rather that global practices themselves might have some kind of interpretive looseness. To put the point simply, the “values of the global community” are not a social fact.

Somewhat remarkably, this is brought out in clear terms by a study that focuses specifically on interpretation. Observing that there can be divergent understandings over what constitutional documents convey, the authors ask, “to what degree do citizens and elites agree about what constitutions say and, assuming some variation, which factors affect relative levels of interpretability?”<sup>60</sup> Their aim is to measure interpretability, which they define as “the ability to produce inter-subjective agreement about the meaning of a text”.<sup>61</sup> By making multiple coders read a constitutional text, they are able to show that while the interpretability of constitutions does vary, this variance is not context depend. “Constitutions written in bygone eras, in different languages, or in extremely different cultural milieux are”, they observe, “no less interpretable by readers than are those written in closer temporal and cultural proximity”.<sup>62</sup>

The odd feature of a study of this kind, a feature revealed by how they define interpretability, is that interpretability is taken to be a technical, objective characteristic of a text. But interpretability is not merely not the same thing as agreement, which is what is being measured, it is in fact substantially different. Interpretability is a hermeneutic enterprise involving an application of mind rather than a fact about a text or the world that is, in some sense, existing in physical space. Claims regarding interpretation are often claims about how the consensus over what a text means is incorrect. The framing of the study makes it impossible for there to be broad-ranging agreement on an interpretation of a text that is a wrong interpretation. Indeed, if the study is to be taken seriously, then the correctness or incorrectness of an interpretation depends on how many people hold that interpretation. Interpretation, however, isn’t about just following what people think a text means – one comes to one’s own interpretation of text using a range of techniques and methods. In this study, by contrast, the methodology has simply swallowed the subject of interpretation. The subject has been redefined to accommodate the method rather than the other way around.<sup>63</sup>

The upshot of the lack of interest in constitutional meaning in that we cannot know what is being captured. Notice, for instance, that in the study of constitutional amendment rules that we considered previously, we observed that the study does not account for the fact that procedural rules could be incorporating cultural attitudes. We can now see that there is a further problem with this study, namely that, though the study acknowledges that some amendments can involve major changes (a single amendment might replace a great many provisions), the change brought about by an amendment cannot be ascertained by merely seeing the number of provisions that are altered. We need to understand what the provisions mean. In certain cases, where cultural contexts, philosophical assumptions, and linguistic traditions are sufficiently similar, what these studies might be capturing – to adopt a Rawlsian distinction – are different conceptions of the same concept.<sup>64</sup> Here, there may well be some overlap at work, though it would hardly be the kind of overlap that is reducible to a binary variable. In other instances, however, all that these studies might be documenting is something like the counting of letters in a word or the counting of pages in a book

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<sup>59</sup> *Ibid.*, at 878.

<sup>60</sup> James Melton, Zachary Elkins, Tom Ginsburg and Kalev Leetaru, “On the Interpretability of Law: Lessons from the Decoding of National Constitutions”, 43 *British Journal of Political Science* 399 (2012).

<sup>61</sup> *Id.*, at 400.

<sup>62</sup> *Id.*, at 401.

<sup>63</sup> On reading and interpretation, one is reminded of Borges’s “Parable of Cervantes and the *Quixote*”. See Jorge Luis Borges, *Collected Fictions* (Andrew Hurley trans., New York: Penguin Books, 1998), at 315. On the content and meaning of sentences, see Paul Grice, *Studies in the Way of Words* (Cambridge: Harvard University Press, 1989).

<sup>64</sup> See John Rawls, *A Theory of Justice* (Revised edn., Cambridge: Harvard University Press, 1999), at 5.

– these are activities that tell us nothing about the meaning of the word or the meaning of the book, respectively, even though they capture some degree of similarity.

There are, thus, two possibilities here. The first is that we are, at best, being left with a thin rather than a thick description of some kind of behavior. As Clifford Geertz emphasized in *The Interpretation of Cultures*, thin descriptions do not allow us to understand human activity.<sup>65</sup> Drawing on Gilbert Ryle, he observed that when three boys contract their eyelids, they appear to be engaged in the same activity, though each may be winking, twitching, and parodying the wink respectively.<sup>66</sup> The second, more devastating critique, takes this further. It suggests that we are not even arriving at thin descriptions of any kind, because the concepts at work, as we understand them in one culture, are different in another culture. How do we know that we are actually comparing torture across two cultures without an assessment of how the cultures understand the infliction of pain and the character of violence? It may well be that we are not comparing different approaches to torture but rather that we are comparing entirely different things. The use and deployment of controls does little to address this problem because the problem is not how certain factors interfere with the phenomenon that we are interested in studying – the problem is in determining whether we are actually studying the phenomenon that we are interested in studying.<sup>67</sup>

The problem arises because the studies that attempt to make a science out of comparative constitutionalism – whether in assessing the impact of torture prohibitions or judging the gap between rights-based guarantees and violations – are interested in similarities. They are, in other words, occupied with patterns rather than practices. The contributions explicitly register their interest in patterns, and they critique other positivist work on this basis. That is to say, they suggest that the patterns that they identify offer a more accurate explanation of the phenomenon under study.<sup>68</sup> But such an effort does not take us very far. This is because the answer to a poor correlation is not a better correlation, the reason being that something other than correlation is going on. There is a *practice* that is taking place. A practice is not the same as a pattern; it cannot be reconstructed as a correlation. Because the inputs may not correlate to how people actually think, whether or not the predictive power of our work is high is somewhat beside the point.

Such an approach – the idea that the response to a poor correlation is a better one, and improvements lie in perfecting correlations – is not new to social scientists. Its origins lie in Milton Friedman’s essay *The Methodology of Positive Economics*.<sup>69</sup> For Friedman, “theory is to be judged by its predictive power for the class of phenomena which it is intended to ‘explain’ ... the only relevant test of the *validity* of a hypothesis is comparison of its predictions with experience”.<sup>70</sup> In assessing the assumptions behind a theory, one should not attend to whether or not they are realistic but rather by “seeing whether the theory works, which means whether it yields sufficiently accurate predictions”.<sup>71</sup> As philosophers of social science are well aware, the key concern with the Friedmanite “black-box” approach is that it ignores the mechanism by which outputs are generated.<sup>72</sup> Without attention to the mechanism at work, we cannot have confidence in the results that emerge. What we have is pure induction rather than an *explanation* for what has occurred. The concern with not knowing the internal structure by which a phenomenon unfolds has long troubled scholars of causation.<sup>73</sup> It has also been a source of interest for students of probability who recognize that it provides no answers to how a series will unfold. As John Maynard Keynes argued in *A Treatise on*

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<sup>65</sup> See Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), at 3-30.

<sup>66</sup> *Ibid.*, at 6.

<sup>67</sup> See MacIntyre, “Is a Science of Comparative Politics Possible?”, 266-267.

<sup>68</sup> See, for example, Tom Ginsburg and James Melton, “Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenge of Measuring Amendment Difficulty”, at 702-707.

<sup>69</sup> See Milton Friedman, *Essays in Positive Economics* (Chicago: University of Chicago Press, 1953), at 3-43.

<sup>70</sup> *Ibid.*, at 8-9.

<sup>71</sup> *Ibid.*, at 15.

<sup>72</sup> On Friedman’s essay and some of the questions that it implicates, see Frank Hahn and Martin Hollis, “Introduction”, in *Philosophy and Economic Theory* (Frank Hahn and Martin Hollis ed., Oxford: Oxford University Press, 1979), at 1-17.

<sup>73</sup> See Paul and Hall, *Causation*, at 161-168.

*Probability*, there was reason to be careful when assessing “the mere repetition of instances”.<sup>74</sup> “Pure induction,” he suggested, “can be usefully employed to strengthen an argument if, after a certain number of instances have been examined, we have, from some other source, a finite probability in favor of the generalization...”<sup>75</sup> The key emphasis here is on “probabilities, however small, *derived from some other source*”.<sup>76</sup> In other words, induction in and of itself cannot do the work for us. For Keynes, “the method of pure induction may be a useful means of strengthening a probability based on some other ground”.<sup>77</sup> In the sciences, he felt, the effort was to “dispense as far as possible with methods of pure induction”, for rather than focusing on repetition, the emphasis was on deepening an understanding of the circumstances under which predictions take effect.<sup>78</sup> Indeed, Keynes went so far as to claim that in “advanced science it is a last resort – the least satisfactory of the methods”.<sup>79</sup>

What correlations can observe is the regularity of behavior, but they cannot capture the internal logic of it. When we think of studying *human* behavior, we are interested in study the actions of rational creatures capable of thought and reasoning; creatures who can act. Other creatures often reveal behavioral patterns, but we view them somewhat different. When we compare human beings with honey-bees, Jonathan Bennett once showed, “It does look on the face of it as though as we can say of honey-bees that their dancing behavior is covered by rules, but not that honey-bees have rules according to which they dance. Or in other words although the dancing behavior of bees is regular, it is not rule-guided.”<sup>80</sup> A behaviorist analysis reveals is how a certain action *looks* but not how it *is*. The behaviorist cannot really tell us *what* people are doing. Here, social meanings are assessed from the outside rather than from the inside. Here, we are trying to interpret social behavior in some way, but we cannot quite achieve an *understanding* of what is occurring. In such studies, the scholar is consciously choosing to deny information. It bears asking whether such a person could be a good scholar.

We know, thanks largely due to Wittgenstein, that there is some idea of a shared life. There is a kind of argument about what it means to understand a practice; to understand how it has meaning for individuals. This is the reason why one can have the same referent but understand matters in a very different way.<sup>81</sup> We cannot do very much with a description of similar patterns without certain ontological decisions, and the idea of similarity misses the thought that there can be tremendous behaviorist consensus alongside great disagreement over meaning. Any orbit of shared meaning has concepts within it, concepts that can only be grasped in relation to other concepts within that orbit, and one needs to be under the same orbit of meaning to understand the concepts; only then can we formulate some sense of the actions that people are engaged in.<sup>82</sup>

### III. Agency

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<sup>74</sup> See, for example, John Maynard Keynes, *A Treatise on Probability* (London: Macmillan and Co., 1921), at 270. There is, of course, a wide body of writing that addresses methods of prediction within the law. In the case of criminal justice, see, for example, Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007). There is a fast growing body of literature on similar themes in the context of new technologies. See, for instance, Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (New York: St. Martin’s Press, 2017).

<sup>75</sup> *Id.*, at 275.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*, at 277.

<sup>78</sup> *Id.*, at 278.

<sup>79</sup> *Id.*

<sup>80</sup> Jonathan Bennett, *Rationality: As Essay towards an Analysis* (Indianapolis: Hackett Publishing Company, 1989), at 15.

<sup>81</sup> See W.V.Q. Quine, *Word and Object* (Cambridge: MIT, 1960).

<sup>82</sup> See Peter Winch, *The Idea of a Social Science and its Relation to Philosophy* (London: Routledge, 1958); Charles Taylor, “Interpretation and the Sciences of Man”, 25 *Review of Metaphysics* 3 (1971).

The reason why the studies that I have held up for consideration should be a source of profound concern to us is not merely that they offer us an impoverished account of the countries that they purport to study or of the legal measures and institutions that they attempt to understand. To be sure, this is no small concern. But there is, I think, an even more fundamental issue at stake. Within the human sciences, the kind of surveys that we undertake, the nature of projects that we pursue, itself bring meaning to us. We are not only studying meaning, but also generating meaning for our own lives.<sup>83</sup> As a human science becomes a source of meaning, it becomes a guide to our conduct. Who can deny that a conclusion about whether torture prohibitions impact the practice of torture does not shape our understanding of the value of such prohibitions? From Weber to Freud, the twentieth century has been a reminder of the fact that humanity frustrates the human sciences, captured tellingly by how Freudian methods were imagined as a science but emerged as a source of meaning.

There are two reasons why the social sciences pose a special challenge for us. The first reason is that the enterprise that we are undertaking – the very *doing* of comparative constitutionalism law – is absorbed into what gives us meaning. We are human beings studying human beings. We are not studying material objects like a doctor or an astrophysicist. Our research itself becomes a source of meaning; it becomes a guide to us. This is the key difference between the physical and social sciences. In the former case, the objects of study – say, different body organs – do not pick up the science of medicine. Similarly, in physics, the planets themselves do not incorporate an understanding of science. Freud initially saw himself as a doctor; the fact that he was studying the mind seemed irrelevant. But, in time, it became clear that psychoanalysis was different from ordinary medical sciences in one fundamental way: the science of medicine is a science of the brain and not of the mind. Because human beings *act* in the world, the principles that they incorporate and the activities that they perform constantly feed into one another.<sup>84</sup>

The second reason is that, as human beings, we can act differently. We ourselves are agents, capable of behaving in ways that are different from the ways in which the people that we study have behaved. Scholars of causation have long been attentive to this fact. As H.L.A. Hart and Tony Honoré put it, in their seminal work *Causation in the Law*: “The idea that individuals are primarily responsible for the harm which their actions are sufficient to produce without the intervention of others or of extraordinary natural events is important, not merely to law and morality, but to the preservation of something else of great moment in human life”.<sup>85</sup> Within the law, we acknowledge that individuals are separate persons, that they can act as distinct agents, in a range of domains.<sup>86</sup> When we think about legal responsibility, we think about how the individual that we choose to hold responsible exercised his or her own judgment, and performed his or her own actions.<sup>87</sup>

Even those who have been skeptical of the establishment of causal relations have had to confront the reality of human experience. David Hume, who saw that causation had an air of mystery to it, grasped that the concept was nonetheless inescapable. At some point, Hume felt, one simply had to accept the limits of philosophy if one needed to acknowledge what it meant to be human. Imagining that we cannot attribute meaning and causal relations to our actions will fill us with “the deepest darkness”; one will feel “ready to reject all belief and reasoning”.<sup>88</sup> Instead, Hume felt, one needed to look the other way – “play a game of backgammon” – when one was burdened by an effort to explain the world.<sup>89</sup> Hume’s deep insight lay in

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<sup>83</sup> See Taylor, “Interpretation and the Sciences of Man”.

<sup>84</sup> A helpful example of this is Weber’s study of stock exchanges. See Max Weber, “Stock and Commodity Exchanges”, 29 *Theory and Society* 205 (2000).

<sup>85</sup> H.L.A. Hart and Tony Honoré, *Causation in the Law*, at lxxx.

<sup>86</sup> In anti-discrimination law, for example, we care greatly about *why* someone was treated in a certain way rather than merely *how* they were treated. See John Gardner, “Discrimination: The Good, the Bad, and the Wrongful”, CXVIII *Proceedings of the Aristotelian Society* 55 (2018), at 55-61.

<sup>87</sup> For a helpful example that illuminates this, see Adrian A.S. Zuckerman, “Law, Fact or Justice”, 66 *Boston University Law Review* 487 (1986), at 498-502.

<sup>88</sup> David Hume, *A Treatise of Human Nature* (L. A. Selby-Bigge ed., Oxford: Clarendon Press, 1978 [1739-40]), at 268.

<sup>89</sup> *Ibid.*, at 269.

grasping that even if something cannot be fully explained philosophically, it might well still play some role in our life because of some kind of human necessity. Even if we could not quite understand how causal relations worked in theory, we would need some account of causation to function in the practical world, and would be manage to locate ways in which our imputation of causal power was validated by nature. Without some sense of an explanation to ourselves about how one event leads to another, we would have no way to live. The contemporary comparative constitutional lawyer is a Friedmanite – he or she is a person who has little interest in *explanations* about how outcomes emerge. Such a person has abandoned the idea of agency. As Hume pressed upon us, a Friedmanite of this kind would have no account of how to live their own lives.

The emerging world of comparative constitutional law leaves us, alas, with a new kind of occasionalism.<sup>90</sup> There is no small irony in the fact that the current mode of scholarship in the field takes neither *comparativism* nor *constitutionalism* seriously. It refuses to take the former seriously because it only views external practices and assumes that when people of very different cultures appear to be doing the same thing, they are indeed doing the same thing. The fact of cultural difference is entirely avoided, thereby meaning that the studies are not genuinely *comparative*, for to compare two things, they must be different. And it refuses to take constitutionalism seriously because a commitment to constitutionalism – in its modern democratic sense – is a commitment to find the legal means by which we can empower ourselves, exercise agency, and structure our collective life.<sup>91</sup> How best to enable and exercise agency is, indeed, the reason for the most important contests in constitutional theory.<sup>92</sup> But positivist comparative constitutionalism does not take individual agency seriously because it adopts a behaviorist lens. It does not take seriously the idea that we are people who are not only being in the world but are also acting in it. One can either be a behaviorist and only view external actions, where people are studied like planets, or one can study how humans think, understand, and act – one can study meaning – and, if so, one must give up on behavior.

Insofar as the critique that I have offered has any merit, we might wonder not whether it is correct but rather whether it proves too much. In essence, the Quinean framework leads to a position of radical skepticism, where we might wonder whether there is any possible meaning at all that can exist between two separate individuals, and whether all that we have is common behavioral responses rather than common understanding. The problem here is not a new one. When John Grote challenged John Stuart Mill's utilitarianism, he called into question not only the idea of inter-personal comparability, but even the very idea of intra-personal comparability.<sup>93</sup> By what yardstick can I compare my life with my own? For now, I shall bracket this concern – and Quine's own answer to his puzzle, the idea of interpretive charity – but I shall certainly pose the question of what possibilities might exist for a non-positivist version of comparative constitutional law. Here, three answers seem to present themselves. The first – visible in the major comparative scholars of the nineteenth century such as Walter Bagehot, Albert Venn Dicey, James Bryce, and so on – as well as in recent work such as Bruce Ackerman's book *Revolutionary Constitutions* is a kind of historical institutionalism.<sup>94</sup> The second, expressed most powerfully in judicial opinions, in the views held, for example, by Justice Stephen G. Breyer of the United States Supreme Court, is a kind of reasoning

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<sup>90</sup> Occasionalism was an attempt to understand the relationship between the mind and the body. How does the mind able to control the body? To prove the existence of God by Descartes, the supposition was put forth that the God is the only spirit that can cross the mind/body distinction, and that therefore explains how our mental intentions (I want to move my arm) and physical actions (I move my arm) can co-exist. The explanation of God's role is supported by a clear one-one correlation.

<sup>91</sup> See generally Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), at 134-177; Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge: Harvard University Press, 2016), at 23-44.

<sup>92</sup> See David Singh Grewal and Jedediah Purdy, "The Original Theory of Constitutionalism".

<sup>93</sup> See John Grote, *An Examination of the Utilitarian Philosophy* (Cambridge: Deighton, Bell, and Co., 1870).

<sup>94</sup> On the nineteenth century approach to comparative study, see Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983), at 207-246.

by analogy.<sup>95</sup> And the third is an attempt to attend to small, discrete forms of legal association and activity in different jurisdictions. This anthropologically-minded method shifts our attention away from canonical constitutional texts and apex courts toward local behavior, and it would entail a different understanding of legal rules and legal behavior. I have said very little about each of these three approach here, and have said nothing at all about how they can respond to the concerns that I have associated with positivist comparative constitutionalism. The approaches that I have gestured at need elaboration; and the internal logic of each needs to be unpacked and defended. And, in each case, one needs to demonstrate how the approach can take seriously both the task of *comparison* and the promise of *constitutionalism*. Until that is achieved, comparative constitutionalism law remains a practice – performed by judges, lawyers, scholars – in need of a theory.

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<sup>95</sup> See generally Justice Antonin Scalia and Justice Stephen Breyer, A conversation between U.S. Supreme Court justices, 3 *International Journal of Constitutional Law* 519 (2005).