

University of Pennsylvania Law School
Scholarship at Penn Law

Year 2004

Paper 56

Constitutional Ethnography: An Introduction

Kim Lane Scheppelle *

*kimlane@law.upenn.edu

This content in this repository is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://lsr.nellco.org/upenn/wps/papers/56>

Copyright ©2004. Posted with permission of the author.

Constitutional Ethnography: An Introduction

Kim Lane Scheppelle

Abstract

Constitutional ethnography is the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape. This article provides an introduction to this sort of study by contrasting constitutional ethnography with multivariate analysis and with nationalist constitutional analysis. The article advocates not a universal one-size-fits-all theory or an elegant model that abstracts away the distinctive, but instead outlines an approach that can identify a set of repertoires found in real cases. Learning the set of repertoires that constitutional ethnography reveals, one can see more deeply into particular cases. Constitutional ethnography has as its goal, then, not prediction but comprehension, not explained variation but thematization.

Constitutional Ethnography: An Introduction

Kim Lane Scheppele

When the well-known paleontologist Stephen Jay Gould was diagnosed with a rare form of cancer, he was told by his doctor that he had eight months to live. But being a scientist who understood statistics, he realized that the doctor was telling him the central tendency of a distribution rather than an individualized prediction of the trajectory of his individual life. And what he cared about, being human, was not aggregate rates of mortality but what was going to happen *to him*. He wanted to know what he could concretely do to increase the likelihood of living longer. For this, the general statistics were not particularly helpful because they only indicated a simple correlation between the date of diagnosis and the date of death. They said nothing about all of the other factors that would allow some particular case to be out in the long tail of the mortality distribution, which is where a particular individual would want to be. So Gould set about trying to disaggregate the statistics, noting:

Variation is the hard reality, not a set of imperfect measures for a central tendency. Means and medians are the abstractions. . . . I had to place myself amidst the variation. (Gould 1991:476)

Unpredictable things occurred that made his prognosis better—new cancer regimens became available; he noted that having a good attitude helped. Having been diagnosed with less than a year to live, Gould managed to thrive another 20 years before succumbing to an entirely different form of cancer (Dunn 2002).

I would like to thank Joe Sanders, Nita Lineberry, Bert Kritzer, and Dianne Sattinger for organizing the complicated process at the *Law & Society Review* from which guest editors benefit, and Bert Kritzer in particular for constructive comments on this introduction. I would also like to thank the authors whose work appears in this issue for putting up with so many requests for revision, for handling these requests gracefully, and for helping me work out what I meant in the first place by constitutional ethnography. Finally, I would like to thank Serguei Oushakine for his theoretical insight and ethnographic support. Please address correspondence to Kim Lane Scheppele, University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia, PA 19104; e-mail: kimlane@law.upenn.edu.

Gould's lesson also applies to constitutional regimes. The scholar, the citizen, and the politician typically care about constitutional orders one at a time, as individuals care about their own life trajectories. And sometimes the unexpected and the contingent matter more than the broad patterns in determining what occurs in individual cases. It does only a limited amount of good, therefore, to say that the life expectancy of a regime with proportional representation in the legislature is higher than the life expectancy of a regime with winner-take-all election districts. Or that certain judicial selection mechanisms are correlated with a particular sort of judicial activism. What most people want to know about constitutions is whether Germany or Taiwan or Nigeria would do better if their constitutions contained these features, not just whether regimes on average work better with one design rather than another. Or alternatively, one may want to know what the distinctive problems are of particular constitutional arrangements (for example, the instability that can be caused by unconstrained votes of no confidence or the dangers that follow when the executive alone can declare a state of emergency) so that one can protect against constitutional pathologies. For this, knowing how constitutional regimes fare on a handful of variables abstracted from context may say little. New knowledge may come on-line over the course of a constitutional trajectory; particular features of the individual state help or hurt in ways that cannot be corralled in any model.

The urgent issue in constitutional studies typically is to know whether the experiences of some constitutional settings are helpful for understanding others—and that will depend on how similar other systems are to one's own, whether they have dealt with the same sort of historical problems, whether they have drawn their constitutional ideas from the same well. Of course, one can come closer to being useful in this way by simply having a model with more variables. In general, however, the study of individual polities up close and in detail is nearly always more helpful for those concerned with the foibles and fates of particular constitutional regimes than ambitious multivariate models in this field, given that the number of relevant countries is typically smaller than the number of relevant variables one would want to take into account.

The more one is interested in particular constitutional dilemmas and the knowledge that can be brought to bear on understanding them, the more one may be drawn to constitutional ethnography. Constitutional ethnography does not ask about the big correlations between the specifics of constitutional design and the effectiveness of specific institutions but instead looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements. The goal of constitutional ethnography is to better understand how

constitutional systems operate by identifying the *mechanisms* through which governance is accomplished and the *strategies* through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context. While any one specific constitutional setting has distinctive and ungeneralizable features, each constitutional context also has *logics* that link various specific features found in the particular case into patterns whose traces may also be visible elsewhere with different specific manifestations.

While constitutional ethnography emphasizes the particular, it has theoretical ambition. Theory is “a precursor, medium and outcome of ethnography study and writing” (Willis & Trondman 2000:7). Theory-building in this view, then, comes not from hypothesis testing, but instead from noting complex relationships in one setting and then seeing how far other settings can be understood in those same terms. Such comparisons inevitably produce modifications that result from consideration of that next case, which can then be used in analyzing further cases, and so on. In the end, what one has is not a universal one-size-fits-all theory or an elegant model that abstracts away the distinctive, but instead a set of *repertoires* that can be found in real cases and that provide insight into how constitutional regimes operate. Learning the set of repertoires that constitutional ethnography reveals, one can see more deeply into particular cases. In addition, one has a sense of what to expect in the future, though given the historical contingency of particular settings, one cannot predict in a strict sense. Constitutional ethnography has as its goal, then, not prediction but comprehension, not explained variation but *thematization*.

In this issue of the *Law & Society Review*, many countries, questions, and methodologies are on display. Because of the ethnographic focus of the issue, each article includes a fair amount of concrete detail about particular places, activities, and ideas. But it is important to understand why it would be crucial for general readers—even readers with a statistical bent—to engage with some of the more specialized subjects that are covered in the articles in this issue: Estonian or Canadian language law, Russian federalism, Turkish political parties, central European constitutional drafting, European social law, Russians suing the state. Each of these articles takes a particular topic in a particular place and identifies a general mechanism that can be drawn from the specific study to add to our catalogue of constitutional repertoires. In addition, each article—while focused on a particular place—takes a basically comparative view. As a result, each author contributes to a more general theory of constitutional functioning by not only providing detail and context, but also avoiding constitutional nationalism.

Constitutional nationalism? At the opposite end of the constitutional studies spectrum from the multivariate model approach

are *nationalist* constitutional law, constitutional history, and constitutional theory, which tend to prevail in single-country studies. The assumptions of a common national “we” in the audience for a particular work pervade the literature. One often finds in single-country constitutional studies that scholars take for granted that their own constitution is the theoretical pivot point of the legal world, not really thinking that their national constitution may be either distinctive in ways relevant to their explanations or similar to other constitutions in ways that may help them see better what is going on in their home polities. So a finding that is portrayed as making a particular place unique and special may instead be an indicator that the country is subject to trends visible elsewhere. The increased activism of the U.S. Supreme Court in recent years, for example, is more than matched by the increasing activism of courts in other constitutional democracies (see Leslie Goldstein’s review in this issue; Stone Sweet 2000; Guarneri & Pederzoli 2002; Hirschl 2004). Is the explanation for such activism in the United States, then, only in the attitudes of its nine justices (especially when most of them know full well what is happening in other countries)? Because nationalist assumptions go deep into the structure of many single-country constitutionalist writings, such studies are rarely translated out of their original language, and comparisons across political systems become even harder to accomplish. Different nationally specific concepts, categories, and explanations abound without a common sense of their shared field of action. Constitutional ethnography is, in many ways, an attempt, both literally and conceptually, to translate concepts across sites, times, and research questions.

The articles in this volume are refreshingly free of constitutional nationalism. In fact, they harken back to a time when it was expected that those who studied constitutional processes would know about a range of sites in some comparative detail. There is a long history of comparative constitutional ethnographic writing that these articles continue, a history that precedes the emergence of the modern disciplines of social science. (Warning: This early literature does not have the anti-ethnocentric self-consciousness of contemporary social science, which against current sensibilities is jarring.) Montesquieu’s most famous discussion about separation of powers took comparative constitutional observations as the basis for his claim, at heart an empirical one, about the relationship between the institutional design and the political liberty of the individual:

In most kingdoms in Europe, the government is moderate because the prince, who has the first two powers [making laws and executing public resolutions], leaves the exercise of the third [judging the crimes and disputes of individuals] to his subjects.

Among the Turks, where the three powers are united in the person of the sultan, an atrocious despotism rules. In the Italian republics, where the three powers are united, there is less liberty than in our monarchies. ([1748] 1989:157)

And Walter Bagehot, in the foreword to the second edition of his classic book, *The English Constitution*, noted:

A contemporary writer who tries to paint what is before him is puzzled and perplexed: what he sees is changing daily. . . . The difficulty is the greater because the writer who deals with a living Government naturally compares it with the most important other living Governments, and these are changing too ([1872] 1993:268)

Bagehot took it as his task to understand the actually existing government of his day, which he could not do without reference to what was happening to similar governments of other modern states. From Henry Sumner Maine ([1861] 1986) to Emile Durkheim ([1893] 1984) to Max Weber ([1925] 1968), comparative legal observation was at the heart of much of nineteenth-century and early twentieth-century empirical work that had theoretical ambition—not just in the study of law, but of society, politics, and culture as well. Raymond Aron ([1965] 1990), Clinton Rossiter (1948), and Carl Friedrich (1957) were just a few of the scholars in the generation shaped by World War II and the onset of the Cold War who carried on this tradition of combining ambitious theoretical undertakings across a broad range of subjects with comparative constitutional observation. As a certain vision of science evolved in both political science and sociology, however, this sort of historical-comparative focus in constitutional studies declined, in favor of either a single-country or a multivariate approach. Constitutional ethnography attempts to recover lost traditions, when theory-building was intimately linked to comparative/historical/legal inquiry.

Constitutional ethnography embraces nation, culture, and context as more than background assumption. As a result, one often finds in constitutional ethnography that the problematics of nation are embraced by foregrounding national self-conceptions in the analysis of constitutional issues. If one asks about the *United States* Supreme Court, rather than just about *the* Supreme Court, for example, the nation comes into the frame and the relationship between the Court and various conceptions of the nation, its history, and its intersections with other national trends can be more central to the inquiry. In the articles that follow, *Turkish* constitutional concepts are elaborated along with *Central European* constitutional histories, and so on. What the articles share, and what they enable researchers who work on other times or other places to see,

is how national, local, and distinctive ideas modify the universalist ambitions of abstract constitutional theory. Constitutionalism, as a result, emerges as a set of practices in which the transnational ambitions of legal globalization flow over and modify the lived experience of specific local sites, and as a set of practices in which local sites inescapably alter what can be seen as general meanings.

The choice of constitution to study in constitutional ethnography, then, is not given automatically by one's own citizenship or personal ties. Constitutional study, like ethnography more generally, relies on a conscious choice of a site or sites of analysis. If one studies the old U.S. Constitution or the new Afghan one, or the changing constitution of Britain or the proposals for a novel European one, or postcolonial African constitutions or post-military-dictatorship Latin American ones, it is because some feature of these constitutions and polities in question recommends their study. This does not mean that a researcher cannot study his or her own constitutional regime. But it does mean that, in focusing on any particular constitutional regime, one sees the matter as a choice. In short, a constitutional ethnographer will choose the location for constitutional study deliberately because of the relationship between the site and the questions asked of it and not just because he or she happens to live in or to know a particular constitutional order. Because constitutional sites are deliberately selected in constitutional ethnography, the broader features of these constitutional orders come into the analysis as conscious parameters of the study.

For example, Max Weber, who was one of the key players in the drafting of Germany's Weimar Constitution at the end of the First World War, used comparative constitutional observation, aided by his detailed observation of the fate of the 1906 Russian constitution ([1906] 1995), to form the basis of both his practical work and his broader theories (Mommsen 1984). He provided a detailed historical account of events in Russia seen from the Germany of his day. Because of his thematic and comparative view, and because he was able to compare constitutional development broadly across several cases he knew well, Weber not only illuminated what was happening in Russia at that time, but he also identified the sources of suspicion of parliamentary government in much of Europe more generally, something that tragically foretold the fate of the constitution he had a hand in writing (Kennedy 2004). Self-consciously choosing a site for constitutional ethnography is a theoretical activity that itself allows more general understanding of the particular sites one seeks to illuminate.

So far, we have discussed what constitutional ethnography is not: simply multivariate constitutional analysis without more or purely nationalist constitutional studies. But what, you may well ask, *is* constitutional ethnography?

Let's try for a definition, however inadequate simple definitions can be: *Constitutional ethnography is the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape.*

It may help to explore the elements of this definition. The phrase "the central legal elements of polities" indicates that constitutional law does not occupy all of the legal field, but only that part of the legal field that constitutes, regulates, and modulates the key ingredients of governance in a society. This phrase also requires distinguishing law from politics, at least in part, because specifying the legal "elements" of politics presupposes that there is more to politics than law. But this phrase also presupposes that law is not completely contained within the concept of politics because if law were completely contained within politics, it could not exist in some regulative relationship to politics:

For all their necessary interaction, law and politics do not collapse into each other, and the study of constitutional history [and constitutional ethnography] shows why it is both conceptually useful as well as pragmatically necessary to leave theoretical space for law and politics to come apart, as well as for each to be considered as an influence upon the other. (Scheppele 2003:5)

The "constitutional" part of constitutional ethnography, then, identifies the complex of relations between law and politics that regulates governance. But while this most obviously leads constitutional ethnographers to focus on the state, fields of law, politics, and governance do not have to be conceptualized as being only about the state, though it would then require some work to identify the politico-legal frameworks of governance in other social institutions. Much of social theory actively holds out the possibility that the exploration of constitutions does not necessarily limit the field in this way; as a result, one could also use a constitutional ethnographic framework to talk about the governance of corporations, families, social groups, and transnational entities. While noting that historically the study of legality focused on royal power, Foucault thought it was crucial to detach law and power from the body and idea of king so that these concepts could be concerned with "not the king in his central position, but subjects in their reciprocal relations; not sovereignty in one edifice, but the multiple subjugations that take place and function within the social body" (Foucault 1997:27). For Weber, a constitution was understood "in the sociological sense, as the modus of distribution of power which determines the possibility of regulating social action" (Weber 1968:330), a definition that can clearly be applied in more sites than the state.

Constitutional ethnography as a general idea is relatively agnostic about the proper scope and scale of study of processes of

governance as well as about the background theoretical commitments brought to bear on the subject. In fact, in the articles contained in this issue, a variety of background theories are on display even as all of the authors understood constitutional ethnography to be about the study of the state. Though I focus primarily on understanding states in this introduction, analogous processes may be at work within other social institutions.

And the “ethnography” part of constitutional ethnography? While ethnography in some contexts means simply in-person, on-site fieldwork as a primary and distinctive method (for a history, see Marcus & Fisher 1986:17–44), ethnography has been coming in recent years to be associated with a wider range of methods that share a common goal. Even within anthropology, the discipline most closely associated with ethnography, for example, historical-archival methods are increasingly in use alongside or even in substitution for traditional fieldwork (Merry 2000, 2002; Dirks 2002). If written records are detailed enough and capture enough about specific instances to see concretely how law, power, and governance work, then it seems to me that there is no reason to exclude historical (or even contemporary) archive-based research from the category of ethnography. In fact, combining archival methods with traditional fieldwork often produces a greater richness of understanding than either one standing alone (Comaroff & Comaroff 1992; Cicourel 1967).

And the expansion of the usual core of ethnography to other sorts of methods does not end there. Participant observation, the method most associated with fieldwork, has always been combined with interviewing. But as Kritzer (2002) has pointed out, interviews and observations do not produce the same level of detail or even generate the same picture of the practices under study. Interviews are likely to generate less information about context than observation can because direct questions can only elicit what at some level the researcher already knows to be important. But, as Kritzer notes, observation has limits too: Some processes are simply not open to the researcher’s eye, or the researcher’s eye can be myopic. The discovery of ethnographic-level detail, then, may be enhanced by multiple methods used together.

In fact, fieldwork has always been permeated by a mix of methods. As John and Jean Comaroff have noted:

Ethnography is like much else in the social sciences; indeed more so than anthropologists often acknowledge. It is a multi-dimensional exercise, a co-production of social fact and sociological imagining, a delicate engagement of the inductive with the deductive, of the real with the virtual, of the already-known with the surprising, of verbs with nouns, processes with products, of the phenomenological with the political . . . [T]he key to doing

ethnography “is ultimately a question of scale.” (Comaroff & Comaroff 2003:172, references omitted)

What makes ethnography a distinctive field of research activity is the commitment to collecting *whole specimens* of social life. Whole specimens? Borrowing a concept from biology, I hope to capture the sense that the relevant sort of knowledge for ethnography can be seen only at the level of detail captured in intact social forms as those forms appear in the field. A “whole specimen” is a concept that itself requires theoretical consideration and will depend on the questions being asked. A whole specimen of a constitutional regime will call for a different frame than a whole specimen of a constitutional court or an electoral system or a field of interest group activity or the international circulation of constitutional ideas. The crucial thing about the idea of a whole specimen is that it must be considered in context and captured live in the field, as it were.

To clarify, let me take an example from my own research on constitutional transformation in post-Communist states. At first, when I embarked on a year (that turned into four) living in Hungary to study the development of the powerful constitutional court there,¹ I imagined that I was studying just a dialogue between petitioners to the Court and the responses that the Court gave to these petitioners, a dialogue that produced “constitutional law.” But, in going to work every day at the Court and seeing how enmeshed both judges and professional staff at the Court were in broader webs of influence, it became clear that the “whole specimen” of Hungarian constitutional life was not just the Court and its direct petitioners, but instead a whole set of practices that involved the Court’s relation with other institutions of state in Hungary as well as its relations with the international practices and institutions of the transnational human rights community. In general, the Hungarian Constitutional Court took separation of powers very seriously, and justices on the Court never in principle or in practice went to other state institutions for meetings on policy. By contrast, many if not most judges on the Court routinely attended meetings of European constitutional judges and constitutional scholars, sharing ideas freely. To mark its compliance with the European Convention on Human Rights, a special office at the Court churned out memos on the applicability of European Court of Human Rights jurisprudence to Hungarian constitutional issues. The whole specimen of constitutional institutionalization in Hungary, then, involved much beyond the archives and building of the Court, embracing both domestic political practices and international audiences in different measure.

¹ Under National Science Foundation grants # SBE 94-11889 and SBE 95-14174 (SGER).

But this lesson doesn't immediately translate into a common model of constitutional influence, even in other post-Communist states. When, several years later, I went to Russia to study the same thing²—the letters from petitioners to the Constitutional Court and the Court's response to petitioners—I found that the boundaries of the whole specimen of constitutional institutionalization was quite different. Only a few of the judges and professional staff members spoke foreign languages and traveled to academic conferences, and the Court as a whole was rather walled off from international influence. Most professionals working at the Court seemed to treat international ideas with a great deal of suspicion. For example, though Russia had become a signatory to the European Convention on Human Rights, some judges and staff routinely grumbled about how impossible (some actually said undesirable) it was to have to be bound by a jurisprudence that was in a foreign language. In Russia, however, domestic political influences loomed large—from the physical presence of a representative of the “presidential administration” and a representative from each house of the Parliament in regular assigned offices in the building to routine twice-yearly private meetings between the Russian President and the judges on the Court, both practices that would have been unthinkable in Hungary. What I had learned was that routine practice in Hungary (where the judges overtly aligned themselves with the international human rights community and kept domestic political influences at bay) turned out to be nearly the opposite in Russia (where members of other branches of government were given offices in the building but international human rights institutions and practices were considered foreign influences best kept at arm's length).

It is quite difficult to imagine how to have studied this from afar using variable-based models unless one already understood how the institutions worked. I would never have thought to ask, based on my experience in Hungary, whether a representative of the nation's president had an office in the country's highest court. But understanding how the Hungarian Court functioned was deepened through the contrast with the Russian Court and vice versa. In-person and on-site observation, combined with interviews and with going through the archives, was the only way to tease out these relationships, and only then because the combination of methods could reconstruct individuals and institutions in their natural habitats, as it were, and could follow their lived experience through to see how a whole variety of influences intersected over concrete actions, decisions, and patterns.

Given the tendency of models to mislead in the absence of deep knowledge or ethnographic observation, *starting* with a

² Under National Science Foundation grant # SBE 01-11963.

variable-based model might be dangerous to understanding rather than productive of it. Generally, when such models work, it is because the researcher already has a deep knowledge of the potential mechanisms in play, at least for the researcher's own constitutional culture. Comparative variable-based analysis often extrapolates one distinctive culture into others in ways that can seriously mislead. But because the variable-based model tends to take whole specimens with which one is familiar, cut them up into pieces called variables, and then put them back together in the context of specimens with which one has no firsthand knowledge, the relationships found can be, without more, an essentially fictional form of correlation.

Fictional? Isn't that a strong attack on those forms of social science that aspire to models? The point is made elegantly by Nancy Cartwright's analysis of physics (1983), an even more model-driven field than sociolegal studies. Cartwright shows that "fundamental equations do not govern objects in reality; they only govern objects in models" (1983:129). The need to disaggregate observations into pieces and to simplify the number of pieces one can include in a model guarantee that the model will never be literally true, according to Cartwright. As a result, a model that specifies the formal relationship between a, b, and c may describe a factual state of the world that does not actually exist in any individual instance. Hence her title—"how the laws of physics lie"—or as she notes, "[t]here is a trade-off between factual content and explanatory power" (1983:72). Powerful models achieve their power at the expense of representing any particular individual instance adequately. As a result, "[t]hings are made to look the same only when we fail to examine them too closely" (1983:19). Quantitative models that see relations among variables may discover "laws" that may not be true in any single actually existing case.

The only way to adequately represent any particular instance, then, is to represent it as a complex and potentially contradictory intertwining of institutions, individuals, sensibilities, histories, and meanings. This does not preclude counting aspects of the whole specimen. Constitutions, for example, can be meaningfully distinguished by the number of state institutions they set up, ranging from the simple United States text, which explicitly establishes only one court in the federal judiciary, to the more complicated South African constitution, which includes detailed constitutional regulation of many more bodies of state in general and many more courts in particular.

But sometimes counting can hide what is going on rather than illuminate it. To take another example from my own fieldwork, a quantitative researcher working on another project wanted to know the percentage of dissents in a variety of high courts because of a hypothesis that this would reveal the extent of fundamental

disagreement among judges about constitutional conceptions, something that itself might vary across constitutional cultures. The researcher asked me for this number for Hungary. I had never calculated this number when I worked at the Hungarian Constitutional Court, because I thought that the number was meaningless. Virtually all the decisions of the Court were unanimous, unless the case dealt with social welfare rights, in which case the Court at that time divided 5–4 for ideological reasons. And since this Court had no discretionary jurisdiction, the number of social welfare cases producing a 5–4 split said more about the number of petitioners raising such issues than about the extent of judicial disagreement or the salience of the topic to the judges (as it might revealed in the United States, where the highest court has discretionary jurisdiction).

Beyond the welfare cases, there was a scattering of dissents, but they were all from the same judge, who had extensive personal conflicts with the president of the Court at that time. When this judge was very angry with the president, he labeled his frequent separate opinions as dissents; if the other judges succeeded in talking him out of it, he labeled the very same opinion a concurrence. (This information came from my interviews with judges, and also from working in the building, where fits of pique on the part of particular judges at the Court could be observed.) The overall dissent rate, then, was a combination of the actual number of social welfare cases brought to the Court and the daily state of the personal relations among particular judges. As a result, the number simply did not reflect the intensity or frequency of differences in fundamental values among the judges except on one issue, and then not in proportion to the number of cases that raised this particular point. The percentage of cases producing a dissent, as a result, was a number that couldn't mean what the other investigator might think. In another constitutional system, depending on a variety of specific factors, it might well reveal what the investigator thought it did. But the comparison across systems without this detailed knowledge struck me as being more dangerous than helpful.

That is not a general point about quantitative methods, however, because understanding a constitutional space may well include counting, which can be just as ethnographic in spirit as verbal description is. Ethnographic counting requires a particular theoretical sensibility, however, and it requires embedding the numbers in a broader account of the individual case. For example, the percentage of professional staff at a high court who spoke foreign languages might well be a decent measure of the potential international influences on these courts, since without language skills much of the literature on international human rights would have been simply inaccessible for consideration. If such a sensibility

about counting is based on nuanced knowledge of particular instances and the way they work, there is no principled reason to exclude numerical data from the category of ethnography, since the ethnographic concern is more with the level of detail of knowledge rather than with the form in which it comes. As a result, when “ethnography” is defined as the “methods capable of recovering the lived detail of the . . . landscape,” it is catholic about both form and method of acquisition (observing, interviewing, reading, and counting) while still identifying the sorts of things that have to be in view (the lived detail of the landscape).

So then why privilege the “lived detail of the politico-legal landscape” over other forms of knowledge, since this is the bit of the definition that does all of the methodological work? If constitutional ethnography is the contextually detailed, empirical study of particular constitutional systems, along with their histories, politics, cultural meanings, and social supports, its aim is to illuminate constitutional theory by reference to “thick” accounts (Geertz 1971). This means studying actual constitutional regimes to see how theoretical questions are answered in particular instances rather than resorting to either abstract constitutional principles or small-variable accounts of complex systems of governance. But that still begs the question of why thick accounts are preferable.

At the level at which constitutional knowledge is typically invoked—when comprehending existing constitutional systems or attempting to design new ones—knowing more about fewer cases tends to be more valuable than knowing less about more cases. That is because a great deal is at stake in individual constitutional systems that might be the object of study. It won’t do, in general, to have only a far-off, merely statistical sense of how state structures work. Each constitutional system matters in ways that make it particularly catastrophic to get individual cases wrong. Lumping all post-Communist constitutional systems together, for example, would badly misstate the degree of difference among legal cultures quite similar from a distance. From my own observation, Hungary is more similar to Germany than it is to Russia, which is in turn more similar to France, for example. Alternatively, grouping systems that share certain structural features can also mistake the degree of similarity. For example, one might assume that systems that have supreme courts instead of constitutional courts would share certain other family resemblances, but that would underestimate the similarity between Canada (with a supreme court) and South Africa (with a constitutional court) because they have a common constitutional language that is pivotal in rights cases. Like the stock market adage “Buy low—sell high,” which is elegantly simple and yet hard to follow in the event, the ethnographic adage “See particular—think general” is also difficult to accomplish in actual

methodological practice. That does not, of course, make it bad advice.

All that said, what have our authors done in their pieces in this issue? All have followed the ethnographic adage of looking particularly and thinking generally. They have given us a great deal of particular detail about particular places while keeping in mind the general concern with repertoires and themes that characterizes excellent ethnographic research. We learn in each piece about particular constitutional settings—including Russia, Estonia, Turkey, Canada, the European Union, and post-socialist Central Europe—while simultaneously learning about more general constitutional processes that might illuminate sites not specifically in focus here.

Given our focus on constitutional repertoires, the articles are grouped around three different constitutional problematics: (1) “Constitutional Edges,” (2) “Constitutional Articulation,” and (3) “States, Courts, and Publics.” “Constitutional Edges” engages ways of defining the boundaries of a constitutional field, “Constitutional Articulation” focuses on the relations among different levels of complex constitutional sites, and “States, Courts, and Publics” highlights the way that courts figure in defining the relationship between the individual and the state.

The two articles in “Constitutional Edges” examine the way in which the boundaries of constitutional orders are constituted. Jiří Přibáň’s article, “Reconstituting Paradise Lost,” explores the ways that constitution writers in post-socialist Central Europe understood the history that they were continuing through their constitutive actions. Constitution makers, in Přibáň’s analysis, faced a choice between ethnic and civic conceptions of national identity, both of which had modern histories in the region but each of which implicated the other in some way. Přibáň’s examination of the different constitutional processes in the Czech Republic, Slovakia, Poland, and Hungary show how differently these alternatives and their possible combinations could be imagined and how, in choosing a constitutional future, each set of constitution makers was also choosing a constitutional past. Dicle Kogacioglu’s study of the dissolution of political parties by the Constitutional Court in Turkey, “Progress, Unity, and Democracy,” focuses on the way in which these key concepts are understood in the process of defining the legitimate ideological boundaries of the state. The Turkish Constitutional Court is assigned the task of dissolving anti-constitutional political parties, which gives it pride of place in defining both what the constitution means and also what is intolerable within the constitutional order. As Kogacioglu shows, the jurisprudence of the Constitutional Court does more than simply embroider constitutional clauses—it weaves the very fabric of Turkish democracy.

Both Příbáň's and Kogacioglu's articles illuminate different ways in which a constitutional order can come to define its own edges, and together they show how present constitutional moments represent the intersection of imagined constitutional pasts and imagined constitutional futures.

In the second section of this issue, "Constitutional Articulation," three articles examine how different levels of complex constitutional orders are related to each other. Nancy Maveety and Anke Grosskopf's article, "'Constrained' Constitutional Courts as Conduits," focuses on the Estonian Constitutional Tribunal and the politically sensitive decisions it made in the 1990s on language rights in Estonia. With a sizeable Russian minority that represented the former colonial power in Estonia, the new nation's leaders were as eager to exclude these interlopers as the European Union, which Estonia aspired to join, was determined to ensure nondiscrimination. Between the domestic political pressures for exclusion and the transnational political pressures for inclusion, the Estonian Constitutional Tribunal acted as a "conduit" that enabled a workable compromise to be reached. Maveety and Grosskopf show how constitutional courts can assist constitutional articulation by translating from one constitutional language to another. Rachel Cichowski's article, "Women's Rights, the European Court, and Supranational Constitutionalism," also examines the relationship between European-level law and national-level law, highlighting the contested issue of gender equity as an example. On this issue, national and European courts have colluded, dragging the sometimes reluctant member state governments along with them. Cichowski's article and the Maveety and Grosskopf article show how courts are particularly well-suited to speeding integration across political levels. Alexei Trochev's article, "Less Democracy, More Courts," adds a useful corrective and complication to this picture. In Russia, the eighty-nine regions (roughly the equivalent of states) were given the power to create their own constitutional courts, but while a majority of the regions included constitutional courts in their regional constitutions, only seventeen actually created such courts, and two of those failed. What accounts for why some regions actually introduced constitutional courts and others did not? Trochev highlights aspects of the local political situation in each case, demonstrating convincingly that the regions that had the greatest entrenchment of their local executives had the greatest likelihood of starting these courts. Trochev's conclusion is that courts are used not to mediate between the center and the regions or even between executives and legislatures within the regions but are used instead to shore up entrenched executive power and to defend it from challenge. As a result, the less democratic choice there is within a region, the more likely there is to be a constitutional court. This

article provides a useful counterweight to the other two in this section, for it shows that courts do not necessarily mediate among political levels. Instead, they may be created precisely to defend particular constitutional institutions against others.

In the final section, “States, Courts, and Publics,” two articles point to the different ways that individual citizens can use courts to leverage their influence over political officials. Peter Solomon’s article, “Judicial Power in Russia,” examines the many ways that individuals can sue state officials so that Solomon can generate some measure of the independence of courts from state power. Solomon finds that success rates for individuals suing state officials ranged from around 80% in the general courts and up to 90% in military courts to a bit less than 50% in the economic courts and only 25% when handled by the procuracy. By looking at the range of cases and the range of possible venues, Solomon paints a nuanced picture of the relative independence of courts and, indirectly, shows how the courts create a vector for influence by individuals in state processes. With an entirely different issue in a very different legal culture, Troy Riddell shows much the same with respect to language rights in Canada. In “The Impact of Legal Mobilization and Judicial Decisions,” Riddell examines the impact of the decisions of the Supreme Court of Canada on the realization of minority language rights in the public schools. Court decisions in hand, active parents were able to get school districts throughout Canada to provide the required educational opportunities for Francophone students outside Quebec. Solomon’s article focuses on individual cases and their respective success rates while Riddell’s article focuses on interest group mobilization before and after key court decisions, but both show how turning to the judiciary can help citizens hold state officials to their constitutional obligations.

There were, of course, other ways that these articles could be arranged together, ways that might have highlighted different common or competing constitutional mechanisms. For example, Solomon’s article on Russia shows how national-level courts exercise substantial independence from political officials, as seen in the rates with which judges ruled against officials when citizens brought suit. But Trochev’s article on Russia highlights the political dependence of the regional courts in the same country. Kogacioglu’s article highlights the way in which the Turkish Constitutional Court created an inward-looking nationalist definition of democracy, while Maveety and Grosskopf show how the Estonian Constitutional Tribunal opened up Estonian constitutionalism to the claims of European institutions. Přibáň’s article shows how understandings of history guided constitutional processes, while Cichowski’s article reveals how absolutely new transnational law has supplanted more traditional national law even in an area as

sensitive as gender equity. Both for Riddell as for Maveety and Grosskopf, language rights are central to the constitution of new democratic publics, while for Kogacioglu, democratic ideology in Turkey is constructed precisely in excluding the special claims of the minority language population. The care with which the authors in this issue have illustrated the specifics of place provide the readers of these articles with many ways to assess and recombine the insights provide here.

Since so many of our articles focus on the role of courts in constituting and sustaining constitutional orders, it is only fitting that the review essay for our issue should take on three new books that contain broadly comparative analyses of the roles of judges in constitutional systems. Our reviewer, Leslie Goldstein, has highlighted the mechanisms through which judges exercise influence in political contexts, which provides a broader perspective against which to locate our more detailed case studies.

I should mention that while this issue begins with something like a methodological manifesto, these articles were not screened on the basis of any such manifesto. In response to a very open call for papers, the *Law & Society Review* received many excellent submissions. Each of the articles selected for this issue went through a rigorous refereeing process that included a minimum of two rounds of external review by referees who had no manifesto before them. A wide range of referees participated in this process of providing feedback to authors, and I am grateful to them. The collection that resulted is, in my view, excellent; what I most regret about this process is that other wonderful examples of constitutional ethnography were screened out along the way.

This introduction, while I think it describes the articles in this special issue, by no means commits the authors of these articles to the vision outlined here. Since the introduction was written only after the other articles were done, the authors not only did not, but they could not have, adjust(ed) their inquiries to the concerns outlined here. The articles stand on their own as the work of their creators. This introduction provides one framing of these pieces, but it is not the only frame there is.

References

- Aron, Raymond ([1965] 1990) *Democracy and Totalitarianism*. Repr. Ann Arbor: Univ. of Michigan Press.
- Bagehot, Walter (1993) *The English Constitution*. Repr. London: Fontana Press (Orig. pub. 1867, 1872).
- Cartwright, Nancy (1983) *How the Laws of Physics Lie*. Oxford, UK: Clarendon Press.
- Cicourel, Aaron (1967) *The Social Organization of Juvenile Justice*. New York: Wiley.

- Comaroff, John, & Jean Comaroff (1992) *Ethnography and the Historical Imagination*. Boulder: Westview Press.
- (2003) "Ethnography on an Awkward Scale: Postcolonial Anthropology and the Violence of Abstraction," 4 *Ethnography* 147–79.
- Dirks, Nicholas (2002) *Castes of Mind: Colonialism and the Making of Modern India*. Princeton: Princeton Univ. Press.
- Dunn, Stephen (2002) "Prefatory Note," Cancer Guide, http://www.cancerguide.org/median_not_msg.html (accessed February 19, 2004).
- Durkheim, Emile ([1893] 1984) *The Division of Labor in Society*. Translated by W. D. Halls. Repr. New York: Free Press.
- Foucault, Michel (1997) "Society Must Be Defended." *Lectures at the Collège de France 1975–1976*. Translated by David Macey. New York: Picador/St. Martin's Press.
- Friedrich, Carl J. (1957) *Constitutional Reason of State: The Survival of the Constitutional Order*. Providence: Brown Univ. Press.
- Geertz, Clifford (1971) "Thick Description: Toward an Interpretive Theory of Culture," in C. Geertz, *The Interpretation of Cultures*. New York: Basic Books.
- Gould, Stephen Jay (1991) "The Median Isn't the Message," in *Bully for Brontosaurus: Reflections in Natural History*. New York: Norton.
- Guarneri, Carlo, & Patrizia Pederzoli (2002) *The Power of Judges: A Comparative Study of Courts and Democracy*. Oxford: Oxford Univ. Press.
- Hirschl, Ran (2004) *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard Univ. Press.
- Kennedy, Ellen (2004) *Constitutional Failure: Schmitt in Weimar*. Durham: Duke Univ. Press.
- Kritzer, Herbert (2002) "Stories from the Field: Collecting Data Outside Over There," in J. Starr & M. Goodale, eds., *Practicing Ethnography in Law: New Dialogues, Enduring Methods*. New York: Palgrave Macmillan.
- Maine, Henry Sumner ([1861] 1986) *Ancient Law*. Repr. New York: Dorset Press.
- Marcus, George, & Michael Fisher (1986) *Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences*. Chicago: Univ. of Chicago Press.
- Merry, Sally Engle (2000) *Colonizing Hawai'i: The Cultural Power of Law*. Princeton: Princeton Univ. Press.
- (2002) "Ethnography in the Archives," in J. Starr & M. Goodale, eds., *Practicing Ethnography in Law: New Dialogues, Enduring Methods*. New York: Palgrave Macmillan.
- Mommsen, Wolfgang (1984) *Max Weber and German Politics 1980–1920*. Translated by Michael S. Steinberg. Chicago: Univ. of Chicago Press.
- Montesquieu, Charles de Secondat ([1748] 1989) *The Spirit of the Laws*. Edited and translated by Anne M. Cohen, Basia Carolyn Miller, & Harold Samuel Stone. Repr. Cambridge: Cambridge Univ. Press.
- Rossiter, Clinton L. (1948) *Constitutional Dictatorship: Crisis Government in Modern Democracies*. Princeton: Princeton Univ. Press.
- Scheppele, Kim Lane (2003) "The Agendas of Comparative Constitutionalism," 13 *Law and Courts* 5–23 (<http://www.law.nyu.edu/lawcourts/pubs/newsletter/spring03.pdf>).
- Stone Sweet, Alec (2000) *Governing With Judges: Constitutional Politics in Europe*. Oxford: Oxford Univ. Press.
- Weber, Max ([1906] 1995) "Russia's Transition to Pseudo-Constitutionalism," in Max Weber, *The Russian Revolutions*. Translated and edited by Gordon C. Wells & Peter Baehr. Repr. Ithaca: Cornell Univ. Press.
- ([1925] 1968) "Economy and Law (The Sociology of Law)," in G. Roth & C. Wittich, eds., *Economy and Society*. Translated by E. Shils (1956). Repr. Berkeley: Univ. of California Press.
- Willis, Paul, & Mats Trondman (2000) "Manifesto for *Ethnography*," 1 *Ethnography* 5–16.