The premise of *The Migration of Constitutional Ideas* is that fast-developing phenomena in comparative constitutional law have rendered inadequate the field’s conceptual frameworks. Under the direction of Sujit Choudhry, leading scholars have set out to develop a new framework capable of explaining cross-constitutional practices and influencing the direction of their development. The authors’ aims are as ambitious as their choices are, at times, surprising.

Few disagree that the field of comparative constitutional law could benefit from some degree of reorientation. Too much of the North American debate fails to place controversies about the judicial use of foreign law within the broader framework that makes such debates possible in the first place. The field’s standard canon of references remains confined to a few legal systems, and, thus, it speaks little to the jurisprudential conundrums that preoccupy constitutional actors around the world. As far as methodology is concerned, the growing recognition that good methods of constitutional analysis should combine normative and descriptive elements is matched only by an awareness that no available methodology currently satisfies that standard.

By choosing constitutional migrations as the overarching theme of this volume, the contributors hope to approach the gap between theory and practice in comparative constitutional law from the best available standpoint. Interestingly, this is the standpoint of comparative law, which has been the primary field for research into how legal ideas travel in private law. This choice is, at once, surprising and refreshing. The prominence of normative questions with regard to comparative constitutional studies makes the turn to comparative law less than self-evident, given that field’s notorious “normativity problem.” Polarized between functionalism, which extols law’s practical role, and culturalism, with its keen sensibility for law’s deep social roots, comparativists...
have seldom been at ease speaking a nuanced dialect of legal normativity. Why, then, turn to comparative law in search for the methodology and normative underpinnings of comparative constitutional phenomena?

One of this project’s great strengths is its answer to that question. Rather than applying the preexisting framework of comparative law to constitutional phenomena, the project seeks to change the conceptual landscape of the comparative field as well. More specifically, it rejects the model of “borrowing” in favor of a new metaphor: “migration.” The transition from “borrowing”—or from concepts such as “legal transplants,” with their family resemblance to borrowing—to “migration” can open up the conceptual framework, which, in the contributors’ view, explains comparative constitutional phenomena. These concepts are just words when they are first introduced; conclusions about their explanatory power must await detailed analysis. Even so, one should not downplay the importance of the choice of words. Here is how one contributor explains the liberating effect of the migration metaphor: “[m]igration is an idea that allows consideration of greater flexibility, larger networks of relation, more complicated connections between points of origin and points of destination that occur in the world of legal ideas. Migration is a metaphor that should open our minds in the field of comparative constitutional law.”

Equipped with this fluid, multifaceted, and nonhierarchical theoretical model, the comparative constitutional scholar can stroll through the comparative law field without fear of being pulled into any of its camps. Functionalism, which sees in convergence the aim or outcome of the comparative enterprise, has less currency than an explanatory framework that does not downplay the role of either luck or ideology in the process of constitutional migration and that studies the influence of nontraditional constitutional actors in the bottom-up formation of constitutional meaning. Similarly, culturalism will lose some of its appeal to scholars interested less in the existence of legal/constitutional cultures than in how those cultures change over time. As Choudhry puts it, “given the centrality of migration to the contemporary practice of constitutionalism, the truly interesting question is why and how such changes take place.”

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3 This is not the first time the migration metaphor has been used in a comparative constitutional context. See Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 Conn. L. Rev. 907 (2005).

4 For a study of borrowing in comparative constitutional law, see the symposium entitled *Constitutional Borrowing*, in 1 Int’l J. Const. L. (I•CON) 177–324 (2003).


The potential for constitutional migration to transform the field of comparative constitutional law seems, at least in the abstract, very promising. This volume makes great strides in exploring its effects at both the doctrinal and discursive levels. Choudhry and his team of authors do not make one of the common mistakes in “paradigm-shift” studies: losing sight of the hard questions in the process of replacing an old paradigm with a new one. The contributors directly confront questions about the criteria for proper methodologies, the relation between international and domestic legal orders, the direction of constitutional influence, among others. To get a better sense of the case they make, and its ultimate success, it helps to have an overview of the different contributions.

The volume is divided into four parts. Part one includes contributions by Ran Hirschl, Mark Tushnet, and Lorraine Weinrib to methodological debates in comparative constitutionalism. Much of part two is dedicated to a discussion, with reference to specific case studies, of the convergence tending toward a liberal democratic model. A chapter by Jeffrey Goldworthy on judicial review and the convergence thesis is followed by Michel Rosenfeld and András Sajó’s in-depth study of the migration of free speech from the U.S. and Germany to new democracies like Hungary. This section is rounded out with Jean-François Gaudreault-Desbiens’s comparative interpretation of the Supreme Court of Canada’s landmark Quebec Secession Reference decision and with Brenda Cossman’s study of cultural changes in the meaning of marriage from a cross-constitutional perspective.

The essays in part three present robust theoretical frameworks for conceptualizing the complex migration that is taking place within and among the domestic, international, and transnational legal orders. Mayo Moran analyzes the nature of legal authority as set against the cross-jurisdictional construction of constitutional values, along with its domestic impact at both vertical and horizontal levels. Mattias Kumm elaborates a set of principles of engagement, from a constitutionalist perspective, aimed at regulating the interaction between national and international legal orders. David Schneiderman discusses different approaches to the interpretative authority of the North American Free Trade Agreement, while Neil Walker explores the model of constitutional migration in context of the European Union.

Finally, part four applies the constitutional migration framework to the legal debate about terrorism in the aftermath of September 11th. Pursuing a theme present in her previous scholarship on constitutionalism, Kim Lane Scheppele’s essay explores the migration of anticonstitutional ideas. Specifically, she analyzes the adoption of antiterrorism measures pursuant to resolutions of the Security Council under the guise of an ill-defined “international state of emergency.” The last two chapters include an analysis by Kent Roach of Britain’s Terrorism Act of

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8 Ran Hirschl, On the Blurred Methodological Matrix in Comparative Constitutional Law, in THE MIGRATION OF CONSTITUTIONAL IDEAS 64.
2000 and a comparative and historical analysis by Oren Gross of the imposition of martial-law regimes.

As one can see from this wide variety of topics, the general structure of this volume reflects an ambitious research agenda that is still in its formative stages. The structure of the volume and the plausibility of its proposed model suffer from the lack of more focused contributions. The unity it lacks is of subject matter. While the contributors to this volume are all committed comparativists, they do not belong to a common school of legal thought and therefore, quite naturally, do not approach their respective topics from a similar jurisprudential perspective. Certainly, the diversity of their approaches is a strength and not a weakness of this volume. Nonetheless, as far as the subject matter is concerned, a more systematic approach would have offered the reader more than just a glimpse of what comparative constitutional discourse would look like if it turned to constitutional migrations. The volume makes significant inroads for such a treatment, especially in Choudhry’s introduction, the methodological debate in part one, and in the contributions of Schepppele, Kumm, Cossman, and Moran. Yet, at times, the contributions slide into familiar debates about judicial review or the authority of foreign law in ways that fail to highlight the novelty of the constitutional migrations model.

These difficulties in the structure of the volume are lessened by the likelihood that its chapters will be read individually. Here, this volume has a lot to offer and I will highlight just a few of its contributions. Let us turn, first, to the pair of methodological arguments presented in part one. To the extent there is anything comparative about it, doing comparative constitutional law requires an ability to explain how constitutional ideas travel among different constitutional jurisdictions. Such an ability seems all the more important within a conceptual framework that takes constitutional migrations as its *explanandum*. These are standard concerns in political science, and yet, as Ran Hirschl’s essay demonstrates, comparative constitutional scholars have not significantly reflected on them until recently. His chapter is a welcome crash course in inference-oriented principles of research design and case selection that are necessary for projects aimed at determining causality or developing explanatory knowledge.  

In a contribution that complements Hirschl’s, Mark Tushnet reminds the reader of the “questions implicated in doing comparative constitutional law as law.” Such an undertaking, he argues, requires close attention to the issues regarding the institutional legal structure peculiar to each legal system, and can pose great difficulties to comparative projects in constitutional law. This is the challenge of contextualism to which alternative models, such as “borrowing,” fall victim but which the migration framework can accommodate. However, as Tushnet’s brief discussion of hate speech in Canada and the U.S. shows, the challenges of contextualism are momentous; it is unclear whether, and how, the migration model can address them in a satisfactory fashion. That

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being said, Tushnet and Hirschl offer discussions of the different methodological aspects in comparative constitutional studies that scholars will find helpful. While each is careful not to overstate his claim, difficult methodological choices will have to be made. Exactly how the paradigm of constitutional migrations influences these choices remains an open question.

The focus on the migration of constitutional ideas also provides a conceptual framework that revisits the traditional boundaries of the constitutional domain. The reexamination is partly the effect of new normative vocabulary, which is more nuanced than, for instance, an emphasis on “borrowing” or “transplants” would allow. In her contribution, Dean Moran uses this framework to shift the focus of the analysis from the cross-constitutional migration of constitutional rights to that of constitutional values. She then identifies in this shift the normative medium for expanding the constitutional domain to include private and common law. This complex relationship between rights and values leads Moran to reject what traditionally has been seen as a direct relationship between the force of constitutional rights and their effect, and to conclude that “the absence of force and presence of effect is constitutive of the relationship between constitutional human rights and private common law.” ¹⁰

This expansion of the constitutional domain invites Moran’s reflection on new forms of legal authority—what she terms “influential” authority—to be placed alongside the well-established precedential and persuasive models.

Similar concerns, in terms of both the interplay among different legal spheres and the need for justification, underlie the contributions by Kumm and Scheppele. They use the migration metaphor to examine the structural relationships between international and domestic legal regimes. Since the migration of legal ideas is not free-flowing outside of existing legal structures, at least under a dualist system, the decision to allow migration rests with the domestic constitutional sphere. Locating the ultimate center of authority is important because that is where the migration of anticonstitutional ideas can be halted. Kumm develops an elaborate and ingenious set of principles that should guide that choice. These two contributions remind us that anti- or unconstitutional ideas can also migrate. Hence, we should not mistake constitutional migrations for a cause worthy of celebration but should recognize them, instead, as phenomena to be studied.

Original in its approach and bold in its ambition, this volume is a contribution to the field of comparative constitutional law that no student or scholar can afford to overlook. It constitutes a major step toward refining our comparative sensibilities in ways that sacrifice neither the rigors of accurate explanation nor the virtues of normativity in speculative thought.