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ARTICLE

Special Issue — Law and Political Imagination: The Perspective of Paul Kahn

The World of Constitutionalism is Not Flat

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Abstract

In recent years, the emerging field of comparative constitutional law has been swept by a new approach with a scientific allure known as the Large-N approach. The methodology of this approach requires flattening the world of constitutional law by reducing the meaning of constitutional determinations into countable data. One of the difficulties in resisting this trend is that while many constitutional scholars have offered accounts that do not flatten the world of constitutional law, their methodology remains unarticulated and rarely discussed. Paul Kahn is one of the few scholars who offered an account of how to conduct non-doctrinal research of constitutional law. This Article aims to distil several principles of Kahn's methodology, discuss its limitations, and demonstrate why it is superior to the Large-N approach. To achieve these goals, I chose to focus on three books on the German constitutional system that are based on dissertations written at Yale University, where Kahn teaches. Based on my discussion of these three books, I argue that Kahn's methodology offers an approach which I dub the "Rich Picture" approach (or Rich-P). The Rich-P approach exposes that participants in a constitutional discourses understand constitutional materials, such as constitutional documents or judicial opinions, through a conceptual array that varies between legal orders. Without acknowledging the conceptual "eyeglasses" we wear when investigating constitutional determinations, measurements of the entire world of constitutionalism may lead to catchy soundbites and tweets, but to conclusions that are misleading at best.

Keywords: Comparative Constitutional Law; Large-N Methodology; German Constitutional Court; Judicial Legitimacy; Social Imaginaries

A. Introduction

The question of methodology has plagued the academic study of law in the US for many decades, particularly the study of constitutional law. To this day in Europe, much of legal scholarship has been engaged in analyzing doctrinal constitutional law by investigating how courts and scholars have used a particular doctrine and how that doctrine should be further developed.[1] The great merit of doctrinal research is its distinct legal methodology that enables a conversation between academic lawyers and the legal profession. However, because legal realism has left its mark on American legal academia, the belief that doctrinal legal analysis should be the focus of academic legal analysis has dissipated in the

[1]*See* Armin von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe*, 7 INT'L J. CONST. L. 364, 391 (2009) ("Throughout Europe, legal doctrine is an important – if not the primary – emphasis of constitutional scholarship."); Rob van Gestel & Hans-W. Micklitz, *Revitalizing Doctrinal Legal Research in Europe: What About Methodology?* 6 (EUI Working Papers, Law 2011/05, 2011) ("Until today . . . doctrinal legal research has managed to keep its dominant position both at the national and the European level.").

US and other systems that have been heavily influenced by it.[2] As Paul Kahn observes, "the legal realists defeated the claims for the autonomy of law by showing that doctrine alone could neither determine nor explain outcomes."[3] Subsequently, researching doctrinal law ceased to be the central endeavor of legal academics in the US.[4] As scholars stopped believing that doctrinal analysis by itself decides cases, especially in constitutional law, they began investigating other factors that determine the results of cases and whether there are other issues worth exploring beyond the factors that determine legal decisions.[5] As a result, the question of methodology raised its head.

Legal realism had an answer to the methodology question. In its desire to become more scientific, legal realism pointed to social science as the proper methodology for legal scholarship.[6] And indeed, the research in some fields of law has been significantly influenced by social science, and most prominently, by the economic analysis of law.[7] Constitutional law was also not immune to the influence of social science. For example, the discussion of judicial legitimacy—a concept which is central to this Article—in American constitutional law is now dominated by measurements based on methodologies devised by social scientists.[8] Political scientists have claimed that judicial legitimacy should be equated with a measurable metric by utilizing public opinion polls that measure public support of courts.[9]

However, much of the scholarship conducted by American constitutional scholars remains immune to the influence of social science. While following the rise of legal realism, constitutional scholars have used various methodologies that were not based on social science and, at the same time, have not adhered to the doctrinal methodology; very few works tried to make sense of these methodologies. Kahn's work—and most prominently his book *The Cultural Study of Law, Reconstructing Legal Scholarship*[10]—offers a methodology for constitutional studies post-legal realism, which is not based on social science.

In recent writings, Kahn argues that his work is part of "the methodless character of the humanities."[11] He argues that research in humanities is "a matter of interpretation" which is "a free, creative act" lacking methodology. As "[c]reation cannot be subject to rule, and without rule there can be no method,"[12] his approach to studying law is methodless. Kahn denies that the

[2]*See, e.g.*, Gestel & Micklitz, *supra* note 1, at 1 (quoting Eric Posner's assessment that "doctrinal legal research is dead", at least in the US); Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 241 (2000) ("In Canada, and even more so in the United State, doctrinal scholarship is still very much alive – primarily in the form of student and practitioner texts – but it ceased to be noteworthy academically long ago.").

[3]Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141 (2001).

[4]*See, e.g.*, Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1116 (1981) ("Particularly in constitutional law … [scholars became] engaged in an enterprise very different from traditional doctrinal analysis.").

[5]*See* Gestel & Micklitz, *supra* note 1, at 5 ("Basically, one can say that American legal realists tried to link the indeterminacy of especially judicial lawmaking with the need to draw on extra-legal considerations to resolve disputes."); Lani Guinier, *Demosprudence* through Dissent, 122 HARV. L. REV. 4, 133 (2008) ("By the 1990s, however, legal academics had begun to engage in more theoretical and interdisciplinary scholarship, and by 2007 many law professors had ceased publishing articles of interest to legal professionals and judges.").

[6]*See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 92 (1997) ("Realism marked the marriage of social science and law.").

[7]*See* Daniel B. Kelly, *Law and Economics, in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 85 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin, & Henry E. Smith eds., 2020).

[8]For a discussion of how legal scholarship capitulated and adopted a measurable understanding of judicial legitimacy, see Or Bassok, *Beyond the Horizons of the Harvard Forewords*, 70 CLEV. ST. L. REV. 1 (2021) (showing through an analysis of the Harvard Law Review forewords the rise to dominance of the idea that judicial legitimacy is to be identified with public support as measured in opinion polls).

[9]*See* James L. Gibson, Gregory A. Caldeira, Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998).

[10]PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999).

[11]Paul Kahn, *Freedom and Method* in RETHINKING LEGAL SCHOLARSHIP—A TRANSATLANTIC DIALOGUE 499 (Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin eds., 2017).

[12]*Id.* at 499.

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moment of creation is bound to rules not only in humanities but also in paradigm shifts in science.[13] There is a "surplus, which is the domain of freedom."[14] He also denies that in humanities and law, the manner in which we are persuaded to adopt a position is based on a rule or proof.[15] I will not dispute Kahn's insistence to preserve a moment of freedom in our thinking, nor will I examine the relationship between rules and freedom. However, I do dispute the idea that Kahn's approach lacks method. It is evident from how Kahn conducts research, as well as from his writing on his approach that he has a certain way through which he believes truths about legal orders are to be discovered. For this reason, in chapter three of his book, *The Cultural Study of Law*, that is titled "Methodological Rules," he writes that "[i]n this chapter, I describe the methodology of this cultural study of law, setting forth a series of rules to guide inquiry."[16] Even in his latest writing he does not deny the existence of "order" in the sense of phases for conducting an inquiry.[17]

The first goal of this Article is to illuminate certain features of Kahn's methodology. Kahn explains that teaching the method of his methodless approach is best done through examples.[18] I follow this advice by reviewing three books on Germany's constitutional order published between 2015 and 2016 and originated in doctoral dissertations written at Yale. The three books are Stephan Jaggi's book *The 1989 Revolution in East Germany and its Impact on Unified Germany's Constitutional Law*,[19] Michaela Hailbronner's book *Traditions and Transformations: The Rise of German Constitutionalism*,[20] and Justin Collings's book *Democracy's Guardians: A History of the German Federal Constitutional Court*.[21] Kahn's work develops, distills, and explicates certain features of the methodology that several constitutional scholars at Yale law school have used since the 1990s to investigate mainly, but not exclusively,[22] American constitutional law. All of these scholars looked at American constitutional history in an attempt to extract certain structural features that explain constitutional development.[23] Their methodology was "in the air" at Yale Law School and naturally influenced students who wrote their doctoral dissertations on constitutional law. Collings wrote his doctorate at Yale's History Department, but he studied simultaneously for his JD degree at Yale Law School. Hailbronner and Jaggi both completed law degrees in Germany prior to attending Yale for their LLM and JSD degrees. While these three doctoral dissertations do not follow any list of methodological rules set by Kahn, they do allow me to point to certain methodological principles that Kahn formulated and their limitations.

Kahn's methodology offers a thick description/rich picture of constitutional orders and stands in stark contrast in terms of its methodology to the Large-N approach that is currently in vogue.[24] Dubbing Kahn's approach the Rich-Picture (Rich-P) methodology, my second goal in this Article

[13]*See id.* at 500.

[14]*Id.* at 508.

[15]*Id.* at 501.

[16]Kahn, *supra* note 10, at 91.

[17]Kahn, *supra* note 11, at 499.

[18]Kahn, *supra* note 11, at 518 ("Sometimes the pedagogy of the example is literally all that I can offer.").

[19]Stephan Jaggi, The 1989 Revolution in East Germany and its Impact on Unified Germany's Constitutional Law (2016).

[20]Michaela Hailbronner, Traditions and Transformations: The Rise of German Constitutionalism (2015).

[21]Justin Collings, Democracy's Guardians: A History of the German Federal Constitutional Court 1951–2001 (2015).

[22]*See, e.g.*, Bruce Ackerman, Revolutionary Constitutions: Charismatic Leadership and the Rule of Law (2019).

[23]Kahn emphasizes that his work is "about the American culture of political legitimacy through law." *See* Kahn, supra note 3, at 156. For a discussion of various substantive themes—rather than methodological ones—that characterize the constitutional scholarship at Yale law school during the last generation, see Or Bassok, *Paul Khan's Origins of Order: Project and System in the American Legal Imagination*, 13 Jurisprudence 301 (2022).

[24]See Kahn, *supra* note 10, at 91 (speaking of his methodology as "thick description of the world of meaning that is the rule of law."). For a review of the rise of the Large-N approach, see Niels Petersen & Konstantin Chatziathanasiou, *Empirical Research in Comparative Constitutional Law: The Cool Kid on the Block or all Smoke and Mirrors?*, 19 Int'l J. Const. L. 1810 (2021); Madhav Khosla, *Is a Science of Comparative Constitutionalism Possible?*, 135 Harv. L. Rev. 2110 (2021).

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is to show that this methodology is vital to prevent the distortion of understanding world constitutionalism by the Large-N approach. I argue that the Large-N approach flattens our understanding of world constitutionalism. In "flattens," I do not mean that this approach fails to detect any differences between constitutional systems. Rather, in order to compare according to a numerical metric, constitutional determinations must be translated into measurable data that flattens them. This flattening is similar to attributing monetary value to diverse activities so they can all be compared according to the same metric. In this manner, the meaning of all constitutional determinations is understood on a surface level so to allow coding and counting. Furthermore, in order to measure the data collected from diverse constitutional systems, the Large-N methodology needs to posit data on the same terrain; otherwise, the data cannot be counted. The doctrine of "freedom of religion" functions very differently in various systems. However, to count it as part of a Large-N research, it will be considered as the same in all these systems.

To avoid too much abstractness in my arguments, think of the doctrine of proportionality. On the surface, many systems adopted the same doctrine and applied the same tests. However, if we use the Rich-P methodology, we realize that the proportionality doctrine functions very differently in a system in which it is considered part of the constitutional expert's legal toolkit, in comparison to a system in which law is understood as politics by other means and proportionality is understood as merely rhetoric to hide this reality.[25] When we look at proportionality as part of rich pictures depicting these systems, we realize that the two constitutional orders have two very different doctrines with the same name.

Using three dissertations that were published as books to distill central traits of the Rich-P methodology and criticize it means that some parts of this Article are dedicated to reviewing these three books. My method in reviewing these books can be best explained by a very insightful anecdote from the interaction between two great philosophers, Ludwig Wittgenstein, and Gottlob Frege. Wittgenstein wondered why Frege criticizes idealism "on its weak side, whereas a worthwhile criticism of idealism would attack it just where it was strongest." Frege replied "of course you attack your enemy on this weak side."[26] By and large, book reviews can be divided into those that take Frege's insight and criticize books on their weak side and those that take Wittgenstein's position and criticize books on their strongest side. Both methods have merit. In this Article, I mostly follow Wittgenstein's approach and review only the central thesis of each of these three books. By and large, I avoid punch-by-punch criticism of weak points because my main focus is not reviewing the books but extracting from them insights on the Rich-P methodology.

B. Jaggi and the Historical A-Priori

Jaggi states early in his book that "[w]hat all traditional explanations have in common is that they completely ignore the possibility of a substantive impact of the 1989 Revolution on unified Germany constitutional law."[27] Jaggi is very explicit in his critique of the "traditionalist" methodology controlling German constitutional law as limited to applying the law on facts.[28] A similar critique is also present in Hailbronner's book though in much less explicit terms.[29] It represents well how American scholarship views German constitutional law scholarship as limited

[25]*See* JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013).

[26]P. T. Geach, *Preface* in GOTTLOB FREGE, LOGICAL INVESTIGATIONS, at vii (1977).

[27]JAGGI, *supra* note 19, at 12. *See also* Geach, *supra* note 26, at 24–25.

[28]*See* JAGGI, *supra* note 19 ("One of the problems that particularly German lawyers seem to have when trying to make sense of the events in the GDR in 1989 is that revolution is not a legal term. Hence, one cannot simply subsume the 1989 events under a legal definition in order to decide whether or not they amounted to a real revolution.").

[29]*See* HAILBRONNER, *supra* note 20, at 41.

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by its focus on applying and developing constitutional doctrine.[30] Hailbronner and Jaggi's rejection of this type of thinking aligns with the way constitutional scholarship is done in the US post legal realism, and is central to their claim to be able to offer an innovative look on German constitutional law and their adoption of the Rich-P methodology.

Yet, the traditionalist approach has at least one advantage: A clear methodology. In analyzing the application of human-created norms on facts, lawyers have a great deal of experience and expertise that explain the appeal of the traditionalist methodology. Sure, there are difficult questions. How do we identify a legal norm? How do norms, which use human-created language, project themselves on facts which are "out there"? Most of these difficult questions would be considered outside doctrinal investigation, relegated to the field of jurisprudence. However, traditionalists can map a clear space for legal research of constitutional law with its unique and clear methodology.

While Kahn does not use the term "traditionalists," for him the category of traditionalists would be broader than Jaggi's and would include even scholars who digested the insights of legal realism as long as their scholarship still imitates the work of judges by "stating what the law is and how it should be reformed."[31] These scholars may have broadened the scope of their inquiry beyond a concrete controversy in a specific case and beyond the application of the law on facts. Still, both the judge and scholars of this genre are committed to the dogma of the rule of law as well as to a similar methodology.[32] Kahn writes,"[l]egal scholars are not studying law, they are doing it."[33] This point is perhaps best elaborated by Kahn's analogy between this type of scholarship and the work done in divinity schools.[34] "Traditionalists," even if they criticize the caselaw, share a commitment to the authority of certain texts: The law in the case of law schools and the holy scriptures in the case of the divinity school. Traditionalists may aim to explain the logic behind the doctrines expressed in the texts, interpret the texts, investigate ways to apply them and even criticize them but in all these ways they are merely working under the rule of law paradigm.[35] Kahn's desire is to study the phenomenology of the law in a manner akin to the study of religions in the religious studies departments.[36] Looking at the rule of law from the outside and without a commitment to it, Kahn is interested in the social imaginary that allows it to thrive.[37]

Jaggi argues that traditionalists miss the full impact the 1989/90 events had on German constitutional discourse because their methodology fails to capture the shift in the prism through which German constitutional law is understood. He does not deny that traditionalists attribute some meaning to the 1989 constitutional changes. After all, Jaggi's attempt to give the 1989/90 events their proper place in the German constitutional narrative relies in part on explicit amendments to the Basic Law, on legislation following unification,[38] and on judgments of the Constitutional Court that explicitly refer to the unification as a reason for changes in doctrine.[39] Obviously, traditionalists do not deny these changes to constitutional doctrine. Doing so would mean that they are not loyal to their own methodology.

[30]*See* Or Bassok, *Showing Germans the Light*, INT'L J. CONST. L. BLOG (May 22, 2013), http://www.iconnectblog.com/2013/05/showing-germans-the-light.

[31]KAHN, *supra* note 10, at 19.

[32]*See also id.* at 26 (explaining that most law professors "write for judges because they conceive themselves as potential judges.").

[33]*Id.* at 27.

[34]*See id.* at 4.

[35]*See* Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 163–64 (2006).

[36]*See* Kahn, *supra* note 3, at 156–58.

[37]*See* KAHN, *supra* note 10, at 27.

[38]*See* JAGGI, *supra* note 19, at 161–70, 185–86.

[39]*See id.* at 184–85, 187–92.

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Jaggi's critique of traditionalists is that they view the changes to German constitutional law following the 1989 events as an evolutionary development in doctrine rather than a result "of the 1989 Revolution's substantive impact."[40] Subsequently, they fail to endow 1989 events with "substantive" meaning beyond mere evolutionary development in doctrinal constitutional law.[41] Jaggi argues that according to traditionalists, the changes to doctrine following the 1989 unification can be read as detached from "the only successful democratic revolution in German constitutional history."[42] He argues that for traditionalists, there is no difference if these changes came from "1989 revolution" or in a "regular days" reform to the Basic Law. For them, all changes to the Basic Law are equal once the text of the Basic Law is amended or once the Constitutional Court has changed its interpretation. Jaggi states:

> Using Ackerman's theory of intergenerational synthesis (IS) as an analytical tool and based on Arendt's work on revolution, I will show three things: (i) The 1989 Revolution was a real revolution, which adopted and retained its own constitutional agenda; (ii) The revolutionary East Germans managed to transfer important elements of this agenda to unified Germany; and (iii) unified Germany's federal legislature and BVerfG [the CC] have brought about the referred constitutional changes by taking up these elements and integrating them into the existing constitutional order under GG [the Basic Law].[43]

Jaggi argues that there was a paradigmatic change in how German constitutional law is imagined following the 1989 Revolution and that this change is not fully captured by the legal changes as traditionalists think. This idea of a shift that cannot be captured simply by doctrinal changes stems from the same source as Kahn's insight that there is an array of concepts through which we imagine the social realm.[44]

Kant taught us that we never view reality naked. We are always bound by certain categories through which we see reality. Kahn has been exploring the concepts through which we understand the legal realm.[45] These "historical a priori" concepts are a priori because we approach experiences already limited by these concepts we did not set. We are bound to see the legal order through an array of concepts that structures our understanding.[46] However, while this array is a priori in the sense that it limits our horizons even before approaching the legal order, at the same time, it is historical as the concepts through which we see reality develop and change over a long period of time. It is contingent yet binding.

Ackerman's dualist model, which Jaggi uses, is a conceptual framework that explicates how participants in American constitutional discourse understand the way the Constitution changes outside of the amendment procedure stipulated in Article V of the American Constitution. The dualist model is based on detecting a certain repeating pattern in American constitutional history for how constitutional amendments occur. Ackerman argues that this pattern creates a binding framework for participants in the constitutional discourse in their attempts to amend the Constitution. Yet this pattern is not part of the formal amendment procedure anchored in Article V of the American Constitution.[47] Beyond the question of whether the Constitution can be amended outside the formal procedure stipulated in the Constitution, a separate question arises: Why would a historical pattern have any binding power? Even if Ackerman's historical depiction

[40]*Id.* at 170–71, 186, 235–36.

[41]*See id.* at 12, 24–25, 170–71.

[42]*Id.* at 16.

[43]Jaggi, *supra* note 19, at 12.

[44]*See* Paul W. Kahn, Political Theology: Four New Chapters on the Concept of Sovereignty 114 (2011).

[45]*See* Paul W. Kahn, Origins of Order: Project and System in the American Legal Imagination 3 (2019).

[46]*See* Kahn, *supra* note 10, at 91 (explaining the "historical a priori" as "the historically contingent, conceptual conditions of our experience of the law's rule").

[47]Bruce Ackerman, We The People: Transformations 28–31, 115 (1998).

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of previous amendments is accurate, the fact that a certain pattern occurred N times does not mean it needs to repeat itself on the N+1 time. Part of Ackerman's answer is based on an idea similar to Kahn's historical a priori in that the pattern he identifies in American history is the way Americans currently understand how to go about when making significant changes to their constitutional commitments. This understanding emanated from a repeating historical pattern, but according to Ackerman, it is now more than merely a historical pattern. It currently structures the way Americans approach constitutional amendments outside the Article V procedure. This structure controls the imagination of Americans in a manner similar to a priori categories.[48]

Jaggi argues that following certain radical historical changes that constitute a "revolution," the reading of constitutional texts radically changes. Following such periods, there is a paradigm shift in the way we understand constitutional law. Jaggi insists that the 1989 changes should be understood as such a revolutionary moment, a rupture in the regular evolution of German constitutional law. Only based on this understanding can current German constitutional law be adequately understood.[49] He argues that traditionalists' focus on the constitutional doctrine—rather than on incorporating history into constitutional interpretation—has led them to miss the revolutionary events of 1989/90 and hence to miss the conceptual shift in reading the Basic Law.[50] Jaggi summarizes this point by noting that "[s]imilar to Ackerman's critique of constitutional understanding in the U.S., I hold the dominant opinion's understanding of constitutional law in unified Germany to be highly ahistorical."[51] He concludes that the "traditional understanding furthers the forgetting of the 1989 Revolution and its constitutional meaning."[52]

Jaggi argues that the interpretation of German constitutional law needs to be inspired not only by the 1949 constitutional moment but also by the 1989 one. An intergenerational synthesis between these two constitutional moments would produce a better account of German constitutional law.[53] Following Jaggi's account, even Collings's analysis—which gives a central place to unification in explaining changes in the Constitutional Court's jurisprudence[54]—would not be considered as properly considering the 1989 constitutional moment. Collings presents the unification as a constitutional moment that allowed the German Constitutional Court (hereinafter: CC) to fully articulate the conclusion of what was embedded in the 1949 constitutional moment.[55] Jaggi views the 1989 constitutional moment as a rupture in the constitutional narrative that began with the 1949 constitutional moment.

The trouble with Jaggi's thesis is that Ackerman's model was constructed based on a historical pattern that repeats itself in American constitutional history. Ackerman's model is a contingent historical model and not general rules of constitutional development that stem from the logic of constitutionalism. Yet Jaggi treats Ackerman's model as an "analytical" tool that can be applied to Germany's constitutional history. In a sense, Jaggi could not fully free himself from the grip of the German traditionalist mentality that detects rules and applies them to reality.[56]

[48]2 Bruce Ackerman, We The People: Transformations 67 (1998) (explaining that in all constitutional moments, the relevant players conceived the problems under the same conceptual framework).

[49]*See* Jaggi, *supra* note 19, at 196–97.

[50]*See id.* at 10–16, 181, 186–87.

[51]*Id.* at 24.

[52]*Id.* at 237–38.

[53]*See id.* at 171, 199, 235.

[54]*See* Collings, *supra* note 21, at xli, 229–56, 273.

[55]*See id.* at 245. Collings suggests that because re-unification was not followed by the enactment of a new constitution, "it fell to the Constitutional Court to adapt the Basic Law in a fashion that fostered the fusion of two long-disparate peoples under [an] untied constitution." Collings, supra note 21, at 242. According to Collings, the CC succeeded in this role playing "an important integrative role." *Id.* at 248.

[56]In many parts of the book there is a division between theory and application (*see* most explicitly Jaggi, *supra* note 19, at 41) that is very similar to how doctrinal work is written.

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C. Hailbronner's Persuasive (but not Convincing) Picture of Transformative Dogmatik

Like Jaggi, Hailbronner argues that current German constitutional scholarship fails to properly understand German constitutional law. However, Hailbronner's project is not directed towards changing the interpretation of constitutional doctrine, and in that regard, her motivation is different from Jaggi's, who has aspirations that the 1989 revolution would have a more radical effect on the CC's adjudication. In line with Kahn's approach,[57] Hailbronner is trying to explain the world of meaning in which the CC has been operating.

Hailbronner offers a clever soundbite to capture the gist of her book: Value-formalism. This catchy phrase is aimed at capturing the source of the CC's authority. The "formalism" part captures the accepted truism that in German constitutional discourse, there is a strong and robust belief in doctrine (or the more accurate term—as Hailbronner emphasizes—dogmatik) as a source for relatively determinate answers to legal questions.[58] Hailbronner explains that in Germany, "[d]octrine holds out the promise of a 'right' interpretation" in a manner that would be unthinkable in the US.[59] This belief in legal expertise is often brought as a chief reason for the success of the CC.[60]

Based on this insight, Hailbronner proceeds to examine the following query: If the CC's authority is based to a large extent on dogmatik, which is inherently a stabling and conservative view of the law, how could the CC transform German society? In other words, if the adherence to dogmatik is made in the name of maintaining an apolitical system of legal expertise that adheres to values such as inner coherency and consistency, how could constitutional law become a tool for a radical political change as Germany went through post-WW II? How could the style and rhetoric of a detached expert directed mainly to the community of experts provide the language to transform society at large? In Hailbronner's words, the issue is how was the CC able to "reconcile what seemed to many at times irreconcilable: A Court that frequently engaged highly political questions while grounding its authority on a traditional and distinctly hierarchical basis of legitimacy."[61] Hailbronner sees the "reconciliation" between transformation/activism and dogmatik/hierarchical authority as the CC's "most significant achievement over the past decades,"[62] which explains its source of power.[63] But how did such reconciliation occur?

Hailbronner explains that the conventional answer offered by scholars relies on the Holocaust. According to this answer, in order to ensure that Germany would not stray again from the path of liberal democracy and that Germans would never cause another Holocaust, values were injected into the long-standing dogmatik and the CC was positioned to restrain German society from contradicting these values. Hailbronner offers a different answer. According to her thesis, it was not a series of important lessons as "the standard narrative suggests" that transformed the German constitutional system.[64] In her view, it is a historical fact that the CC was not designed nor functioned as a counter-majoritarian restraint over the state's action.[65] The "existing narratives have missed," she writes, that "transformative constitutionalism entails in its core the idea of an activist state" and that the CC read the Basic law not as "a mere charter of restraints" but "as a roadmap for a new state and society."[66]

[57] *See* Kahn, *supra* note 11, at 519–20.

[58] *See* HAILBRONNER, *supra* note 20, at 73, 109, 112, 121–22; *see also* Christoph Möllers, *Legality, Legitimacy, and Legitimation of the Federal Constitutional Court* in THE GERMAN FEDERAL CONSTITUTIONAL COURT: THE COURT WITHOUT LIMITS 131, 145, 170, 172 (Jeff Seitzer trans., 2020).

[59] HAILBRONNER, *supra* note 20, at 113.

[60] *See id.* at 111.

[61] *Id.* at 79. *See also id.* at 89–90, 94, 97–99, 112–13, 175.

[62] *Id.* at 109.

[63] *See id.* at 123, 192.

[64] *Id.* at 3. *See also id.* at 53–55

[65] *See id.* at 44

[66] *Id.* at 44.

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Hailbronner argues that "[t]he real influence of Germany's Nazi past is much more indirect and less important than the standard narrative suggests."[67] In place of a break in legal continuity between National Socialism and the Bonn Republic, as the conventional answer suggests, Hailbronner sees continuity as "many lawyers continued to work with the open legal methodology developed during the Weimar Republic and National-Socialism, often replacing National-Socialism with natural law thinking and later with constitutional values."[68] The legal thinking that preceded the 1949 constitutional moment was enslaved to achieve new and different goals. Instead of the values of National Socialism, the Federal Republic inserted new goals, but the method remained the same. The Karlsruheprinzip replaced the Führerprinzip. The system's hardware from the period prior to 1949 remained the same, just the software changed. In other words, Hailbronner argues that the success of post-Holocaust Germany is explained by the legal methodology that continued from the Weimar Republic and the Nazi period but was injected with new values.[69] Thus, she writes:

> [I]n dealing with the new values, National Socialist methodology came in handy: To realize the Basic Law's transformative vision, it was important not to get bogged down by narrow formalities. The persistence of open approaches to legal interpretation from the Weimar and Nazi era thus furnished the Court with necessary flexibility to further its transformative agenda.[70]

"Yet, ultimately," summarizes Hailbronner, "the German court would build its authority not primarily on its role in improving state and society (unlike the Indian Supreme Court), but on a more traditional legal basis."[71]

While Hailbronner notes that "other scholars have emphasized the continuity in German constitutional thought rather than its break with the past,"[72] her innovation is in marrying "formalism" with "value" as well as her explanation of how this "successful synthesis" became possible in post-WW II Germany.[73] She writes that the great success of German lawyers is the creation of "their own particular style of jurisprudence, Value Formalism [that] reflects the conflicting demands both of transformative constitutionalism and a hierarchical culture of authority."[74] The label "value" is a bit misleading. Hailbronner speaks on the transformative effect that constitutional law had on German society and not merely on constitutional values. Hailbronner exposes the German "turn to an activist model of constitutionalism, related to its counterparts in the Global South."[75] As the label "formalism," according to Hailbronner, also does not capture the accurate meaning of German adherence to doctrine,[76] a more accurate but less catchy label to describe Hailbronner's argument would be "transformative dogmatik."

It is important to stress that Hailbronner does not claim that the conventional narrative is ill-founded. Many jurists, including several judges who served at the CC, have narrated their actions in the voice of the conventional theory explaining the importance of a strong CC as a lesson of the Weimar Republic or the Nazi regime.[77] As we shall see, Collings's book offers an excellent account

[67]*Id.* at 3.
[68]*Id.* at 78. *See also id.* at 48.
[69]*See* HAILBRONNER, *supra* note 20, at 94.
[70]*Id.* at 78.
[71]*Id.* at 79.
[72]*Id.* at 3.
[73]*Id.* at 123.
[74]*Id.* at 99.
[75]*Id.* at 43.
[76]*See id.* at 73, 84.
[77]*See* COLLINGS, *supra* note 21, at 235 ("For many years the Court's was the clearest official voice condemning the atrocities of the Nazi era and expressly defining the Federal Republic in opposition to its tyrant forebear.").

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of how this narrative has been continuously herald by the CC to justify its judgments.[78] Hailbronner offers an additional explanation for the development of constitutional law in Germany post the Second World War.

The difficulty with Hailbronner's argument is that it contradicts the Popperian principle of falsification as the criterion for scientific theory.[79] Hailbronner does not deny the conventional narrative according to which current German constitutional law is a break with the past of Nazi Germany and a counter-reaction to it.[80] But at the same time, she argues that constitutional thinking in Germany has had a strong continuity with the Nazi past. Any piece of evidence would support Hailbronner's account. Either it would demonstrate that the German constitutional system has reacted against its Nazi past or that "National Socialist methodology came in handy"[81] and there is a continuation. There is no way to falsify Hailbronner. This is indeed one of the difficulties Kahn's methodology presents in a post-legal realist world that wants to adopt the scientific model that adheres to the Popperian principle.

Yet, although Kahn does not explicitly confront the Popperian refutability principle, he has an answer to it. Kahn detected an important element in explaining human developments that is antithetical to scientific explanations: Two explanations that at certain points contradict each other may both have an explanatory value; both may be true.[82] Paradoxically, Kahn detected this idea from his analysis of traditional legal thinking: In hard cases, the dissenting opinion may be as persuasive as the majority opinion in giving a doctrinal account for its decision.[83] In hard cases, both the majority and the dissenting opinions offer a full and consistent account of the entire legal landscape supporting their ruling in a concrete controversy, and yet their conclusions are contradictory. The decision of which path to choose and hence the ruling in the case is not dictated by one of the accounts refuting the other. Rather, the decision between the two comes as if from nowhere.[84] Following this line of thought, two pictures of reality may be correct and yet contradict each other. This idea created space for works that offer a picture of reality that explains certain phenomena in a manner that contradicts the dominant picture and explanation but with no attempt to refute them.

In some sense, Hailbronner is obviously correct. There is never an *ex-nihilo* break. The early CC's judges were educated according to ideas that preceded 1949.[85] However, Hailbronner does not present a judgment which failed to receive the spotlight and confirms her thesis while disproving the conventional explanation. Nor is there a narrative analysis of judgments refuting their current reading. Hailbronner presents a sophisticated and complex narrative of the CC's history aimed to persuade the reader as a picture of reality. While Hailbronner attributes her "analytical framework" and methodology to Kim Schepple, Mirjan Damaska, and Ackerman,[86]

[78] *See id.* at 245.

[79] KARL R. POPPER, *Science: Conjectures and Refutations* in CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 43, 48 (2002) [1953] ("A theory which is not refutable by any conceivable event is nonscientific. Irrefutability is not a virtue of a theory (as people often think) but a vice.").

[80] *See* HAILBRONNER, *supra* note 20, at 99 (explaining Germany's adoption of the transformative view of constitutional law based on "the moral catastrophe of the Holocaust and the second World War").

[81] HAILBRONNER, *supra* note 20, at 78.

[82] *See, e.g.*, PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION 23 (2016) ("[A] political project is not a logically organized scheme . . . .[W]e work with multiple norms and values, each of which can generate its own account. These different accounts can be in conflict."); KAHN, *supra* note 10, at 24 ("A cultural practice, unlike a theoretical inquiry need not satisfy a demand for coherence.").

[83] *See, e.g.*, KAHN, *supra* note 82, at 17 ("We read the dissenting opinion and may find it equally convincing."); KAHN, supra note 44, at 80 ("Controversial cases are not won because one side writes a brief that fails as a matter of law . . . .The decision maker must decide."); KAHN, *supra* note 10, at 28.

[84] *See* KAHN, *supra* note 44, at 81.

[85] *See* HAILBRONNER, *supra* note 20, at 7. *See also* COLLINGS, *supra* note 21, at 167 (quoting the claim that judges from the early years of the CC built on "that which had been worked out in the public law scholarship of the Weimar era").

[86] *See* HAILBRONNER, *supra* note 20, at 6–8.

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her attempts to persuade using a picture are reminiscent of Kahn's methodology. Moreover, as opposed to Ackerman and Jaggi, that are in a quest after moments of rupture, Hailbronner, in a similar fashion to Kahn, detects deep continuities. Even after an experience such as the Holocaust and an attempt to create a complete break from the past, continuities are never fully eradicated.

The lack of a so-called smoking gun hardly makes Hailbronner's narrative incorrect. In describing complex societal developments over a long period of time, there is currently no method that is able to imitate the scientific method of proof nor the deductive method of logic. In such complex occurrences with so many variables, one must either desert the attempt to give an account of the "big picture" and focus on small well-defined issues, reduce reality into a model accepting that certain variables are outside of the picture or struggle with the difficulties Kahn and Hailbronner encounter.[87]

In a previous review of Kahn's work, I distinguished between convincing and persuading based on the etymology of the two words.[88] While the contemporary use of the words "convince" and "persuade" does not adhere to this distinction,[89] Kahn's methodology becomes clearer if we follow this distinction. The etymology of con-vin-cing is based on winning and requires the argument to defeat all competing accounts.[90] The etymology of persuasion is different and connected to inducing and sweetening. Persuasion encapsulated the idea of making someone buy into a position based on "taste."[91] For example, persuasion occurs when readers are presented with a picture of reality that composes the pieces of the puzzles of reality readers already have in their minds into a coherent narrative. Hailbronner does exactly that: She rearranges the pieces of the puzzle of reality to present a coherent picture different from the conventional arrangement of the same pieces. She does not argue that her picture "wins" over the conventional picture, just that her picture can also offer a persuasive narrative to the CC's adjudication.

Kahn is trying to persuade his readers, not convince them. For this reason, he speaks of "[a] theory that must feel right; it must express that we already know . . . .Thus, the 'truth' of a political theory has to be measured against how well it explains that which is self-evident."[92] In a recent piece, Kahn explains that the criterion for a "good interpretation" of the social reality is that it "has persuaded its audience. Persuasion is not a matter of checking an interpretation against the facts of the matter. The interpretation offers a map of what is otherwise without chart. The reader must trust that map. He will not trust it, if he does not trust me."[93]

Yet these maps and pictures sound more like the work of a novelist than a researcher committed to pursuing truth rather than fiction. The "sweetness" criterion for detecting correct and incorrect accounts seems flimsy and unscientific. Even if we cannot aspire to a mathematical or a hard science model of proof, the dependence of Kahn's thick description on the sense of "sweet" does not sound very convincing. The evolution of political science included the rejection of exactly these types of narratives in favor of highly focused, numerical analysis of events with a clear "research question" that can either be proved or disproved. But Kahn insists that "All I can do is try to make the argument and ask myself whether it is persuasive."[94] He recently added that the reader of his work "cannot prove me wrong by offering data or proof. One interpretation can

[87]*See* Or Bassok, *How to Investigate the Social Imaginary*, 5 JRLS 2, 2–4 (2012).

[88]*See id.* at 8. *See also* BRYAN GARSTEN, SAVING PERSUASION 2, 5–6 (2006).

[89]While today "convince" and "persuade" are used interchangeably, the first use of convince with the "sense of persuade is first recoded in 1606, in Shakespeare's Troylus and Cressidea." THE BARNHART DICTIONARY OF ETYMOLOGY 217 (Robert K. Barnhart ed., 1988).

[90]The etymological roots of the word "convince" express the notion of vanquishing, conquering, defeating and victory. *See* JOHN AYTO, BLOOMSBURY DICTIONARY OF WORD ORIGIN 136 (1990) ("Latin convincere meant originally 'overcome decisively' (it was a compound verb formed from the intensive prefix com- and vincere 'defeat,' source of English victory).").

[91]"Persuade" is etymologically related "to advice," "to urge," "to induce" and even "to sweeten." AYTO, *supra* note 90, at 391.

[92]KAHN, *supra* note 44, at 120.

[93]Kahn, *supra* note 11, at 516.

[94]*Id.* at 514.

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be displaced only by another interpretation."[95] While Hailbronner's account exposes how the Rich-P methodology enables the development of alternative persuasive interpretations, in the next section, I discuss how one is able to assess persuasiveness according to this approach.

D. Collings and an Outsider's Perspective on the Legitimacy of the Constitutional Court

Collings presents his book as "a narrative history . . . , a political and societal, rather than a doctrinal and jurisprudential, history of the Constitutional Court."[96] While, like Jaggi and Hailbronner, Collings distances his book from doctrinal methodology, he does not purport to offer an alternative narration to the conventional depiction of the CC's adjudication. Rather, Collings's book aims to produce a complete historical account—written in English—of the CC from its inception and up until 2001. Collings masterfully integrates analysis of the key cases of the CC over the years with a description of the interactions between the CC, political players, academia, and public opinion. The result is a book that is one of those rare legal books that can be read even by those who are not lawyers without compromising its quality as a legal scholarly book.

Throughout his narration of the Court's work over five decades, Collings weaves two arguments. First, Collings supports the view that the CC's "greatest historical achievement was to correct the course of Germany's Sonderweg [special way]."[97] According to this thesis, Germany ran astray in the 19th century and the beginning of the 20th century: While other European nations progressed to liberal democracy, Germany "failed to turn"[98] and instead followed a path of "illiberalism, authoritarianism, military aggression, dictatorship, total warfare, and the unimaginable horrors of the Holocaust."[99] Since the establishment of the CC, "[i]n their role as self-proclaimed guardians of the constitution," the CC's judges promoted the vision of liberal democracy and kept Germany on the right track.[100]

Collings's second argument concerns the CC's success in gaining and maintaining public support. After describing at the beginning of his book the CC's high ratings of trust in public opinion polls, Collings writes that "[t]his is a book about how the German Constitutional Court came to possess such extraordinary power, and why so many Germans are grateful that it does."[101] Collings explains that "[e]ach chapter highlights one of the book's major themes—one explanation of the public's acceptance of the Court's power."[102] At the center of Collings's argument is the Court's "popular legitimacy" and he views this type of legitimacy as measured in public opinion polls.[103]

Collings's argument follows the current American paradigm that equates judicial legitimacy with public support.[104] This paradigm is not a law of nature. It has history and represents a relatively new development in understanding judicial legitimacy that was possible only after the invention of opinion polls that allowed measuring support for courts. Before this development, elected institutions had a monopoly on legitimacy arguments based on public support as they could rely on election results. Courts lacked a competing metric to demonstrate their support.[105] Only after the invention of public opinion polls in the 1930s did such data become possible. It took

[95] *Id.* at 511.
[96] COLLINGS, *supra* note 21, at xxxi.
[97] COLLINGS, *supra* note 21, at 298.
[98] *Id.* at 228.
[99] *Id.* at xxxiii.
[100] *Id.* at 228–229.
[101] *Id.* at xxxi.
[102] *Id.* at xxix.
[103] *See, e.g., id.* at xli, 157–58, 177, 181, 183, 201–02, 211, 217, 272, 274, 284, 287.
[104] For an explanation of this paradigm, see Bassok, *supra* note 8.
[105] *See* Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 UNIV. PA. J. CONST. L. 153, 194 (2013).

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even more time until consistent measuring of public support of courts became available. For this reason, Collings brings no data on public support for the CC prior to the 1970s,[106] and with regard to the US Supreme Court such data exists sporadically starting from the 1930s but consistently only from the 1960s.[107]

Today, there is an almost total consensus among American jurists that, because the Court lacks direct control over either the sword or the purse, enduring public support (or sociological legitimacy in professional jargon) is necessary for the Court's proper function.[108] In their research, political scientists equate judicial legitimacy with public support as measured in public opinion polls.[109] However, this equation is not an analytic truth deducible from the structure of democracy. It is a choice with a history that begins with the invention of public opinion polling. While the understanding that judicial legitimacy is to be equated with public support and that public support is measurable in opinion polls are part of the current historical a-priori in the US, other legal orders do not share this social imaginary.[110]

Collings' adherence to the American understanding of judicial legitimacy, according to which legitimacy equals public support as measured in opinion polls, raises an important challenge to the ability to persuade using the Rich-P methodology. If persuasion requires to cater to the audience's "sweet tooth," then, the writer needs to know what is considered "sweet" for his audience.[111] He must share with his audience certain premises on how "things work" in their society. In other words, the writer and his audience need to share a social imaginary. While many parts of the historical a-priori are shared in Western democracies, there are still significant differences. Applying Hailbronner's idea of injecting transformative values through dogmatik in the adjudication of the American Supreme Court would fail because legal dogmatik does not have in the American social imaginary the persuasive power it holds in Germany.[112] Is Collings, who was educated in the US and never lived in Germany for a substantial period of time, imposing on the German constitutional discourse an American understanding of judicial legitimacy that is foreign to it? And more generally, according to the Rich-P approach, if the researcher is a foreigner, how can he know what is a persuasive argument when he discusses any society except the one that he is native to? These questions have been central to my ongoing discussion of Kahn's work partly because I choose to write at Yale a doctoral dissertation that was focused on American constitutional law while my initial legal education was in Israel.

In a previous review of Kahn's work, I argued that empirical data on the inability of the US military to fill its ranks even after 9/11 contradict Kahn's argument on the central place of dying for the state in current American society. I added that his methodology lacks a criterion to judge whether his argument is true or false.[113] There is simply no evidence that can falsify it. Kahn replied that empirical data on volunteering for the US military could be interpreted in a different manner than my interpretation. He added that an insider to American political imagination would be persuaded by his interpretation of the place of sacrifice in current American society. An

[106]Collings argues in sweeping language that "[t]he Constitutional Court has always been and remains one of the most trusted institutions of the German state" but support in terms of public opinion data is provided only from the 1970s. COLLINGS, *supra* note 21, at xxix–xxx.

[107]*See* Bassok, *supra* note 105, at 157.

[108]*See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L. J. 153, 221 (2002) ("[M]any commentators made the point that judicial power ultimately depended upon popular acceptance.").

[109]*See* James L. Gibson, *Public Images and Understandings of Courts, in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 828, 839 (Peter Cane & Herbert M. Kritzer eds., 2010) ("Political scientists routinely measure the legitimacy of courts via public opinion polls.").

[110]*See* Or Bassok, *South African Constitutional Doctors with Low Public Support*, 30 CONST. COMMENT. 521 (2015).

[111]*See* GARSTEN, *supra* note 88, at 2.

[112]*See* Bassok, *supra* note 105, at 172–75.

[113]*See* Bassok, *supra* note 87.

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outsider like me simply lacks the proper perspective to judge his picture of American society.[114] Persuasion requires a certain fit between the picture the researcher presents and the one that her readers—who are members of the community explored—already have on their minds. Someone who is not immersed in the relevant social imaginary may misjudge such a fit. Kahn wrote that "[p]ersuasion is a function of the social imaginary, of beliefs and practices that are in circulation and that make sense to a community occupying a particular time and a place."[115] What an outsider to the current American community finds on his scale as not sweet (unpersuasive) to an insider is sweet (persuasive).

Such an approach makes comparative constitutional law, especially with regard to large- scale comparisons, almost impossible. In order to investigate a legal order, a scholar must immerse herself in the society governed by the legal order she investigates. Such immersion requires not only mastering the native language (a requirement many comparativists lack regarding many of the systems they investigate) but also good knowledge of the local culture and politics which usually requires spending substantial periods in that country. Kahn writes that "[i]t takes years of living within the network of associations, of listening and responding."[116] It is no accident that these requirements sound very much like those required from an anthropologist as Kahn, speaks of his approach as standing at an intersection that includes cultural anthropology.[117]

In Germany, the claim that the judiciary's legitimacy is to be understood in terms of public support has its own history. During the Weimar period, one of the reasons Carl Schmitt rejected the idea of the judiciary serving as the Guardian of the Constitution was its lack of ability to demonstrate public support in the face of the elected institutions.[118] With the evidence Collings brings on the CC's public support, Schmitt—who envisioned an invention that may allow measuring support for the Court[119]—would have one less objection to the idea—that Collings supports—of the CC's ability to serve as "Democracy's Guardian." Yet, the idea that the CC's legitimacy is based on public support remains foreign in German constitutional discourse, perhaps partly because, in view of the lessons of the Nazi regime, Germany chose to adopt a different version of judicial legitimacy than the one Schmitt envisioned to the Guardian of the Constitution.

Take, for example the thorough analysis of the CC's legitimacy by Christoph Möllers in his chapter *Legality, Legitimacy, and the Legitimation of the Federal Constitutional Court*. Early in his discussion, Möllers notes that the entire issue of the source of legitimacy of the top judicial body is "debated above all in the American literature. In German constitutional law, however, this discussion only plays a modest role."[120] Möllers does not disregard the notion that judicial legitimacy can be understood in terms of public support. However, he dedicates only two pages out of a 65-page chapter to discuss this understanding of judicial legitimacy in the context of the CC. Most of the chapter is based on normative justifications which assume that the CC's source of legitimacy is to be understood in terms of expertise either in constitutional doctrine or in fields such as human rights or fundamental values.[121] At some point, Möllers even notes that "[i]t no coincidence that American constitutional lawyers are surprised at the aspirations of their European colleagues to define the constitutional system with expert knowledge."[122]

[114]Paul W. Kahn, *Political Theology Defended*, 5 JRLS 28, 38–41 (2012).

[115]Kahn, *supra* note 11, at 521.

[116]Kahn, *supra* note 114, at 38.

[117]*See* KAHN, *supra* note 44, at 26, 114. *But see* Kahn, supra note 3, at 159 ("[T]he genealogy of my work is philosophical, not anthropological.").

[118]*See* HANS KELSEN & CARL SCHMITT, THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 93–95, 167–68 (Lars Vinx trans., 2015); *See also* Or Bassok, *The Schmitelsen Court: The Question of Legitimacy*, 21 GERMAN L.J. 131, 136 (2020).

[119]*See* Schmitt, *supra* note 118, at 301. *See also* Bassok, *supra* note 118, at 148–50.

[120]Möllers, *supra* note 58, at 153.

[121]*Id.* at 168.

[122]*Id.* at 170.

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Even Armin von Bogdandy and Ingo Venzke's suggestion for a democratic source of legitimation to courts shy away from identifying this idea with measurements of public support. The authors note that According to Article 25(4) of the German Law on the Federal Constitutional Court, the judgments of the Constitutional Court are issued "in the name of the people."[123] Yet they write that the formula "in the name of the people," used by domestic courts to describe "in whose name" they decide cases, invokes the authority of the abstract democratic sovereign rather than the actual current public.[124] Venzke and von Bogdandy view it as a reflection of an old concept of popular sovereignty that is detached from the actual public support of the here and now as measured in public opinion polls.[125] It is a concept that views the democratic subject as a single collective, mostly a nation or a people, rather than the accumulation of individual voices as measured in opinion polls.[126]

Collings seems to sense this difference between the US and Germany. He notes that in Germany, democracy was understood from the outset as not only a majoritarian endeavor but as requiring robust protection of human rights.[127] He further explains that for this reason, it is not surprising that "[t]he 'countermajoritarian difficulty' that has been the obsessive concern of American discourse about constitutional justice ever since Alexander Bickel coined that unwieldy phrase had no significant parallel in West Germany."[128] Collings explains that as a lesson from the Weimar and Nazi eras, the CC was constructed and understood as a countermajoritarian "defender of democracy" in the sense of a defender of human rights against the majority.[129] Hailbronner adds that the "realm of legitimacy" in the sense of public support is considered outside the realm of legality and therefore "not a proper subject for the Constitutional Court to discuss."[130] In the American Supreme Court's judgments, such discussions are quite common.[131]

If, as Collings explains, democracy in Germany is understood not merely in majoritarian terms, but as a system of values centered on the muscular protection of human rights, it is not surprising that the CC's legitimacy is not understood in terms of public support.[132] As an astute reader of the Court, Collings writes:

> [T]he proposition that democratic legitimacy presupposed fundamental rights protection cast the Court as a kind of ur-democratic actor. It made any challenge to the Court's democratic legitimacy almost a non sequitur. The near-universal embrace of this proposition represents the Court's most enduring achievement—the explanation and the essence of its success story.[133]

However, if all this is correct, then Collings's depiction of public opinion towards the CC is of much less importance than in the US. While in the American context, judicial legitimacy is understood in terms of public support, in the German context, judicial legitimacy is understood in

[123]*See* Law on the Federal Constitutional Court (Federal Constitutional Court Act [BVerfGG]). Available at: http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1. For other examples of the same practice *see* ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME?: A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 20 & n. 94–95 (Thomas Dunlap trans., 2014).

[124]*See* Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR J. INT'L L. 7, 7–8 (2012).

[125]*See* BOGDANDY & VENZKE, supra note 123, at 20.

[126]*See id.* at 140.

[127]*See* COLLINGS, *supra* note 21, at 219.

[128]*Id.* at 219.

[129]*Id.* at xxii, xxxv, 225.

[130]HAILBRONNER, *supra* note 20, at 148–49. *See also id.* at 136–39.

[131]*See* Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239 (2011).

[132]*See* COLLINGS, *supra* note 21, at 107–08, 219.

[133]*Id.* at 219. *See also id.* at xxxviii.

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terms of protecting human rights or in terms of expertise in constitutional doctrine.[134] This is not to say that the question of "why so many Germans are grateful" that the CC "possess such extraordinary power"[135] is unimportant, but it is distinct from how Germans understand the CC's legitimacy.

E. Rich-P v. Large-N

Three doctorate theses that were written with much effort and talent produced three books that offer valuable insights into Germany's constitutional system. And yet, after all this hard work, their insights are not without flaws that invite critique. In comparison, there is a shiny, glittering methodology—the Large-N approach—that offers sweeping insights on a large number of constitutional systems that are hard to dispute as they use the language of science, the language of numbers. Take, for example, the article that, in many ways, is the point of origin of this approach: David Law and Mila Versteeg's article *The Declining Influence of the United States Constitution*.[136] This article began the Large-N trend with a big-bang in a *New York Times* headline stating that "'We the People' Loses Appeal with People Around the World."[137]

Law and Versteeg argue that a comparison of constitutions in existence between 1946 and 2006 shows that the American Constitution is increasingly out of sync with global trends both in terms of its rights-related provisions and structural features. The authors coded constitutional provisions from all national constitutions adopted from 1946 to 2006 and quantified the degree of similarity between these 729 constitutions.[138] Based on their "rights index" as a yardstick, they concluded that "the world's constitutions have on average become less similar to the U.S. Constitution over the last sixty years."[139] In a similar vein, an examination of three structural features of the US Constitution brought them to a conclusion that "structural features of the U.S. Constitution have also fallen out of vogue."[140] For these reasons, the authors concluded that the American Constitution could no longer be considered influential in the global arena.[141]

One reason for the stark contrast between Law and Versteeg's Large-N approach and Kahn's Rich-P approach is the difference in their position towards interpretation. While Kahn views his methodology as interpretative in nature, Law and Versteeg explicitly reject the need to interpret. They have to. With great candor, Versteeg explicitly writes that the Large-N method means that "legal researchers will need to extract information from, rather than interpret, legal texts."[142]

Researching comparative constitutional law under the methodology of Large-N research means that constitutional law has to be transformed into points of data. This methodology requires coding constitutional provisions in a manner that transforms them into numerical information

[134] *See, e.g.*, HAILBRONNER, *supra* note 20, at 27 ("While there may exist some higher source of legitimation at the highest level (God the king, the people), administrative offices as well as the judiciary depend of their professionalism and expertise as their main source of public authority."); Möllers, *supra* note 58, at 172–74.

[135] *See* COLLINGS, *supra* note 21, at xxxi.

[136] David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

[137] Adam Liptak, *'We the People' Loses Appeal with People Around the World*, N.Y. TIMES, Feb 6, 2012, https://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html.

[138] *See* Law & Versteeg, *supra* note 136, at 768–72 (describing their method).

[139] *Id.* at 781.

[140] *Id.* at 785.

[141] *See id.* at 781 ("To the extent that a particular constitution is increasingly out of sync with global trends, we can rule out the possibility that it is leading those trends. And it is in precisely this manner that we establish the declining influence of the U.S. Constitution."). *See also id.* at 762, 769, 785, 801.

[142] Anne Meuwese & Mila Versteeg, *Quantitative Methods for Comparative Constitutional Law*, *in* PRACTICE AND THEORY IN COMPARATIVE LAW 230, 240–41 (Maurice Adams & Mila Versteeg eds., 2012). Whether "extraction of information" without interpretation is possible remains a separate question.

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without taking into account the variation created by interpretation.[143] Furthermore, the very idea that there are various lenses or conceptual arrays through which data is conceived is foreign to Versteeg and Law. For them, data arrive with its meaning apparent on the surface of the words and merely require extraction and coding. There are no historical a-priori categories through which we view the data. The idea that the "same" piece of data can be understood differently at different times or in different places is completely antithetical to their methodology. In order to count various constitutional articles dealing with privacy, the premise must be that privacy is understood in the same manner everywhere and throughout history. The world of constitutional law must be flat for the Large-N methodology to have data to count.

According to Versteeg and Law's approach, if the text is similar, then the meaning is similar.[144] Subsequently, the rise of Large-N research returns formalist or doctrinal elements to our thinking of law.[145] In this manner, the Large-N approach is split in its orientation. On the one hand, it aims to adopt a social science methodology as legal realists desired.[146] On the other hand, it disregards the indeterminacy of legal norms, which is one of the central insights of legal realism. The legal realist movement taught us that the indeterminacy of legal texts means that similar provisions may receive distinct meanings.[147] Especially with regards to constitutional provisions that are, on many occasions, formulated in vague language, different interpretations may provide different meanings to similar—or even identical—provisions. Yet, the methodology of Large-N calls explicitly for coding provisions in a manner that transforms these provisions into numerical information without considering the variation created by interpretation.[148] It calls for the extraction of information or a translation to numerical data without interpretation.

In some cases, this methodology leads to embarrassing mistakes. For example, all judges in *Obergefell v. Hodges*[149] agreed that the right to marriage is anchored in the Constitution. As Chief Justice Roberts wrote, "[t]here is no serious dispute that, under our precedents, the Constitution protects the right to marry . . . ."[150] Yet, according to Versteeg's coding, the right to marriage is absent from the American Constitution.[151] This example demonstrates a severe flaw in Law and Versteeg's methodology because while Roberts stated, "[t]he Constitution itself says nothing about marriage . . . ,"[152] there was no doubt that such a right was recognized by interpretation.

In other cases, there are serious inconsistencies with deciding when judicial interpretation is considered as appearing on the face of the constitutional document. Take for example, the

[143]*See* Ming-Sung Kuo, *A Dubious Montesquieuian Moment in Constitutional Scholarship: Reading the Empirical Turn in Comparative Constitutional Law in Light of William Twining and his Hero*, 4 TRANSITIONAL LEGAL THEORY 487, 495–97 (2013) ("To put it bluntly, the exercise of coding in constitutional empiricism means seeing without reading the text of constitutional documents.").

[144]*See* Khosla, *supra* note 24, at 2131 (reviewing Large-N research and noting that "this surface-level analysis of constitutional texts may potentially hide more than it reveals. Constitutions can contain similar—even identical—expressions but radically different rights").

[145]Kuo, *supra* note 143, at 494–97, 501 (explaining that constitutional empiricists code without interpreting and calling their approach "neo-formalism").

[146]DUXBURY, *supra* note 6, at 83 ("It is beyond doubt that a good majority of those writers who came to be associated with realism during the 1920s and 1930s were attracted in one way or the another to the social sciences.").

[147]*See, e.g.*, BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 65–67 (2006).

[148]*See* Kuo, *supra* note 143, at 495–97 ("To put it bluntly, the exercise of coding in constitutional empiricism means seeing without reading the text of constitutional documents.").

[149]*Obergefell v. Hodges*, 576 U.S. 644 (2015).

[150]*Id.* at 2612.

[151]*See* Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1157 (2014) ("In the United States, for example, 88% of the population disagrees that marriage is outdated, yet marriage does not appear in the constitution."). *See also* Law & Versteeg, *supra* note 136, at 774, 779.

[152]*See Obergefell*, 576 U.S. at 690 (Roberts, J., dissenting).

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authority to strike down legislation that appears nowhere in the American Constitution (as the authors admit[153]). Yet, this authority is coded by the authors as part of the American Constitution. Obviously, coding the American Constitution as lacking judicial review would look ridiculous because this is one of the innovations of American constitutionalism, but this is what the authors' methodology dictates. A similar example is the right to privacy which was coded as part of the Fourth Amendment's prohibition of "unleasable searches and seizures,"[154] even though it is well known that the notion of the right of privacy as part of the American Constitution is not stated in the document and was only adopted by the Court only in the 20th century.[155]

These two examples are from American constitutional law that the authors mastered, and the readers of NYU Law Review know well. But think of all the constitutional systems that the authors lack deep knowledge of. Think of systems that use a language that the authors cannot read, making their caselaw not fully accessible to them. How many judicial interpretations were not taken into account and may have changed their coding and conclusions? The effect on the "generic bill of rights" that served the authors as the metric for the "global mainstream"[156] could have been significant. Perhaps rights that were absent according to the coding of constitutional documents—and thus not regarded as generic—were considered by courts in many countries as part of the constitution making them generic?

Furthermore, Law and Versteeg's methodology cannot detect a shift in the conceptual array through which a constitution is read, such as the shift depicted by Jaggi. While Jaggi argues that German constitutional law went through a regime change following the 1989/90 constitutional moment that affected the reading of the entire document, according to Law and Versteeg, the reunification did not affect the rights provision unless they were explicitly amended.[157]

F. Conclusion

The three books on German constitutional law reviewed in this Article taught us valuable lessons on the Rich-P methodology. From Jaggi's book, we learned the influential role of a shift in the conceptual eyeglasses through which we view constitutional law. Hailbronner's book showed us that the falsification principle is problematic when it comes to historical narratives that aim to depict developments in constitutional discourse that occurred over a long period of time. Deserting the falsification principle does not mean that any narrative has the potential to persuade us as true. Collings's book taught us that in order to persuade, the researcher needs to be aware that the conceptual eyeglasses she wears correspond to those worn by the jurists in the society she researchers.

All three books adhere to Kahn's basic premise that we view constitutional law through a priori concepts. This idea is entirely foreign to the Large-N approach that assumes that all constitutions are viewed with no (or through the same) conceptual eyeglasses in order to be able to count their characteristics using one set of categories. This inherent flaw in the Large-N methodology leads first, to missing that similar constitutional concepts are understood differently in different legal orders. Second, it leads to missing shifts in understanding constitutional concepts in a particular legal system. In addition, it also leads Versteeg and Law to miss ways of understanding a

[153]*See* Law & Versteeg, *supra* note 136, at 793 ("It is perhaps ironic that the most popular innovation of American constitutionalism has been judicial review, given that this celebrated institution is nowhere mentioned in the U.S. Constitution itself.").

[154]*Id.* at 779 n. 32 ("The Fourth Amendment's prohibition of 'unreasonable searches and seizures' is coded as a constitutional protection of privacy.").

[155]*Griswold v. Connecticut*, 38 U.S. 479 (1965). *See also* TAMANAHA, *supra* note 147, at 86 ("The Court found that a constitutional right to 'privacy' existed, notwithstanding the fact that it was nowhere stated in the document.").

[156]Law & Versteeg, *supra* note 136, at 779.

[157]*Id.* at 824 ("[T]he constitutional amendments that accompanied reunification did not touch upon any of the rights-related provisions found in our rights index.").

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constitution that may be highly influential yet not written in the constitutional document. One of the unique contributions that the American Constitution has given world constitutionalism in recent decades is the understanding that a constitutional document can serve as the focal point of a nation's identity.[158] This point is central to Kahn's work on American constitutionalism, in which he investigates American identity by focusing on its constitutional discourse. The American conceptualization of constitutional documents as the focal point of American national identity is nowhere to be found in the American Constitution. Rather, it is a conceptual frame through which Americans understand their Constitution.[159] Outside the US, this idea is known under the heading of "constitutional identity" and constitutes one of the significant contributions that the US gave to world constitutionalism. This contribution simply cannot be detected by Law and Versteeg's methodology. Yet they argue that American constitutionalism's influence has declined worldwide.

The battle between the Large-N approach and the Rich-P approach, if there was ever one, has been decided. The appeal of numbers not only makes the Large-N approach more promising in terms of great tweets and news headlines, but technology companies and funding agencies are also addicted to numbers that imitate "real" scientific research. In the growing field of comparative constitutional law, the appeal of numbers is even stronger. In a reality in which few legal researchers are able to follow legal developments in more than three countries consistently, it is next to impossible to write large-scale non-doctrinal comparative accounts using the Rich-P approach. The comparativist world belongs to the Large-N approach that can purport to encompass the world in its research. Yet this methodology ignores the effect of the conceptual array we bring to our reading of constitutional law. In transforming constitutional determinations into countable data, this methodology ignores the central role interpretation plays in our understanding. To say "the Court has legitimacy" may mean different things in different constitutional orders according to their understanding of the concept of judicial legitimacy. In one order it may mean that the Court enjoys public support; in another, it may mean that the Court properly protects human rights.

Believers of the Rich-P approach will continue to focus mainly on the few systems they mastered, and their conversations will be primarily with other scholars studying the same systems. For this reason, the main campfire around which Rich-P researchers from different systems can regularly meet is the one in which their joint methodology is discussed. We have much to thank Paul Kahn for lighting this fire which is vital if only to remind us all that the world of constitutional law is not flat.

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[158] *See* PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 1 (1997) ("Like no people before them, Americans turned to secular law to ground their political community and to establish their own identity.").

[159] *See* KAHN, *supra* note 10, at 9 ("American identity is peculiarly dependent on the idea of law . . . ").

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