Diffusion of ideas and comparative law

I. The doctrine of separation of powers

As an idea which was ostensibly derived from the domestic constitutional practice of a single state but which has subsequently been adopted as a core constitutional value in many jurisdictions, Montesquieu's separation of powers theory should be a poster child for the carrying out of constitutional transplants. Widely celebrated and globally diffused, the tripartite model of the separation of powers is generally regarded as one of the most important constitutional insights of the Enlightenment era. It has been cited as an influence on the development of the constitutional structures of multiple states, be they the 18th century's radical new American republic or those states that more recently obtained independence in the post-colonial era\(^1\) or aftermath of the Cold War.\(^2\)

Indeed, the theory's ubiquity is such that it has political and normative resonance in states which do not traditionally adhere to a tripartite model of government. It was instructive, for example, that the UK's creation of a Supreme Court and reform of the role of the Lord Chancellor were discussed in separation of powers terms.\(^3\) Yet, the separation of powers doctrine has traditionally not been regarded as part of the United Kingdom's constitutional system.\(^4\) That the theory could be cited as a legitimate institutional norm in such a historically alien context underscores its apparent efficacy as a constitutional transplant.

However, the popularity of the separation of powers has often obscured the fact that the tripartite theory suffers from several fundamental flaws. While the contention that the separation of powers is a “bad idea” may be a controversial one, it is instructive

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\(^1\) See Article 6, Bunreacht na hEireann (The Constitution of Ireland), for example.

\(^2\) For an analysis of how this has subsequently developed, see Per Kopecky, *Power to the executive! The changing executive-legislative relations in Eastern Europe* 10 Journal of Legislative Studies 142 (2004).


\(^4\) Robson, for example, dismissed it as a “rickety chariot”. W ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* 14 (2nd ed., Stevens, 1947).
to note that the theory has been subjected to sustained and consistent criticism for several decades.\(^5\) Geoffrey Marshall, for example, famously dismissed the theory many years ago as “infected with so much imprecision and inconsistency that it may be counted as little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds”.\(^6\) More recently, Bruce Ackerman has commented that:

[[I]t is past time to rethink Montesquieu’s holy trinity. Despite is canonical status, it is blinding us to the world-wide rise of new institutional forms that cannot be neatly categorized as legislative, judicial or executive. Although the traditional tripartite formula fails to capture their distinctive modes of operation, these new and functionally independent units are playing an increasingly important role in modern government. A ‘new separation of powers’ is emerging in the twenty-first century. To grasp its distinctive features will require us to develop a conceptual framework containing five or six boxes – or maybe more.\(^7\)

Criticisms of the separation of powers are, accordingly, not new. For that reason, it is not proposed to address this preliminary assumption at any great length in this piece. It may be useful, however, to briefly identify the theory’s key weaknesses as they necessarily inform any assessment of what the diffusion of the doctrine tells us about comparative constitutional law.

1. **Historically inaccurate:** The tripartite theory was ostensibly presented by Montesquieu as an overview of the workings of the English constitutional system. However, it has been persuasively argued that Montesquieu’s description of England’s institutional structures was inaccurate.\(^8\)

\(^5\) See, for example, M. J. C. VILE. CONSTITUTIONALISM AND THE SEPARATION OF POWERS (OUP, 1967); GEOFFREY MARSHALL, CONSTITUTIONAL THEORY (Clarendon, 1971); EóIN CAROLAN, THE NEW SEPARATION OF POWERS (OUP, 2009).

\(^6\) GEOFFREY MARSHALL, CONSTITUTIONAL THEORY 124 (Clarendon, 1971).

\(^7\) Bruce Ackerman, Goodbye Montesquieu (2010), at 129.

\(^8\) Laurence Claus, Montesquieu’s mistakes and the true meaning of separation, 25 OJLS 419 (2005). It is unclear whether this was based on a misunderstanding by Montesquieu of the system which then operated in England or whether, on the other hand, he consciously depicted an idealised version of the English system.
2. **Impractical:** The classical version of this theory prescribes a tripartite separation of functions between legislative, executive and judicial branches. In practice, this is impossible to achieve. If government is to operate effectively, institutions cannot be absolutely sealed off from each other in this fashion. Madison noted the “impossibility and inexpediency of avoiding any mixture of these departments”\(^9\). The result of this inherent impracticality is that contemporary constitutional structures tend not to implement the purest version of the theory.

3. **Indeterminate:** The theory is hopelessly indeterminate. It requires the functions of government to be allocated amongst the three branches but provides little or no guidance as to how this allocation should occur.

Under the formalist version of the theory, powers and functions are classified as legislative, executive or judicial and allocated accordingly. However, this approach simply begs the different question of the basis for such classifications. There are many functions and powers of government which are, in the abstract, impossible to conclusively identify as legislative, executive or judicial. As Stevens J. observed:

> [T]he exercise of legislative, executive and judicial powers cannot be categorically distributed among three mutually exclusive branches of government [because] governmental power cannot always be readily characterised with only one of those three labels. On the contrary … a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned.\(^{10}\)

The functionalist understanding of the theory accepts this difficulty but, once again, simply replaces one imprecise set of criteria with another. Functionalists seek to ensure that the allocation of powers or functions preserves the inter-institutional balance which is necessary to provide an

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\(^{10}\) Bowsher v. Synar 478 US 714, 749 (1986).
appropriate level of checks and balances. Yet, how is such balance to be measured? How is it determined?

Just as the formalist theory necessarily (and misguidedly) assumes the ability to accurately define and distinguish the three functions of the state, so the functionalist approach similarly rests on the system's chimerical capacity to define, adopt and consistently employ the essentially indefinable notion of institutional balance.\textsuperscript{11}

4. **Ineffective:** As a model of institutional arrangement, such indeterminacy is particularly problematic. The purpose of a constitutional model of institutional structure is to assist in the organisation and operation of government. The separation of powers is, however, incapable of providing such assistance. The theory can only be usefully invoked by those charged with making decisions on matters of institutional structure after some external values have been imported into it, be they some extrinsic (and often surreptitiously adopted) theory of government or the decision-maker’s own personal views. By itself, the model functions only in the abstract. This calls into question its entire value as a constitutional principle. As Barber has observed, “[a] utopian constitutional theory [is] a waste of time.”\textsuperscript{12}

5. **Anachronistic:** The utility of the separation of powers theory has been further undermined by the way in which conceptions of government and of the state have changed since the 18th century. Government for Montesquieu was a limited rule-based activity, operated by the state’s central organs. By contrast, contemporary governance is both interventionist and decentralised in character with power and influence exercised through an array of instruments and agencies. It is unrealistic and artificial in the extreme to suggest that the complex and multi-faceted nature of modern government can be adequately described – much less regulated – by a simple three-fold categorisation of government functions.

6. **Misleading:** The criticisms outlined above indicate that the theory of a tripartite separation of powers has limited, if any, value as a constitutional principle of institutional organisation. Yet, it continues to be cited as a fundamental tenet of many domestic constitutional systems. The ongoing employment of the theory raises additional difficulties. One is that the theory tends to mislead rather than inform, obscuring the real basis upon which decisions about questions of institutional structure are taken. Secondly, the presence and persistence of the theory can discourage or prevent the development of alternative systems of institutional arrangement. For example, accountability in a separation of powers system is usually secured by the notional accountability of a decision-maker to one of the three branches of government. In reality, however, such accountability mechanisms – such as the accountability of a minister to Parliament for the decisions of administrative bodies, or the accountability of the executive to the legislature for the execution of legislative instructions under the non-delegation doctrine – do not reflect the way in power is truly exercised in modern government. The use of such nominal safeguards provides a veneer of accountability, thereby inhibiting the development of alternative mechanisms which would provide much greater protection for the values which the separation of powers system is supposed to protect.

It is clear from this brief recital of the difficulties associated with the separation of powers that it is, in its bare tripartite form, deeply flawed. Yet, persistent academic criticism of the doctrine across several jurisdictions has not affected either its usage or migration across many constitutional systems. This raises questions for our understanding of comparative constitutionalism. What does the successful migration of the separation of powers theory tell us about comparative constitutional law? Why is one of the most frequently transplanted constitutional theories a doctrine which was descriptively inaccurate when first elaborated and is prescriptively inadequate whenever it is operated? Is the diffusion of this bad idea an isolated case or an illustration of a potentially broader problem? The purpose of this piece is to conduct a broad examination of these issues. Drawing on work done in other fields on the diffusion of ideas, it aims to provide some preliminary views on the possible responses to these questions.
II. The diffusion of ideas

Diffusion research combines scholarship in areas such as sociology, anthropology, psychology, marketing and communication studies to examine the process by which ideas and innovations spread. One of the core findings of this research is that good ideas do not necessarily diffuse. The reality, in fact, is that the majority of innovations fail. Studies suggest that, depending on the parameters of the particular market at issue, only between 1% and 30% of the many thousands of new products introduced each year succeed. Some of these products may have inherent flaws but others amongst them are likely to present an opportunity for genuinely beneficial innovations. For those in the latter category, however, there is no guarantee of success.

Most technologists believe that advantageous innovations will sell themselves, that the obvious benefits of a new idea will be widely realized by potential adopters, and that the innovation will diffuse rapidly. Seldom is this the case.

Rogers uses the example of the British Navy’s efforts to control scurvy to illustrate his point. In 1601, an experiment with lemon juice by a Captain James Lancaster strongly indicated that lemons had a beneficial impact on the control of scurvy on ships. Sailors who were allocated lemon juice survived while 40% of those who were not given lemon juice died of scurvy. However, it was almost 200 years before the Navy adopted this practice and over 250 later before the merchant navy followed suit.

A review of the relationship between scientifically valuable research and patent citation found a similar lack of correlation between objective value and diffusion. As

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the authors summed up their findings “[s]cientific knowledge and patents are related but good publications and good patents are not”.

This indicates that evidence that a practice or product is beneficial will not, of itself, ensure that it will be widely adopted. On the contrary, diffusion researchers regard the migration of ideas as a complex social process. Much of the work in this field focuses on the social mechanics of diffusion. While this research also has interesting implications for comparative constitutionalism, this piece concentrates on the extent to which the design and characteristics of an idea can influence how it spreads. The diffusion scholarship indicates that “innovation attributes are significant factors in the diffusion of innovations”. In particular, it has been demonstrated that certain characteristics of innovations consistently affect the speed and extent of their diffusion.

The characteristics of an innovation, as perceived by the members of social system, determine its rate of adoption. Five attributes of innovation are: (1) relative advantage, (2) compatibility, (3) complexity, (4) trialability, and (5) observability.

Unlike product innovations, the latter two criteria are generally not applied to the study of idea-only innovations. In the constitutional context, for example, it is difficult to conceive of how a trial of a constitutional innovation could be conducted on a limited basis. Similarly, the results of a constitutional innovation cannot easily be

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15 Michelle Gittelman & Bruce Kogut, Does good science lead to valuable knowledge? Biotechnology firms and the evolutionary logic of citation patterns (2003) 49 Management Science 366.
16 It raises, for example, questions in relation to the role of networks in the spread of constitutional ideas and, in particular, in relation to the influence of particular agents and/or network structures such as scholarly publications, academic conferences, judicial conferences or exchanges, inter-court communications, international charities and/or organisations with an interest in post-conflict reconstruction, and so on.
18 Everett Rogers, Diffusion of Innovations 35 (5th ed., Free Press, 2003). The attributes of innovations have been categorised in other ways by other scholars. For example, Perry & Kraemer identifies the key attributes of innovation as “task complexity, pervasiveness, communicability, specificity of evaluation, departure from current technologies, and cost”. In general, however, there is a degree of commonality about the substantive content of these categories, if not about the way in which they are described and sub-divided. See, for example, James L. Perry and Kenneth L. Kraemer, Innovation Attributes, Policy Intervention, and the Diffusion of Computer Applications among Local Governments, 9 Policy Sciences 179, 186 (1978)
subjected to consistent observation or assessment. Isolated illustrations of the principle in operation may provide some degree of observability but such examples cannot form the basis for reliable findings. They may be wrongly attributed to other factors, or they may represent an atypical but high-profile example of the relevant principle in action. Constitutional structures are too complex to allow the impact of one principle to be readily observed.

For that reason, the analysis here is confined to an examination of how the first three characteristics are said to affect the diffusion of ideas, as well as the extent, if any, to which the migration of the separation of powers corroborates the analysis of this diffusion research.

(a) Relative advantage:

It is obvious that ideas are more likely to diffuse if they are regarded as more advantageous than the other options available. The key point here, however, is that such comparative assessments of the merits of competing ideas typically depend not on their objective strengths and weakness but rather on their perceived advantages. “[P]erceptions count. The individuals’ perception of the attributes of an innovation, not the attributes as classified objectively by experts or change agents, affect its rate of adoption”.19

Yet, errors recur in the making of these assessments. Research has shown that the human mind is naturally predisposed to commit certain errors. One prominent example is what the literature describes as availability error where “decisions [are based] on the most available information and not on all the evidence.”20 This error is compounded by the unreliable way in which we frequently obtain such information. “Information may be available because it is widely publicized, recent, dramatic, or emotional”.21 Similarly:

20 Omar Mahmoud, The Operation Was Successful But The Patient Died: Why research on innovation is successful yet innovations fail, paper delivered at ESOMAR Consumer Insight Congress, Barcelona, 2002.
21 Omar Mahmoud, The Operation Was Successful But The Patient Died: Why research on innovation is successful yet innovations fail, paper delivered at ESOMAR Consumer Insight Congress, Barcelona, 2002.
[W]e often assign excessive weight to confirmatory data at the expense of contradictory data. This usually involves two mechanisms: first, we often quote anecdotal cases that support our beliefs and ignore those that don't, and, second, we exercise 'optional stopping' or 'satisfying' in the pursuit of data when the early data supports our convictions, but continue the search for more data when early indicators do not support our predictions.  

One infamous recent example of how advertising can take advantage of such tendencies was the Swift Boat Veterans for Truth advertising campaign that took place during the 2004 American presidential election. Studies of the marketing strategy adopted by those behind this campaign show that their advertising had a deliberately controversial character. This was intended to ensure that the ads received wide coverage and made a greater degree of impact on individuals. The media debate about the truth or falsity of the claims made meant the claims received far more attention than their small advertising spend would have secured alone.

Furthermore, the campaign made a significant effort in advance of the broadcast of the ads to contact and brief conservative media outlets whose antipathy to Kerry made it more likely that they would engage in the form of ‘optional stopping’ referred to above. The strategy was a conspicuous success.

While most major news outlets debunked or refuted the claims of the Swift Boat Veterans, and although only a very few of their ranks had ever actually served with Kerry in combat, their message was played and replayed throughout the national media, garnering them far more exposure than their limited budget ever could have allowed. Indeed, this was part of their overall strategy.

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Regardless of the accuracy of their claims, or perhaps because of their inflammatory nature, the Swift Boat Veterans were successful in casting doubt on one of the cornerstones of Kerry’s campaign: his war record.\(^\text{23}\)

Another common error of reasoning is asymmetric evaluation. This “is one special type of the lack of objectivity involving observing and citing occasions when an event occurred and a specific outcome resulted, and overlooking all other event/outcome combinations”.\(^\text{24}\) We are more likely to recall the high-profile performance of an innovation in an atypical situation than the many mundane occasions when it functioned in a different way. In the legal context, this may manifest itself in a focus on the way in which a principle applied in the notorious ‘hard case’ rather than in an analysis of how it functions in the majority of less dramatic situations.

The importance of perception in assessing relative advantage, and the frequently flawed nature of that perception, has a number of implications for the diffusion of new ideas. The first is that it underlines the fact that the objective merits of an innovation do not guarantee widespread adoption. As a corollary, it also means that the weakness of an innovation will not necessarily inhibit its diffusion.

In terms of the diffusion of ideas, this raises the specific problem that an idea, once adopted, may be difficult to dislodge. Individuals do not directly experience the effects of ideas on a regular basis. They thus will rarely have the incentive to assess the relative advantage of established orthodoxies. In the absence of a radical malfunctioning of the relevant system, individuals are likely to trust the ideas upon which it was originally established. In this way, trust in current suppliers poses a significant barrier to entry for new innovations.\(^\text{25}\) In turn, this confers significant first-mover advantages on those ideas that are initially accepted. Research on the diffusion of ideas in other fields suggests that the importance of this should not be underestimated.


\(^{24}\) Omar Mahmoud, The Operation Was Successful But The Patient Died: Why research on innovation is successful yet innovations fail, paper delivered at ESOMAR Consumer Insight Congress, Barcelona, 2002.

Evidence from the pharmaceutical industry suggests that the first-mover advantage is quite substantial, be it due to reputation effects, slow information diffusion, or simply ‘capture’ of the medical profession.\textsuperscript{26}

The research also indicates that these first mover advantages are particularly pronounced where the dominant innovation or idea in question successfully obtains a large market share.

Pioneers such as Coca-Cola and Kleenex have become prototypical, occupying a unique position in the consumer's mind. Their large market shares tend to persist because perceptions and preferences, once formed, are difficult to alter.\textsuperscript{27}

The normatively cohesive character of most state’s constitutions means, of course, that the prevailing orthodoxies of that system, once initially accepted, occupy an almost monopolistic position in that order. The orthodox position of established constitutional ideas is supported by their repeated invocation and application. Competing ideas are, by definition, presumptively invalid.

Thus, once an idea-only innovation is generally accepted as advantageous, it makes it very difficult for new ideas to successfully diffuse. That any assessment of their relative advantages is also likely to be flawed further compounds this difficulty.

From the point of view of the separation of powers theory, its historical pre-eminence has arguably conferred this type of first mover advantage on it when compared against alternative potential models of institutional arrangement. It is telling that we tend to think of the “separation of powers” in tripartite terms. There is nothing in the neutral branding of the concept as one of separating power to indicate that it should necessarily be organised in this way. If a political scientist or constitutional lawyer was asked to design a separation of powers system from


\textsuperscript{27} Marvin B. Lieberman & David B. Montgomery, \textit{First-Mover Advantages} 9 Strategic Management Journal 41, 46 (1988).
scratch, it is questionable whether he or she would distribute power in this way. After all, if the point of the separation of powers theory is to prevent tyranny and the abuse of government power (as many of its advocates claim), why limit this preventative allocation of power to only three institutions? Why not four or five? And why employ a model which is arguably ineffective and unrealistic? Yet, the tripartite model’s pedigree and long-standing position in the market means that it dominates and effectively defines how we think about separating institutional power. As with the examples of Coca-Cola and Kleenex highlighted above, the first-mover’s product (the tripartite model) and the market (separating institutional power) may become so intertwined in the popular consciousness that the market is conceived of in terms of the dominant product. This reinforces the position of the product. Thus, a ‘good’ idea to which people are attracted (that we should separate power to prevent it from being abused) becomes defined in terms of a ‘bad’ one (that separation must follow the tripartite model), which strengthens the capacity of the bad idea to diffuse and to retain its dominant position.

The influence of the separation of powers doctrine bears out other aspects of this diffusion analysis. The theory’s association with celebrated figures of the past such as Madison, Montesquieu and Locke, as well as its citation in landmark cases of constitutional jurisprudence, encourages an asymmetric evaluation of it as an influential and effective theory. We (with the possible exception of specialists in these matters) are more likely to recall these celebrated examples where the separation of powers theory was relied upon to restrain high-profile examples of potential government abuses than the more mundane but common scenario in which its imprecise and indeterminate character complicates arcane or technical issues of administrative law. The absence of any significant impetus for undertaking a reassessment of it, together with the difficulties which any new innovations would face in the conduct of that assessment, further copperfastens its perceived position as a central principle of constitutional thought.

(b) Complexity:

28 See, for example, Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952); Buckley v. A.G. (1950) I.R. 64.
Another key driver in the diffusion of a new idea is the extent to which it is regarded as complex to use or understand. "New ideas that are simpler to understand are adopted more rapidly than innovations that require the adopter to develop new skills and understandings".\(^{30}\) Silvester’s research into the impact which complexity has on the success of technological product launches is telling:

> The human mind's inability to assimilate technology is the dark secret of the tech industry ..... The consumer simply doesn't use most of what technologically advanced companies build into their products.\(^{31}\)

For Silvester, the key to a successful technological product – even one aimed at a young audience – is simplicity. "Simple devices and software that do one thing, not several, can have an electrifying effect on consumer mentality, clearing minds, and changing the way consumers think".

The importance of simplicity applies not only to the product itself, but also to the way in which it is named, branded and positioned.

> [A] brand name can help make the innovation visible because it provides a label for the 'news'. As a result, it is likely that it will be easier to achieve higher recall and recognition scores around the innovation. It is easier to remember a brand name than the details of a new offering or a branded feature or service. In fact, one of the characteristics of a good brand name is that it is easy to recall.\(^{32}\)

Again, the migration of the separation of powers bears out the analysis of the diffusion research. The tripartite model arguably provides a textbook example of how combining a selling point which is easy to understand with clear and simple branding can have a very positive impact on the diffusion of an idea. One of the chief strengths of the tripartite theory is its inherent simplicity. The neat model of three institutions exercising three distinct functions is easy to explain and to appreciate.

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\(^{31}\) Simon Silvester, The emperor's new clothes: technology is useless if consumers can't use it, 36 Market Leader 20, 21 (2007).

\(^{32}\) David Aaker, "Innovation: brand it or lose it" 41 Market Leader 20, 22 (2008).
Even the theory’s title (or ‘branding’) is simple, suggesting instantly and clearly what it is that the theory aims to achieve. Of course, this simplicity is also one of the primary reasons why the theory is functionally inadequate. However, while the doctrine’s lack of complexity and detail may undermine its utility as a useful instrument of institutional organisation, it is arguably one of the primary reasons why it has migrated so successfully.

(c) Compatibility:
The extent to which an innovation is compatible with previous practice can also influence the success and scope of its diffusion.

Compatibility of an innovation with a preceding idea can speed up or retard its rate of adoption. Old ideas are the main mental tools that individuals utilize to assess new ideas and give them meaning. Individuals cannot deal with an innovation except on the basis of the familiar.33

This argument has significant implications for our understanding of the way in which ideas spread. In particular, it provides useful insights about the process by which ideas both diffuse and are adopted.

From the point of view of diffusion, this means that the adaptibility of an innovation can have a critical impact on its likely success. In the absence of objective analyses of relative advantage, we are more likely to favour innovations which tally with – or are capable of being understood to tally with – the information and ideas which we already have. For this reason, vagueness or imprecision can be a valuable attribute for anyone seeking to promote a new innovation. “[A]n innovation diffuses more rapidly when it can be re-invented [by its users] and … its adoption is more likely to be sustained”.34 The more user-adaptable an innovation is, the more likely it is to be successful. Studies indicate that this was something of which President Obama’s electoral advisers took advantage when, having correctly forecast that “change” was likely to be a prominent theme in the primary and election campaigns, they devoted


much of their early efforts to defining what was a vague and malleable idea of change “in ways that played directly into Barack Obama's message and his personal strengths”.  

In addition, this analysis also suggests that an idea which involves little or no innovation is more likely to be adopted than one that genuinely involves a departure from previous practice. The more compatible an idea is with the norms which it purports to improve upon or replace, the more likely it is to secure general adoption within that particular system.

In addition, studies in other contexts have suggested that the adoption of an idea from another jurisdiction typically occurs not because of any objective recognition of the value of the idea itself but rather as a response to a particular domestic need.

It should be noted that much of the policy diffusion that takes place is, in some sense, motivated by expediency and convenience. Diffusion is a political routine, a shortcut or expedient way of making policy. Confronted with a need to deal with a particular problem, Commonwealth countries look with remarkable frequency towards their community partners for technical and substantive direction. Why, after all, reinvent the wheel?  

From the point of view of the adoption of new ideas, these considerations suggest that the process of diffusion may be more illusory than it first appears. The fact that diffusion occurs in response to domestic developments underlines the extent to which the process remains a primarily domestic one. Domestic considerations prompt the search for a ‘new’ idea but, it is suggested, also skew the search in favour of ideas that are compatible with existing domestic norms. In addition, the importance of compatibility implies not only that a more compatible idea is more likely to successfully diffuse but also that the idea may itself be amended as it is adopted into a system. In other words, an idea which initially exists in a particular

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form outside the system may be made more compatible with pre-existing norms by
the users who ultimately incorporate it into that system. There are elements in this
account of what Scalia, Thomas and Rehnquist criticised in the legal context in
Roper v. Simmons in the following terms: “to invoke alien law when it agrees with
one’s own thinking and ignore it otherwise is not reasoned decision-making”.

Yet, in many cases, the users in question will be unaware that such changes have even
occurred. It is because they understand an idea to be compatible with their prior
views that they are willing to adopt it. Whether that understanding of the original idea
is as its creators or earlier users intended may have little influence on its adoption or
subsequent employment.

While terminology such as diffusion or (in particular) transplants, may appear to
underplay the influence of the recipient on the end result of the process, the critical
influence of the adopter has been widely recognised by those engaged in diffusion
research. A study on the diffusion of democracy, for example provides a number of
findings which – by virtue of that work’s concern with the diffusion of ideas rather
than products – are particularly relevant to this piece.

One preliminary point to note is that democracy is a particularly adaptable idea. As
the study observes at the outset “the meaning of the term [democracy] may become
so malleable that it is difficult to ascertain how widely differing conceptions and
aspects of democracy may be reconciled”. The analysis outlined above suggests
that this means both that democracy is an idea which is more likely to successfully
diffuse and that the end result of that diffusion will differ from place to place.

This was borne out by the researchers’ findings. In particular, the study suggested
that the diffusion of democracy could not be understood as a consistent or linear
process in which the idea of democracy was transplanted from one system into
another. The adoption by different states of democratic government was, on the
contrary, a more complex phenomenon which was heavily influenced by local
circumstances and could not be understood in unitary terms.

38 John O’Loughlin, Michael D. Ward, Corey L. Lofdahl, Jordin S. Cohen, David S. Brown, David Reilly, Kristian S.
We have shown how the ebb and flow of democracy is regionally variable. Like Starr (1991), we conclude that analyzing regime change will benefit from a "domain-specific" position. We caution against assuming that "universal laws" govern the growth of democracy. It remains important to recognize that the process is apparently affected by regional and local contextual elements that remain important.\(^{39}\)

In ostensibly adopting an innovation (whether so perceived by themselves or by those outside to the system), users thus may, in fact, by developing their own localised or contextual idea. This in turn raises the possibility that the version of the idea ultimately adopted may depart from or even contradict the original innovation, reflecting, as it does, not the idea that is superficially being diffused but rather the particular’s system’s pre-existing ideas. In such a situation, all that diffuses is, at most, a garbled version of the original idea. This can mean that, even where an idea is objectively advantageous in its own terms, it may be transplanted in a misconceived and less advantageous form.

Once again, elements of such experiences can be seen in the adoption and diffusion of the separation of powers. Magill has described how the separation of powers doctrine represented an attempt to unify two pre-existing institutional ideas – the mixed and balanced theories of government.\(^{40}\) That the theory was compatible with these familiar conceptions of government must have aided its migration. This was so despite the fact that the "marriage of the two ideas is a troubled one"\(^{41}\) which contributes, to a significant degree, to the indeterminate character of the theory.

Similarly, the successful migration of the separation of powers also demonstrates how imprecision can be a significant advantage in the diffusion of an idea. One of the primary criticisms of the separation of powers is that it is inherently indeterminate. It


is “an institutional vision in search of an ideal”. Yet, this imprecision has been one of the reasons why it has been adopted and embraced by so many different groups. Munro has noted how the theory’s “open texture, which enabled people to see in it what they liked, and take from it what they wanted, was no disadvantage to its reception or employment”.

In turn, this has meant that the separation of powers has not been uniformly replicated in different systems. The doctrine’s design and its implications for the way in which government operates differ from jurisdiction to jurisdiction. Indeed, it is arguable that the adaptability of the theory has led, in some situations, to the doctrine being applied in a manner which significantly departs from the purpose of the separation of powers as it was originally understood (to the extent that such an understanding can be said to exist, of course). Brown has criticised how the American courts have rarely considered the liberty of the individual in their treatment of the separation of powers, while the Irish Supreme Court has invoked it to justify its refusal to enforce an individual’s constitutionally-protected right to education against the other organs of government. In both these context, the separation of powers has acted as a vehicle for the unacknowledged enforcement of alternative ideas with which it was compatible.

III. Paths of diffusion

Thus, it would appear important for comparative constitutional scholars to approach any analysis of an ostensibly popular idea with some degree of caution. Diffusion studies indicate that neither ubiquity nor acclaim can necessarily be regarded as a proxy for the quality or comparative influence of a particular theory. As the previous section suggested, the successful diffusion of a theory may be based not on its inherent advantages but rather on the fact that it has certain characteristics –

44 See, for example, Hermann Punder, Democratic legitimation of delegated legislation – a comparative view on the American, British and German law, 58 ICLQ 353 (2009).
47 A useful discussion of a similar phenomenon is contained in Hasebe’s account of how French doctrines have influence the development of Japanese constitutional jurisprudence in Yasuo Hasebe, Constitutional borrowing and political theory, 1 ICON 224 (2003)
imprecision, historical or reputational pedigree, adaptability, and so on – which make it a suitable candidate for diffusion. Furthermore, such imprecision or adaptability may mean that the idea becomes much altered in its migration from one jurisdiction to another. It is apparent that the propagation of constitutional ideas involves far more than the simple citation or adoption of foreign authorities by a domestic court. Ideas do not travel alone. On the contrary, the mechanisms by which they diffuse are complex, multi-faceted and contingent on a variety of shifting considerations. This sections considers in brief the implications of these mechanisms for the study of comparative constitutional law.

The comparative exercise involves, at its most basic, the retrieval and relative evaluation of information from different legal systems. Gerber has pointed out that developments in globalisation and information technology have made the retrieval of information a less taxing undertaking than was formerly the case. This has inevitably altered the focus of comparative scholarship from a “traditional … view[w of] information as a product rather than a tool [and] … as an end in itself”48 to one premised instead on the analysis of the information obtained.

Where the knower has ready access to copious amounts of information, the problem is no longer obtaining enough ‘information’, but rather having the capacity to use the information effectively. The emphasis shifts from the process of getting information to the process of transforming it into useful knowledge – that is, structuring and interpreting information so as to provide answers to the questions posed or problems presented.49

If the value of comparative scholarship today lies primarily in the evaluation of information, this means, in turn, that it is necessary for comparative scholars to have regard to the cognitive processes involved in such evaluation. In particular, comparative scholars must be prepared to critically assess the limitations or risks associated with the evaluative exercise. The previous section highlighted the extent to which the presence of particular characteristics may increase the possibility that

an idea will successfully diffuse. The value of these characteristics derives from the way in which they feed into certain cognitive biases, some of which were identified above. The remainder of this section considers these processes in a more comprehensive manner in order to assess their implications for the future of comparative scholarship.

From an academic perspective, confirmatory bias is the cognitive tendency which arguably has the potential to most severely undermine the value of comparative research. The social sciences have long accepted that individuals have a tendency to seek out information which tends to confirm the hypothesis under consideration. Importantly, studies have suggested that this may occur regardless of the individual’s own views about the hypothesis. Rather, the mere fact that an individual has been asked to consider a particular proposition makes it more likely that they will identify and rely on information which supports that proposition.\textsuperscript{50} This poses obvious difficulties for comparative research. As Gerber has noted, the landscape of comparative law has been profoundly altered by the advent of electronic databases containing extensive information about other legal systems. This means that the main challenge for a researcher is to filter that information in order to extract the most relevant or informative material for the particular project being pursued. However, the phenomenon of confirmatory bias means that there is an inherent risk that the information which the researcher will seek out, identify and extract is that which tends to confirm whatever hypothesis they intend to test. The risk is that this would introduce an element of circularity into the research undertaken which would fundamentally undermine its value.

This risk is compounded by the faulty way in which individuals generally tend to incorporate data into their reasoning. It is cognitively commonplace for beliefs to be extrapolated from incomplete or unrepresentative data. In many situations, judgments or beliefs are based on the data which is available to an individual, rather than on the data which would most directly prove or disprove the hypothesis in question. This is not necessarily because of any deficiency in the individual’s research. It may simply be that the relevant data is impossible to ascertain. For

\textsuperscript{50} See, for example, Thomas Gilovich. How We Know What Isn’t So (Free Press, 1993), at 33.
example, a legal or institutional analysis which focuses on decisions of the courts carries with it the risk that the evaluation is distorted by a reliance on the sort of disputes which are more likely to give rise to litigation (whether because of the character of the claim, or the stakes for the parties involved). Because the courts, by definition, never see non-litigated disputes, they are never captured by judicial decisions or data. Nonetheless, there is an identified human tendency to base decisions on the data to hand without methodically scrutinising the causal relationship between the information in question and the judgment derived therefrom.

Similarly, we are also predisposed to place more emphasis on high-profile examples which may not necessarily be representative. This was canvassed above in relation to the separation of powers. Is it possible that one of the reasons that the separation of powers is regarded as a valuable principle of liberal democracy is because it has been deployed in a small number of dramatic cases to restrain the most egregious executive or legislative tyrannies? Are we predisposed to look to these cases rather than the arguably more representative but less dramatic instances in which courts have been asked to assess the more mundane issue of whether an administrative function is executive, legislative, judicial, or some quasi-combination of these three?

This, in turn, highlights the potential relationship for beliefs based on incomplete or unrepresentative data to become a self-fulfilling prophecy. Merton has pointed, in this regard, to rumours of a financial institution’s insolvency as an example of a judgment based on incomplete or incorrect data which may nonetheless become true by virtue of its existence.\footnote{Robert K. Merton, The Self-Fulfilling Prophecy (1948) 8 Antioch Review 193.} Similarly, there may be a circularity between the occurrence of a high-profile phenomenon and the belief in its value. To return to the separations of powers example, there would logically appear to be a likely correlation between its enforcement by the judiciary and the unrepresentative character of the case in which that occurs. Regardless of its myriad imperfections and imprecisions, it seems reasonable to speculate that courts are most likely to be willing to invoke the doctrine when faced with particularly severe examples of legislative or executive over-reach. Yet, these are also the situations most likely to attract the attention of the public (and, indeed, arguably of constitutional scholars). Thus, the data which we are
most likely to rely upon in assessing the value and merit of the theory is based on those relatively unrepresentative situations when the application of the principle was relatively free of the uncertainty and ambiguity that so often affects its usage in other everyday contexts.

In addition, it is possible that there may be specific biases and risks associated with the diffusion of legal theories or ideas. The formal and hierarchical nature of the legal process lends itself to an unduly limited and simplistic conception of diffusion. From a formal legal perspective, an idea migrates from one jurisdiction to another at the moment it is incorporated into a domestic legal text or decision. This ostensibly singular account of the moment of migration obscures, however, the dynamic and multi-faceted process that has led to that point. In particular, it may serve to conceal the role which various parties and thought processes have played in bringing that idea into the domestic context. As discussed in the previous section, it may also disguise the changes the idea has undergone in the course of its ‘translation’ into the domestic order.

This reflects the enormous difficulties involved in comparing legal theories. A legal norm does not enjoy an independent existence. It develops and is operated within the confines of a particular social and institutional structure, with its own culture and pattern of power distribution. This is particularly true of constitutional concepts which often echo normatively significant aspects of national culture or ideology. Domestic audiences understand legal norms or values not as free-standing principles but as elements of a structure based on shared assumptions or intuitions. This constrains the extent to which an external observer with limited exposure to the residual logic of the system can accurately process and interpret specific elements of it. In the legal context, this difficulty is exacerbated by the fact that that external observer is likely to bring with him or her a separate set of assumptions or intuitions based on their own experience or expertise, which will, in turn, shape the way in which the observer processes the ‘information’ obtained. Thus, for true comparison to occur, “the comparative lawyer has to understand the cognitive structure of the law as well as the epistemological foundations of that cognitive structure”.  

That there may frequently be a superficial similarity between the ideas being assessed only serves to further complicate the process. As Francois Venter has remarked:

What emerges from a comparison of constitutional material, even where the constitutional roots of the jurisdictions concerned are deeply intertwined, is the fact that in many instances the lyrics sung by constitutional lawyers are the same but the tunes vary, not only due to cultural variety but also in terms of meaning and effect. Humanity is too far removed from a state of similitude to allow for the existence of truly universal constitutional law.53

Nor, it should be remembered, is the process of migration or translation typically accomplished by a single observer acting alone. Despite the formal focus of law on a single moment of reception, the reality is that the diffusion of a legal or constitutional idea may be influenced by a variety of individuals or organisations, each of whom may introduce their own institutional influences into the process. International organisations involved in constitutional or legal reform, transnational networks of judges and international associations of comparative legal academics are all examples of epistemic communities through which ideas may be diffused but which may also be susceptible to certain forms of cognitive or normative bias. Is it conceivable, for example, that academics with an established interest in comparative law are more likely to see value in the act of migration than might necessarily be justified?

IV. Conclusion

These issues raise a number of challenges for the practices and conception of comparative constitutional law. Diffusion research may have significant implications for our understanding of the aims and objectives of comparative constitutional law, and of the way in which it ought to be pursued.

For example, it tends to undermine the view of those who envisage comparative law as an engine of universalist convergence. Diffusion research suggests, not simply that true convergence is unlikely to occur, but also that any convergence that does occur will not bring about an enlightened “international unity of law and legal science” but may instead involve the bare aggregation of simplistic and superficially similar notions. The research indicates that the ‘best’ constitutional innovations will not necessarily be the same as those that migrate or transplant successfully. Our analytical limitations mean that we may be unable, in the first instance, to distinguish between the objectively or rationally advantageous theory and the one which we are more inclined, for various reasons, to perceive as advantageous. Even if experts are able to engage in such an objective assessment of competing constitutional theories, the research still suggests that the ideas that are more likely to diffuse are those that are easier to understand, and those that appear to approximate most closely to existing concepts.

A gloomy reading of the diffusion research calls into question the purpose of constitutional transplants at all. Given the complexity of constitutional governance, it seems reasonable to question whether transplanting a constitutional concept from one system to another will bring any significant benefit to the recipient state. If the simple ideas are those that transplant successfully, will they be of any real value to the recipient system’s constitutional jurisprudence? Certainly, it can be argued that the simplicity of the separation of powers has meant that it has had little operational utility in its various constitutional incarnations, serving instead to mislead more than it guides.

Furthermore, given the apparent tendency for an idea to diffuse successfully when it is compatible with pre-existing values, the question arises as to whether true migration or transplants ever actually occur? If an individual or system is predisposed to favour the least different idea, can transplants have any real impact? This is particularly so given the accompanying tendency for diffusion to occur where

the ideas in question are simple and adaptable. If transplants will take only where they are too simple to offer detailed solutions and too similar to involve any significant change, why undertake the operation at all? Diffusion research suggests that constitutional transplants may involve no more than a cosmopolitan re-branding of ideas already latent in domestic legal or political culture. On this analysis, the constitutional transplant is, at worst, a label or slogan borrowed from one constitutional context for use in another and, at best, a means of prompting the system to examine or re-examine domestic issues that, for whatever reason, remain unresolved.

It is clear that, even on this more optimistic analysis, the migration of the idea does not operate as a true transplant in the sense for which Watson, for example, contended.⁵⁶ In fact, diffusion research suggests that such transplants may simply be too difficult to undertake. Constitutional concepts may be so bound up in the political, historical and cultural context in which they develop that they are too complicated to ever truly be successfully transplanted. The donor system’s idea is not grafted, fully-formed, onto that of the donee. A ‘transplant’ involves not a transfer of ideas but (at best) an evolution in the legal norms of the ‘recipient’ order. Critically, the ‘recipient’ system retains control of the pace, content and implications of this evolution. Diffusion research suggests that very little of substance passes between the two. Thus to speak of constitutional transplants seems misleading and misconceived.

Of course, the deficiencies of the transplant metaphor do not necessarily deprive the practice which it purports to portray of its intrinsic merit. It would take the findings of the diffusion research much too far to claim that the examination of external constitutional innovations by a domestic legal system is inevitably a futile, or even harmful, endeavour.

What the research does suggest, however, is that there is a need to retain a realistic appreciation of what that process involves. In conducting such comparative analysis, it is important to resist the temptation to place too much faith in what the research indicates will most likely be an inadequate, unsophisticated or misguided

understanding of the idea at issue. We must remember how little we understand the toolkit which comparative constitutional study provides for us, and exercise our consequent judgments with appropriate caution.

Furthermore, it must also be remembered that the exercise in question plays out in, and is almost entirely determined by, domestic legal culture. As Legrand has argued, it is likely that the idea in question will be “understood differently by the host culture and … invested with a culture-specific meaning at variance with the earlier one.”57 It is also likely that the impulse for a system’s consideration of an external constitutional idea will be based not on the inherent validity of that notion, but rather on the way in which it speaks to questions of politics, power or law that already exist in that jurisdiction – or, more cynically, to the interests of influential groups within the domestic order.58 This suggests that it is necessary to ensure that proposals that are put forward on the basis of constitutional practices in other systems are subjected to duly rigorous assessment. In particular, it is necessary to temper any enthusiasm for the wholesale adoption of comparative innovations by recalling that the idea in question is unlikely to be used or understood in the same way in either system.59 Citation of comparative practice should not take the place of rigorous scrutiny of what is actually being proposed – because the diffusion research suggests that it is likely to be different in character and potentially deficient in detail.

These are the difficulties which diffusion research poses for the practice and project of comparative research. However, the diffusion research may also provide valuable guidance for the future development of comparative law. The formal and hierarchical structures of law may pose particular challenges in understanding and assessing how migration or transplants actually occur but there is no reason to suppose that these are insurmountable difficulties. After all, the cognitive biases identified above are not limited to legal researchers alone. Thus, there may be lessons to be learned

58 See, for example, the discussion of how domestic politics can shape constitutional design in Lee Epstein & Jack Knight, Constitutional borrowing and nonborrowing 1 ICON 196 (2003).
59 In this regard, see Rosenkrantz’ criticism of the effects and legitimacy of the Argentinian courts’ practice of adopting American constitutional doctrines without any significant consideration of domestic legal instruments. See Carlos F. Rosenkrantz, Against borrowings and other nonauthoritative uses of foreign law, 1 ICON 269 (2003).
from the way in which other disciplines have sought to deal with these biases. In particular, it would appear reasonable to suggest that comparative law may derive considerable benefit from the adoption of a more rigorously scientific approach to its research methodologies.

One of the core principles of scientific practice in many areas is that the researcher must undertake repeated tests to validate a particular hypothesis. This is done in order to ensure that the research is based on an adequate range of relevant data points. Similarly, scientific practice frequently requires that the research provide a precise and a priori definition of the objective and scope of the research being undertaken. This will involve defining in advance the hypothesis to be investigated, what would constitute successful validation of that hypothesis, and the criteria to be used in defining such success. The main aim of this is to minimise the impact of the confirmatory biases previously discussed.

In many ways, such practices are alien to at least some traditional notions of legal study. After all, one of the chief skills of the practising lawyer is to develop a persuasive argument, based on relevant data, which is favourable to his or her client – in short, the confirmatory bias writ large. For the reasons outlined above, however, a more scientific approach to comparative law seems apposite. This will require the development of new methodological skills which emphasise repetition and causal validation, of more objective forms of data extraction and processing, and of a shared language and approach for determining the scope and output of comparative research. As diffusion studies suggest, it is only by expanding the comparative skillset in this way that scholars will be able to fully assess the way in which legal ideas spread – and the patterns of institutional influence and power distribution that shape that process.