CHAPTER 38

COMPARATIVE CONSTITUTIONAL LAW

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I. Introduction: The Evolution of the Field of Comparative Constitutional Law

The study of comparative constitutional law began when the study of comparative law did, but the waves of constitution-making during the twentieth century reinvigorated the field. Montesquieu's *Spirit of the Laws*, a predecessor to all contemporary comparative legal scholarship, can readily be taken as an inquiry into comparative constitutional law. Yet, systematic study of comparative constitutional law rests on several related phenomena, which emerged in the generation after Montesquieu. First, the systematic study of comparative constitutional law requires that people believe that they can design institutions by 'reflection and choice' rather than having institutions imposed on them by 'accident and force', as Alexander Hamilton put it in the first *Federalist Paper*. Second, that study probably requires that there be some significant examples of *written* constitutions for scholars to compare. Writing a constitution, of course, is an exercise of reflection and choice. Finally, the constitutions to be studied must have some serious relation to the actual operation of a nation's institutions, going beyond the simple provision of a framework within which government takes place. A constitution that merely creates institutions for making policy offers little to study unless the policies that emerge differ depending on what the institutions are.

For these reasons, the study of comparative constitutional law arose roughly contemporaneously with the adoption of the US Constitution. Not surprisingly, in light of their understanding of the task before them, major figures in that constitution's drafting, John Adams and James Madison, engaged in extensive surveys of constitutional practices in other nations and throughout history, in an effort to discern the features of institutions that would help resolve the political and economic problems that motivated the effort to create a new constitution. Consistent with one of the themes of comparative legal scholarship generally, scattered efforts to borrow constitutional ideas occurred through the nineteenth century. Juan Buatista Alberdi, for example, based his prescriptions for Argentine constitutional design in part on his reflections on the US Constitution.

The study of comparative constitutional law deepened early in the twentieth century, largely as a reaction to observations outside the United States to what the US Supreme Court was doing. In 1921 the French scholar Eduard Lambert published *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, a critical examination of decisions by the US Supreme Court invalidating laws regulating wages and hours. Working in a tradition dating to pre-revolutionary France, Lambert used the US example to demonstrate why empowering judges to set aside legislation was unwise. The German jurisprude Hans Kelsen, relying on the same experience, drew a somewhat different conclusion: Constitutions should include provisions for judicial review, but the ordinary courts should not be given the power to exercise it because of the important policy and political components of constitutional adjudication.[1] The drafters of the Irish Constitution of 1937, emulated a decade later by the drafters of the Indian Constitution, took a third course. Responding to constitutional principles shared by secular socialists and Roman Catholics influenced by their church's social teaching, the Irish Constitution contained constitutional guarantees of social welfare rights, but expressly insulated legislation dealing with such rights from judicial review by including them in a section labelled, 'Directive Principles of Social Policy'.

Neither the creation of constitutions for the nations that had been colonies of European powers, nor sporadic revisions of Western constitutions, provoked substantial scholarship on comparative constitutional law. There were of course studies of how particular problems were treated in different constitutions, and some scholarship on the subject of constitutional borrowing.[2] Prior to the 1950s, the US Supreme Court was the only constitutional court that did enough worth studying, but the emergence of the German Constitutional Court as a creative constitutional interpreter basically doubled the number of constitutional courts whose work product provided fertile ground for scholarship, enabling true comparative studies of constitutional law as actually implemented and interpreted.

The field took off in the 1980s. Canada's effort to patriate its constitution (ie to make constitutional revision in Canada possible without recourse in any way to the British Parliament) and the negotiations that led to both patriation and the adoption of the Canadian Charter of Rights and Freedoms were driven by a deep conceptualization of the role of constitutions in creating and possibly transforming national identity by Pierre Trudeau, a law professor turned politician. The return of democratic constitutionalism to Latin America through the 1980s was relatively little noticed by scholars of constitutional law outside the region, perhaps because it was a return that seemed to need little explanation or to provide interesting new material for scholarship.

[1] For a discussion of Kelsen's views on constitutional design, see Klaus von Beyme, 'The Genesis of Constitutional Review in Parliamentary Systems', in Christine Landfried (ed), *Constitutional Review and Legislation* (1988), 21–38.

[2] See eg Louis Henkin and Albert J. Rosenthal (eds), *The Influence of the United States Constitution Abroad* (1990).

That could not be said of the transition to democracy in Central and Eastern Europe from 1989 on, or of the end of apartheid and the establishment of democracy in South Africa in the early 1990s. For all practical purposes, those developments created the field of comparative constitutional law as it exists in the early twenty-first century. Partly out of the urgent need to create democratic institutions and to institute constitutionalism, partly out of enthusiasm over the possibilities of an invigorated democracy in formerly totalitarian nations, and (especially for Europeans) partly out of the importance of ensuring that one's neighbours were governed decently, scholars of constitutional law turned their attention to constitutional developments around the world. Constitution-drafters in Central and Eastern Europe and in South Africa consulted experts from the United States and Western Europe, consultations that were facilitated by the practice in modern constitution-drafting of relying heavily on technical specialists to develop the precise language to be used in new constitutions. More problematic was the possible development of a federated Europe out of the European Community and European Union. Debate over whether a constitution required a pre-existing political community, or whether a liberal constitution could consolidate an existing but unrecognized polity, produced important scholarship.[3] The emergence of the field was signalled in the usual way, by the establishment in 2003 of a scholarly journal dedicated to comparative constitutional law, the *International Journal of Constitutional Law*.

II. Comparative Constitutional Law, Politics, and International Human Rights

Constitutions lie at the intersection of law and high politics, and distinguishing between the study of comparative constitutional law and the study of comparative politics is sometimes particularly difficult. Recently another distinction has become increasingly difficult to draw: between the study of comparative constitutional law and the study of constitutionalism as such, including internationally recognized human rights.

Consider this problem. Constitution-makers might find themselves facing a choice between instituting a system in which the executive is the head of the

[3] The most important early work was Joseph H. H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', (1995) 1 *European LJ* 219–58.

party controlling the legislature or one in which the executive is elected separately from the legislature, for example. That choice may have important consequences for the system's functioning, by affecting its stability or the vigour with which contested policies can be developed and implemented. Students of comparative constitutional law, though, have relatively little to contribute to the analysis of that choice, compared to what political scientists or political sociologists can contribute.

Yet, limiting the study of comparative constitutional law to distinctively legal topics approached in a distinctively legal way would eliminate from the field the connection between constitutional law as law and constitutional law as high politics. In addition, some topics properly studied in comparative constitutional law can only be understood by drawing on some concepts and conclusions developed in political science. Consider recent scholarship in the latter field on how judicial review becomes a firmly established and socially significant institution. Several authors have argued that it does so when the leaders of a political coalition that has controlled the legislative and executive branches of government for a long period foresee the possibility that they will lose office in the relatively near future. They establish or reinvigorate judicial review as a means by which they can ensure that the policies they advanced in the political branches will remain in force, now constitutionalized and enforced by the courts.[4] This argument describes important features of the institutionalization of judicial review, and at least offers a substantial supplement to more purely legal analyses that root judicial review in constitutional text and ideas about the rule of law.

The connection between constitutional law and high politics gives some issues commonly studied in comparative law a different coloration when the subject is constitutional law. Constitution-makers do borrow provisions they find in other constitutions, and constitutional ideas do migrate. Yet, nationalist concerns may affect the way in which such provisions and ideas are assimilated into national constitutions differently from the way in which such concerns affect the assimilation of ideas in private law, and probably have a more dramatic effect as well. Further, questions of sovereignty may arise when a constitution's designers and, even more, its interpreters look to constitutional experience elsewhere for guidance. The impulse expressed by US Supreme Court justice Antonin Scalia in one prominent opinion, that interpreting a domestic constitution calls for examining domestic sources alone,[5] is widely shared though often resisted. The concern is that

[4] See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004) (discussing the adoption of judicial review in four nations in the late twentieth century); J. Mark Ramseyer, 'The Puzzling (In)Dependence of Courts: A Comparative Approach', (1994) 23 *Journal of Legal Studies*, 721–47 (discussing Japan); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in East Asia* (2003); Matthew Stephenson, 'Independent Judicial Review', (2003) 32 *Journal of Legal Studies*, 32 (2003), 59–89 (developing a formal model of the process).

[5] *Stanford v Kentucky* (1989) 492 US 361.

interpreting a domestic constitution in light of experience elsewhere might lead to some degree of surrender of national sovereignty, and exacerbates the compromise of popular sovereignty that exists whenever judicial review does. Yet, despite the inevitable nationalist components of domestic constitutional law, there is reason to believe that at least in some areas constitutional law in many nations has begun to converge on some general analytic approaches if not on particular substantive results (see Section VII below).

III. Constitutionalism and Constitutional Law

A second challenge for the study of comparative constitutional law is to resist the temptation to elide the distinction between constitutional law and constitutionalism. Some states have constitutions but do not have constitutionalism, and the study of comparative constitutional law cannot exclude from its purview such states by defining its interest as one in constitutionalism.[6]

Constitutionalism, a normative concept, tends to be the focus of comparative studies strongly influenced by the strains of universalism that appear in comparative legal study more generally. Constitutionalism is a threshold concept. All legal systems to which the term can be applied must satisfy some minimum requirements, but can vary substantially in the way in which those requirements are fleshed out in institutional detail. Constitutionalism's components include these, and perhaps not much more: First, a commitment to the rule of law, understood to mean a generally observed disposition to exercise public power pursuant to publicly known rules, adherence to which actually provides a substantial motivation for acting or refraining from acting; second, and related, a reasonably independent judiciary; and third, reasonably regular and reasonably free and open elections, with a reasonably widespread franchise.

The study of constitutionalism is basically a philosophical one. It is the branch of the study of classical and modern liberalism concerned with institutional design and fundamental rights. Analysis of the threshold systems must cross to be constitutionalist illuminates the range within which systems might differ from each

[6] In this regard, compare the approaches taken in the two leading US course-books on comparative constitutional law. Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* (2nd edn, 2005), deals with constitutions generally, with a substantial emphasis on government structure, whereas Norman Dorsen, Michel Rosenfeld, Andràs Sàjo, and Suzanne Baer, *Comparative Constitutionalism: Cases and Materials* (2003), focuses on constitutionalism and individual rights issues.

other and yet all be constitutionalist. The later work of Jürgen Habermas exemplifies the study of comparative constitutional law as the study of constitutionalism. At a rather high level of abstraction, Habermas examines the way in which constitutional institutions, particularly a well-designed system of judicial review, can instantiate his dialogic understanding of how human communication fits together with liberalism's philosophical foundations.[7]

The twentieth century saw a transformation in the notion of constitutionalism. Originally, constitutionalism was an idea clearly associated with classical liberalism. Its concern was ensuring that government power not be abused. Structures of government were designed to guard against the adoption of abusive legislation and bills of rights enumerated guarantees that no legislation could permissibly touch. The rise of socialist and social democratic parties in the late nineteenth century, and the response of the Catholic Church to those parties' critique of capitalism and their political programmes, led those who thought about constitutions to expand the scope of constitutional guarantees from classical rights to civil and political participation, and to equality, to incorporate guarantees of social and economic rights. Social and economic rights included rights to shelter, a decent job, and minimally adequate nutrition, for example. Like civil and political rights, these 'second generation' rights could be enjoyed by individuals, although implementing them required affirmative government intervention in the economy, in a way that implementing classical rights seemingly did not. Later the second-generation rights were further supplemented by a third generation of rights to cultural preservation and environmental quality, rights that, it was thought, were inherently available only to groups and communities taken as aggregates.

As some scholars put forth the idea that there could be second- and third-generation constitutional rights, controversy arose over whether such rights were appropriately included in constitutions. One line of criticism was conceptual. Rights, some scholars argued, necessarily entailed the existence of correlative duties located in some identifiable person or body. Yet, against whom was the right to shelter to be asserted? Who had a duty to provide shelter? Supporters of second- and third-generation rights responded that there was no conceptual difficulty in imposing a duty to provide shelter on the government as a whole.[8] The conceptual controversy was resolved in practice by the political necessity that to receive popular support, modern constitutions simply had to include at least second-generation rights.

The conceptual controversy then migrated to the institutional arena. Classical civil and political rights could be enforced by the courts through traditional

[7] See especially Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans William Rehg, 1996).

[8] For a discussion of the conceptual controversies, see Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (2000).

methods of injunctions, declaratory judgments, and related devices within each nation's remedial system. Critics of social and economic rights pointed out that courts would correctly find it difficult to enforce such rights. Guaranteeing everyone a right to shelter, for example, might impose back-breaking fiscal burdens on governments facing other demands on the national budget. The constitutional formulations of social and economic rights take these concerns into account in various ways, such as the Irish Constitution's 'Directive Principles of Social Policy' (see Section 1 above). The Constitution of South Africa addresses fiscal concerns by directing the government to seek to guarantee the constitution's social and economic rights through 'progressive realisation', and 'within [the government's] available resources'.

Some courts resisted efforts to deny them the ability to enforce second-generation rights, or to direct them to enforce such rights only by applying a loose standard of reasonableness. The Indian Supreme Court, for example, used a judicially enforceable constitutional provision protecting against deprivations of life or liberty as the vehicle for importing into constitutional adjudication rights that were contained in the constitution's enumeration of directive principles that had been modelled on the Irish provisions. The development of weak-form systems of judicial review (see Section VI.3 below) might provide a new mechanism for enforcing second-generation rights in ways that address the fiscal concerns opponents of such rights continue to raise.

The study of constitutionalism necessarily deals only with a subset of all systems with constitutions. In contrast, the study of comparative constitutional law includes the study of the constitutions of totalitarian governments, about which one might ask *why* they have constitutions, and the constitutions of failed or failing nations, about which one might ask whether there is some relation between the constitution and the nation's failure. Why do nations have constitutions without constitutionalism?[9] Some reasons are obvious. Constitutions are a convenient—and, in the modern world, probably a necessary—way of creating or at least identifying the institutions that make law. In constitutionalist systems such institutions would include the elected legislature, but in non-constitutional ones with written constitutions the relevant institution might be the Supreme Leader or the ruling party. In addition, in the modern world having a constitution, or at least having some readily identifiable source of law-making authority of a sort easily embodied in a constitution, may be a prerequisite to recognition as a political actor by the world's other nations. Entities without constitutions might be rebel groups, or terrorists, or military forces with *de facto* control over territory, but they will not be nations entitled to participate in international institutions. Related, having a

[9] See H. W. O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox', in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993).

constitution might signal that a nation aspires to become constitutionalist, or that the nation's leaders understand that for domestic political reasons they must send a signal to their own and other nations that they have such aspirations, however badly realized at the moment.

Political scientists have suggested that some constitutions might interfere with constitutionalism.[10] A stylized version of their argument involves a nation whose constitution creates a presidency elected by the nation as a whole and a legislature elected independently of the president and with proportional representation. Such a nation, political scientists suggest, is quite likely to face problems of policy gridlock, in which a divided legislature is unable to address pressing national problems in an acceptable way. The president may respond by asserting that, having a national constituency, he and he alone speaks for the nation, and does so by suspending the operation of the legislature—ruling by executive decree rather than by law. As with all arguments from political science, this one identifies tendencies, albeit ones supported by substantial empirical evidence, not necessities. The argument shows, though, why it is important to distinguish between constitutions and constitutionalism.

The study of comparative constitutionalism today intersects with the study of international human rights law. The reason, in part, is that many constitutional systems are subject to the supervision of international institutions that apply international human rights law: the European Court of Human Rights, the United Nations Human Rights Commission, and many more. Often one cannot today understand the way in which human rights norms are articulated in domestic constitutional law without understanding the degree to which domestic decision-makers might be responding to concerns about international supervision. It seems reasonably clear, for example, that the United Kingdom's adoption of the Human Rights Act 1998 was in part a response to the fact that the European Court of Human Rights had held, with some regularity, that practices approved by the British courts violated the European Convention on Human Rights. At present, then, in some aspects the study of comparative constitutional law is continuous with the study of international human rights law.

[10] See Juan J. Linz and Arturo Valenzuela (eds), *The Failure of Presidential Democracy* (1994); Carlos Santiago Nino, 'Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America', in Greenberg *et al.* (n 9).

IV. Constitutional Foundings and Transformations

A long-standing tradition in the comparative study of constitutional law deals with the question of how constitutions get off the ground in the first place. The issue is focused when there is a relatively dramatic regime shift—when a fully domestic constitution replaces rule by a colonial power, or when a dictatorship (perhaps under a sham constitution) is overthrown and a new constitution put in place. The prior regime is, by hypothesis, discredited, so that the norms for effectuating constitutional change embedded in *its* constitutional order carry no legitimacy. Frequently, perhaps always, substantial constitutional transformations occur outside the forms prescribed by existing constitutions and are sometimes criticized as illegal for that reason. If not from the existing constitution, where do the forces instituting a new constitution get their legitimacy from?

Classical constitutional theory offers an answer cast in abstract theoretical terms, which are, however, often difficult to match up with social and political reality. That theory distinguishes between the *pouvoir constituant* and the *pouvoir constitueé*. The former, the constituent power or capacity, is always authorized to institute new fundamental arrangements; the latter, the constituted power, is the regime in place at any one time. The theoretical work is done by observing that the constituted power is always subordinate to the constituent power, implying that the norms embedded in any existing constitution, which are the forms the constituted power takes, cannot in principle regulate actions by the constituent power. Specifically, the distinction means that the observation that the constituent power has acted outside the forms of existing legality carries no normative weight.

The real difficulty, though, lies in giving institutional form to this conceptual distinction. Consider, for example, the common practice of convening a constituent assembly to draft and submit new constitutions for approval. There must be some rules for the appointment or election of members to the constituent assembly. The discredited old regime can hardly be the legitimate source of such rules, although sometimes it generates such rules in default of any other mechanism for doing so. Legitimacy comes from general public acceptance of the rules for selecting the constituent assembly, not from laws already in place purporting to say how the existing constitution can be amended or replaced.

Bruce Ackerman's account of constitutional transformations in the United States provides a vivid account of how such legitimacy can arise, although one must not assume that the processes Ackerman identifies for the United States operate universally—an assumption that Ackerman himself sometimes

makes.[11] Ackerman distinguishes between what he calls periods of ordinary politics and what he calls constitutional moments. The people pay close attention to 'high politics' during constitutional moments. Politicians mobilize the people themselves over questions of fundamental political organization, rather than working through interest groups to determine public policy.

Ackerman's metaphor of constitutional moments has been quite influential, but it must be employed cautiously. In Ackerman's interpretation of US constitutional history, constitutional moments occur during rather compressed time periods, but there is no general reason to believe that the process of constitutional transformation must be quite as abrupt as the metaphor suggests. Nor is it necessarily true that the people during periods of ordinary politics always neglect questions of fundamental constitutional design, although Ackerman is probably correct in perceiving that the amount of attention people can devote to such questions is always limited. The importance of Ackerman's metaphor lies in its ability to provide an explanation of how the *various* forms by which the constituent power exercises itself gain legitimacy: They do so, on his account, because the mobilizations that occur during constitutional moments provide popular endorsement, and therefore normative value, to whatever institutions emerge to transform the constitutional order.

Those institutions historically have taken a wide variety of forms. Perhaps the most common has been the constituent assembly charged solely with drafting and seeking approval of a new constitution. The advantage of constituent assemblies lies in their focused attention to constitutional design; their disadvantages lie in the possibilities that their members may design constitutions either irresponsibly (because they themselves will have no role in the new constitutional order) or with an eye to promoting their own positions in that order. The most prominent alternative to constituent assemblies for constitution-drafting is the existing legislature. Even in situations where dramatic regime-change is about to occur, the existing legislature may be the only institution that political forces can agree on, perhaps as everyone's second choice, to draft a new constitution. This may be especially true when the political forces supporting the existing regime retain some political or economic power and must be accommodated by the new regime; sometimes the political process leads to modest alterations in the composition of the legislature in place, giving it just enough legitimacy with all parties for it to serve as the constitution-making body. Here the difficulty lies in the fact that the legislature has a dual role. It must continue to govern in the ordinary course even as it creates a new constitution. People chosen because they will be good legislators may be not be good constitution-makers, particularly if Ackerman is correct in seeing a difference between the orientation of ordinary legislators to deal-making and interest

[11] Bruce Ackerman, *We the People: Foundations* (1991); Bruce Ackerman, *We the People: Transformations* (1998).

groups and the orientation of constitution-makers to matters of fundamental principle.

Modern constitution-making faces an imperative of transparency. The US Constitution was drafted in a closed session, and its contents were not revealed to the public until the final document was ready. Such a practice would be unacceptable in most nations today. Transparency at the drafting stage has the important advantage of inducing deliberation and rational argument, but perhaps the equally important disadvantage of discouraging bargaining.[12] Public discussions typically invoke basic principle, thereby educating the observing public about the choices being made as the constitution-drafters create a full constitution. Speaking in public, advocates must take responsibility not only for their arguments but for the provisions they support. Public sessions, though, make it difficult to strike what might be essential compromises that can be defended only as necessary to get the constitution adopted but not as based on fundamental principle.

Transparency occurs at another stage. Historically, constitutions are drafted, submitted to the public, and ratified or rejected. An intermediate stage has recently been introduced into the constitution-making process. In this stage, a constitutional draft is submitted for public comment and revised in light of the public reaction, after which the revised constitution is presented for ratification or rejection. The stage of public comment allows the public to begin to gain a sense of its responsibility for the constitution. Given the difficulties of constitution-drafting, though, often the public comments are merely compiled, and only the ones easiest to integrate into the document are placed in the final constitution. The new or modified provisions may not be the ones about which the public was most concerned, and to that extent the public dissemination of the draft constitution may sometimes come close to being a mere public relations effort.

Still, revising a draft constitution can contribute to its legitimacy. The process of adopting the South African Constitution of 1996 illustrates how. The political dimensions of the transition from apartheid to democracy made it impossible to craft a constitution immediately. No body created under the apartheid regime could have the legitimacy, in the white, coloured, and African communities, to develop a constitution that had a chance of being widely accepted. Complex negotiations led, first, to the adoption of an interim constitution in 1993, enacted by the apartheid regime's legislature. A parliament was elected, and a constitutional court created, under that constitution. The new parliament sat as a constituent assembly to draft a final constitution. The negotiations leading to the adoption of the interim constitution produced two additional important conditions: The negotiators agreed that the final constitution had to comply with thirty-four 'basic principles', and that the new constitutional court would have to

[12] Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process', (1995) 45 *Duke LJ* 364–96.

certify that the final constitution did so. The final constitution was adopted by parliament and then submitted for certification. The constitutional court found that the proposed final constitution was generally consistent with the thirty-four principles, but found as well that several proposed provisions needed revision.[13] The most important of these was that the mechanism for insulating basic rights from later amendment had to be strengthened. Parliament modified the final constitution, and the constitutional court then certified that the constitution comported with all of the basic principles. Although the mechanism of external review of proposed constitutional provisions has not yet been widely emulated, the South African process offers valuable insights into the ways in which institutional innovation can help solve some problems associated with constitutional transitions.

The South African example shows one way in which new constitutions can be adopted—by action of an elected parliament. The composition of that parliament is of course particularly important when large-scale transitions are involved. In South Africa the existing parliament was reconstituted before the new constitution was developed and ratified. Elsewhere extra-parliamentary negotiations have led to agreements on new constitutions; formally, the existing parliament adopts the new constitution, but in doing so it is merely ratifying the agreements reached outside its walls. Alternatively, new constitutions can be submitted to the public for ratification in referenda. Voting rules may be set to fit the nation's political requirements, so that, for example, majorities in each of the nation's sections must vote in favour of adopting the constitution. Direct public participation is frequently valuable, but it has its costs. The vote is essentially yes-or-no, with the public unable to reject particular provisions. From the point of view of securing agreement, presenting the new constitution as a package allows bargains struck at the drafting stage to stick, but voting on a package may undermine the ability of the constitution to garner deep public commitment. Public participation in a ratification referendum may be relatively uninformed, as the question presented is abstract and may not convey to the public how the new constitution will actually operate. And, of course, the number of people who vote may not be large enough to give the new constitution the legitimacy its authors hope for.

Problems of legitimacy arise as well when constitutions are imposed, whether in the large or with respect to particular provisions. The post-war constitutions of Germany and Japan drew upon some domestic liberal constitutionalist elements, but both were also substantially imposed by the nations' occupying powers. International demands may place important constraints even on constitutions that are developed through largely domestic processes. After the fall of communism

[13] *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (Constitutional Court, South Africa).

in Central and Eastern Europe, for example, those creating new constitutions believed it politically essential that their nations be seen as part of Europe, which meant acceding somehow to the nominally optional 'Protocol Six' of the European Convention on Human Rights, abolishing the death penalty. Hungary accomplished this through the first decision of its constitutional court rather than in the constitution itself, Poland by legislation, but whatever the mechanism, this basic decision, often at odds with the apparent preferences of each nation's people as revealed in public opinion polls, was at least as much imposed as chosen.

Strikingly, though, the post-war German and Japanese constitutions were among the most successful of the twentieth century. Their successes indicate an important way in which constitutions can gain legitimacy. Attention to the mechanisms of constitution-drafting and ratification, or to constitutional moments, may suggest that legitimacy arises out of the circumstances of a constitution's creation and adoption. The German and Japanese examples suggest that constitutions can become embedded in a nation's political-legal culture by accretion, as the institutions created by the constitution are seen by the public to work reasonably well. Indeed, adequate performance may overcome problems, obvious at the moment of creation, that theorists concerned with constitutional abstractions and concepts might have thought insurmountable.

No constitutions are perfect, and all must therefore contain some means by which they can be changed to address problems with the original document and new circumstances. Constitutional amendments lie along a continuum beginning with minor adjustments in technical provisions, running through more substantial though still relatively confined alterations, to transformations so substantial that scholars can fairly claim that a new constitutional order has replaced the prior one even though much in the prior system seems untouched.

The most important variations in provisions for constitutional amendment affect the relative ease of amendment.[14] At one limit, an amendment procedure might authorize a constitutional amendment by a majority vote in a single legislative session; constitutional amendments under such a system are not much different from ordinary legislation. Layers of difficulty can be added, by requiring a super-majority vote in the legislature to adopt an amendment, by requiring adoption by successive legislatures (perhaps after an intervening election), by requiring approval of amendments by popular referendums or other methods, and the like.

At the other limit lie constitutional provisions that cannot be amended. Placing such provisions in a document that otherwise authorizes amendments poses something of a conceptual puzzle. Consider the provision in the US Constitution purporting to bar amendments that deprive states of their equal representation in the

[14] See Sanford Levinson, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995).

Senate.[15] Could equal representation none the less be eliminated by a two-step process, in which the ban on eliminating equal representation by amendment was itself eliminated by amendment, and then equal representation, no longer protected against amendment, was itself eliminated? As a matter of pure legal form it seems hard to find that process impermissible, and yet it seems inconsistent with the point of asserting that the underlying provision is unamendable.

The highest constitutional courts in Germany and India have asserted that some constitutional provisions are unamendable even though the constitution does not itself expressly identify those provisions. Those courts have said that some constitutional provisions are part of the nation's 'basic' constitutional structure, and cannot be changed even by processes that conform to the letter with the processes laid out in the constitution for amending it. The German Constitutional Court has simply asserted the possibility that some constitutional amendments might be unconstitutional,[16] and the Indian Supreme Court engaged in a substantial analysis of whether amendments affecting the courts altered the nation's basic structures, in what observers describe as a confusing set of opinions that concluded by upholding the amendments.[17] The conceptual puzzles about constitutions' provisions asserting their own amendability disappear in this setting, because the courts as decision-makers external to the document determine which provisions are unamendable. Those puzzles, though, are replaced by another: Because constitutional amendments can have so substantial an effect as to amount to a change from one constitutional order to another, why should not constitutional amendments that transform a nation's 'basic structure' be treated as revolutionary interpositions? They would have the form but not the substance of legality, but none the less could have the legitimacy that comes from revolutionary success.

Amendment procedures are tied as well to questions about constitutional interpretation. The burden of adjusting constitutions to new conditions can be discharged by easy amendment processes. In contrast, the more difficult it is to amend a constitution directly, the more pressure there will be on constitutional courts to interpret existing provisions in ways that address the problems posed by new conditions. This will be particularly true if the difficult-to-amend constitution is an old one, as is the case in the United States, where it can fairly be said that the Supreme Court has recurrently amended the constitution by decisions purporting to interpret it.

[15] US Constitution, art V.

[16] BVerfGE 1, 14 (1951) (Federal Constitutional Court of Germany) (The Southwest Case).

[17] See Granville Austin, *Working a Democratic Constitution: The Indian Experience* (1999), 258–77 (describing *Kesavananda Bharati v State of Kerala*, 1973 (4) SCC 225 (Supreme Court of India)).

V. Constitutional Structures

Constitutions are blueprints for operating a government. Political scientists typically have more insight than lawyers into the way the structures based on those blueprints actually operate. Federal structures, for example, might promote national solidarity in divided societies, but they might also exacerbate divisions, depending on a range of factors, many of which have nothing to do with law. Another example is provided by the choice among presidential, semi-presidential, and purely parliamentary systems, a choice that seems quite likely to be consequential but that implicates relatively little law as such.

Perhaps, though, law as such might play some role as courts rely on constitutional law to enforce the bargains, struck at the time of a constitution's adoption, that are reflected but only imperfectly expressed in the details of constitutional structure. Parties to a deal about allocating power among a nation's regions, for example, might retain a continuing interest in reopening the deal whenever they can, and may seize upon constitutional ambiguities as the mechanism for doing so. Judicial review might be helpful in enforcing the original deal for enough time that other structures of bargaining can develop to accommodate changes in the interests and power of competing regions and the like.

Studies of comparative constitutional law might illuminate some *general* features of some aspects of constitutional structure. The treatment of emergencies in national constitutions provides an example. Emergencies take a wide range of forms: natural disasters, terrorist threats, sustained or sporadic domestic disorder, economic distress, and more. Emergency conditions may induce political leaders to suspend some aspects of ordinary constitutional legality. They may seek to enact regulations by executive decree, bypassing the legislature. Or they may limit civil liberties in ways that might be unjustified outside the emergency context. These decisions might be wise or unwise, and constitution designers have struggled to devise methods of reducing the occasions for and the extent and duration of unwise exercises of emergency powers.

One question designers must face is the extent to which the constitution will attempt to define what constitutes an emergency. The US Constitution is among the thinnest in the world, referring only to 'rebellion or invasion'.[18] The French Constitution of 1958 refers to situations in which the nation's institutions 'are under serious and immediate threat', which clearly includes domestic disorder.[19] Other constitutions do not identify emergency circumstances as such, but instead provide that emergencies can be declared only pursuant to the terms of an organic law, understood as a statute with a status somewhere between that of the constitution and that of an ordinary law.

[18] US Constitution, art I, § 9, cl 2.

[19] Constitution of France, art 16(1).

It is unclear whether constitutions can actually identify, in a helpful way, the occasions on which emergency powers might be necessary. The difficulty lies in the fact that constitution-makers, even drawing upon a wide range of experience throughout the world, cannot fully anticipate what circumstances will impel political leaders to seek to exercise such powers. Defining 'emergencies' broadly allows those leaders to trigger their emergency powers when they feel the need, but fails to constrain their choices. Defining them narrowly may lead to evasions of the constitution's apparent constraints, either through creative interpretation—such as seeing economic turmoil as a threat to the nation's institutions as the French Constitution requires—or through blatant disregard, justified by the constitution's failure. The German political theorist Carl Schmitt, whose work was discredited for a generation by his association with the German fascist regime but was somewhat rehabilitated in the 1980s and 1990s, argued that constitutions could never identify the circumstances for declaring an emergency. For Schmitt, sovereignty resided precisely in the power to declare an exception to ordinary legality, and even written constitutions could not displace the ultimate sovereign power.[20]

A second question for constitution designers is, What is the basic strategy for controlling the exercise of emergency powers once they are invoked? Probably the predominant strategy combines two features: The executive can suspend legality only for a limited period, and can restrict only some, not all, constitutional liberties; and these limitations on the executive are to be enforced by the courts. Whether this strategy is effective is unclear. Executive officials are often able to devise credible legal arguments that their actions fall within the scope of authorized actions during an emergency. And, probably more important, judges have found it difficult to resist executive actions during declared emergencies, either accepting strained arguments that the executive's actions are lawful or implicitly acknowledging that they as judges lack the force or moral credibility to stand against the executive's actions.

Another strategy, reflected in some decisions by the US Supreme Court, might be called a separation-of-powers strategy. Rather than relying on the courts directly to enforce restrictions on executive emergency power, the separation-of-powers strategy relies on politics to constrain the executive. This strategy is easiest to discern in formal separation-of-powers systems, in which a legislature elected independently of the executive can mobilize itself against executive actions.[21] Courts can play a role in the separation-of-powers strategy as well. They can insist that executive actions that seem constitutionally troublesome or excessive be expressly authorized by the legislature. When the courts do so, they are not, at

[20] 'Sovereign is he who decides on the exception.' Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty* (trans George Schwab, 1986), 5.

[21] A related, though perhaps weaker, version can be seen in parliamentary systems, though. Where the parliament is governed by a coalition, reluctant coalition partners might pressure 'their' prime minister to avoid excessive uses of emergency powers.

least formally, barring the executive from taking action the executive deems necessary. As a result, the courts might not face the difficulties of legitimacy and effectiveness that arise when they seek directly to enforce constitutional restrictions on emergency powers.

The separation-of-powers strategy for controlling emergency power demonstrates the inevitable connection between what constitutional law has to say about government structure and what political science has to say. The extent to which the strategy will be effective will vary, and not entirely with the extent to which a nation's constitutional structure is parliamentary or divides powers between the executive and the legislature. How politics actually operates will matter as well, perhaps more—and legal scholars have relatively little to contribute to understanding that process.

VI. Structures of Judicial Review

Much in the study of comparative constitutional law involves examination of judicial review. There are now two main axes for examining the structures of judicial review. The first is of long-standing, and distinguishes between the specialized and centralized form of judicial review devised by Hans Kelsen for Austria after World War I and emulated in many European nations thereafter, and the generalist and dispersed form of judicial review characteristic of the United States. The second has arisen more recently, and distinguishes between strong-form systems of judicial review, in which the constitutional court's interpretations are final and unrevisable except by means of constitutional amendment or overruling by the court itself, perhaps after a change in membership, and weak-form review, in which the constitutional court's interpretations are subject to revision through a process of relatively short-term dialogue with the nation's political branches.[22]

1. Diffuse, Generalist, Strong-Form Review: The United States

The world's first constitutional court, the United States Supreme Court, exemplifies strong-form review in a generalist and dispersed system. That Court is a generalist one because it is authorized to interpret the national constitution *and*

[22] See Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism', (2001) 49 *AJCL* 707–60; Mark Tushnet, 'Alternative Forms of Judicial Review', (2003) 101 *Michigan LR* 2781–802.

national statutes, and even to develop 'common law' rules where distinctively national interests are involved and neither the Constitution nor the national legislature provides appropriate rules. Notably, the Supreme Court can interpret national statutes even when no constitutional questions are implicated. In addition, every court in the United States, including the lowest trial-level court in a small town, the lower national courts, and state supreme courts, is authorized, and indeed required, to resolve properly raised constitutional questions. In this sense judicial review in the United States is dispersed. But, in another sense, it is centralized in the Supreme Court, which sits at the top of a pyramid, authorized to hear appeals from all lower courts in which constitutional questions are properly raised.

The dispersal of the power of constitutional review in the United States is connected to the historical circumstances of the creation of judicial review in the United States, to the nation's prevailing conception of adjudication, and to the typical methods by which judges are appointed in the United States. The idea of judicial review was reasonably well-accepted in the early years of the national constitution, but the nation's institutions were at a rudimentary stage. The nation was geographically extended, and the national government lacked the personnel to implement national policy directly throughout the nation. If judicial review was to be effective, it had to be exercised on the local level. Also from early in the nation's history, Americans believed that constitutional law was a special kind of law, to some extent enforced by the people themselves but in any event rather different from the ordinary law of contract and property because of its strong political components.[23] Controlling judicial review by keeping its exercise visible to the people lent force to the dispersed system of judicial review. Finally, judges in the United States hold their offices as a result of processes that incorporate important political elements. Judges in the national judicial system are nominated by the President and confirmed by the upper house of the national legislature; judges in most state judicial systems are elected, or at least must face election within a few years after their appointment. These political components of the appointment process support a dispersed system of judicial review to the extent that every judge is connected to the electorate, directly or indirectly.

The political components of the appointment process also help explain the acceptance in the United States of strong-form judicial review. An important concern about expansive exercises of judicial review has been that judicial review allows judges to displace the choices made by the people's representatives and so is in tension with democratic self-governance. The judges speak in the name of the constitution, and to the extent that they can credibly treat constitutional law as similar to ordinary law they can defuse some of this countermajoritarian concern. But, the high political component of constitutional law means that it can never be merely a specialized area of law alone, and the democratic anxieties

[23] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

about judicial review cannot be entirely eliminated. This is particularly so when the view becomes widely held, as it is in the United States, that the constitutional interpretations proffered by judges unavoidably invoke—explicitly or implicitly—the judges' own values. The fact that US judges have some connection to the political process alleviates some of these concerns.

In the early years of the US Constitution, there was significant support for what has been called 'departmentalism'. Departmentalism took several forms. In one, each department—the judiciary, the legislature, the President—was entitled to interpret and act on its own interpretations of the Constitution, taking into account the rational merits of the interpretations offered by other branches but not compelled to accept them. In another, each department would have the final say on the constitutionality of legislation affecting its own operations. In its strongest version, departmentalism would allow a President to disregard the coercive orders entered by courts in adjudicated cases. Yet, allowing that outcome seems in severe tension with the requirements of the rule of law, and few theorists in the United States ever adhered to such a strong departmentalist view.

Instead, rejecting the seemingly anarchic implications of that form of departmentalism, members of the political branches came to accept first the final authority of the courts in adjudicated cases and then, gradually, strong-form review itself, in which the judiciary's pronouncements are taken to provide authoritative constitutional interpretations, articulating principles that the political branches must follow even in enacting new legislation. Of course the courts' interpretations can be overridden by constitutional amendment, which is however quite difficult in the United States. More important, the composition of the national judiciary in the United States is affected by politically driven decisions through the process of nomination and appointment by the President and upper house of the national legislature. The judiciary's constitutional interpretations can be altered as new judges are placed on the courts.

2. Centralized and Specialized Review: The Kelsenian Constitutional Court

The US Supreme Court's generalist mandate reflects the view that constitutional interpretation is continuous with other forms of legal interpretation, different only in small degree from statutory interpretation because of the role that high politics plays in constitutional interpretation. Hans Kelsen developed an alternative institutional model for judicial review.[24] Kelsen's model began with the insight that constitutional law differed from ordinary law because of its connection to high

[24] For a discussion, see von Beyme (n 1).

politics. For Kelsen, judicial review was continuous with the legislative process, not sharply distinguished from it. To avoid the complete displacement of democratic politics by judges on constitutional courts, Kelsen argued that such courts could act only in a negative capacity, invalidating legislation that was inconsistent with constitutional limitations on public power. In addition, Kelsen believed that the political component of constitutional law required that judges on constitutional courts not be mere legal specialists. In the European context in which Kelsen worked, judges were bureaucrats expert in the law alone. Kelsen therefore insisted that judicial review be exercised not by ordinary judges but by a specialized constitutional court, to which appointments would be made with an eye to the fact that constitutional law had a political component. For related reasons, Kelsen's model centralized constitutional review in the specialized constitutional court. And, finally, in most versions of the model access to the constitutional court was limited to a selected list of political actors—some executive officials, representatives of the national legislature, officials of subnational governments—to place a politically controlled screen between the constitutional court and the constitution considered in its entirety.

Many nations have adopted centralized and specialized constitutional courts, even as they have abandoned other components of Kelsen's model. The vision of the constitutional court as a negative legislator only was compatible with the commitments of the classically liberal state, which saw the primary threats to constitutional order in improvident exercises of public power. A constitutional court that was a negative legislator, though, would necessarily stand in the way of some legislation that altered the status quo. Such an institution could not survive the development of the modern social welfare state, one of whose premises was that improvident exercises of private power—that is, some of the consequences of the status quo—were as troubling as some exercises of public power. The idea of the constitutional court as a negative legislator became inconsistent with the ideological commitments of the social welfare state, although it did not follow that such courts necessarily became positive legislators. Further, placing limits on access to constitutional courts was in tension with the ideal that ordinary citizens should be able to participate in the decision-making processes of institutions that exercised substantial public power. Most modern constitutional courts therefore provide some form of procedure for citizens to complain to such courts.

Centralized and specialized constitutional courts face distinctive problems in coordinating their interpretations of the constitution with the actions of the ordinary courts, which in the purist Kelsenian system are prohibited from ruling on constitutional objections. So-called 'battles of the courts', between the constitutional courts and the highest courts charged with implementing non-constitutional law, were particularly common in the post-Communist systems created in the 1990s, though skirmishes have occurred in nearly every system with a specialized constitutional court.

There are a number of devices to secure coordination, none entirely satisfactory. The ordinary courts can be required to refer constitutional objections to the constitutional court whenever they appear. The broad scope of modern constitutions makes a referral mechanism awkward; it would flood the constitutional court with cases while delaying the ultimate resolution of those cases substantially. Constitutional courts can interpret legislation to make it compatible with the judges' interpretation of the constitution, but then they may face resistance from the judges on the ordinary courts charged with the general enforcement of those statutes. Constitutional courts can exercise some control over the ordinary courts by imposing on those courts an obligation to apply the ordinary law in their charge in a manner sensitive to constitutional concerns. The large number of cases in which litigants might claim that the ordinary courts had not been sufficiently sensitive to constitutional norms means that the constitutional court must as a practical matter accord a substantial degree of deference to the ordinary courts. This deference, and related concessions to the ordinary courts when other mechanisms of coordination are used, has led the constitutional courts to win the battle of the courts, though not always on the terms the judges of the constitutional courts set out when the battles began.

3. Weak-Form Judicial Review

The second contrast in institutions of judicial review is between strong-form and weak-form systems. Discussions of constitutional review in the mid-twentieth century laid the groundwork for the development of weak-form systems. Those discussions distinguished between the so-called *erga omnes* effects of constitutional determinations made by the US Supreme Court, and the merely *intra partes* effects said to be characteristic of Kelsenian courts. Judgments have *erga omnes* effects when they 'bind' all legal actors. The precise nature of the binding effect is sometimes unclear, but in a precedent-based system decisions are binding in the sense that they provide a strong basis for predicting that the same judgment will be reached by the constitutional court in any later case presenting the same issue. That prediction gives legal actors strong prudential reasons for conforming their actions to the judgments. In contrast, a judgment has a merely *intra partes* effect when it binds only the parties to the judgment, leaving all other actors free, at least as a matter of law, to disregard the judgment. *Intra partes* effects can be quite significant, of course, in systems where the parties to the judgment include the legislature that enacted a statute found to be unconstitutional.

As a practical matter, the distinction between *erga omnes* and *intra partes* effects might not have been as significant as it was in legal theory. The same predictive evaluations that give judgments a wide effect in a precedent-based system can usually be made in one formally committed to merely *intra partes* effects. What the distinction did, though, was to suggest that some forms of constitutional review might reduce the tension between judicial review and democratic self-governance that many thought characterized the US system, by limiting the scope of judgments of unconstitutionality.

The Canadian Charter of Rights and Freedoms, adopted in 1982, utilized an innovative form of weak-form review.[25] As a result of political compromise, the Charter contains a 'notwithstanding' clause, authorizing legislatures to declare that a statute will be effective notwithstanding its inconsistency with selected Charter guarantees. Canada's Supreme Court interpreted the clause to authorize pre-emptive declarations, issued before a court found the statute unconstitutional, and blanket declarations insulating a large number of statutes from unconstitutionality. It did so in a case closely bound up with the Canadian political controversy over Quebec's status within or independent of Canada. Perhaps as a result, the notwithstanding clause has rarely been invoked in Canada, although some commentators suggest that the mere existence of the provision affects legislative and judicial judgments.[26]

Commentators argue that the notwithstanding clause, along with other features of the Canadian Charter, promote a valuable dialogue between courts and legislatures over the meaning of constitutional terms.[27] At least in theory if not in practice, the dialogue could proceed with the legislature enacting a statute believing it to be constitutional because of a considered judgment the legislature made about constitutional meaning, the courts finding the statute unconstitutional because inconsistent with the judiciary's different judgment about meaning, and the legislature responding either by accepting the court's judgment or by insisting on its own judgment by invoking the notwithstanding clause. Such a dialogic approach to judicial review has the attractive feature that it encourages deliberation about constitutional meaning in the legislature without inevitably displacing the legislature's judgment and without enforcing unconsidered judgments.

Other variants of weak-form review exist. The weakest is the pure interpretive mandate, illustrated by New Zealand's Bill of Rights, which directs the courts to interpret later-enacted legislation to be consistent with the provisions in the Bill of Rights, where such an interpretation is fairly possible without violating ordinary rules invoked in statutory interpretation. The British Human Rights Act 1998 contains an interpretive mandate bolstered by a power in the courts to make a statement that legislation is incompatible with the provisions of the European Convention on Human Rights.

[25] One of its substantive provisions, the limitations provision discussed in Section VII.1 below, can be understood as a version of weak-form review as well.

[26] Lorraine Weinrib, 'Learning to Live with the Override', (1990) 35 *McGill LJ* 541–71.

[27] Peter Hogg and Alison Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)', (1997) 35 *Osgoode Hall LJ* 75–124.

Stephen Gardbaum calls these institutional innovations the 'New Commonwealth Model' of judicial review,[28] a label that raises questions about whether weak-form systems are institutionally stable. As Gardbaum's label suggests, the innovations emerge from constitutional systems previously committed to strong versions of parliamentary supremacy. Weak-form judicial review might be a politically acceptable first step away from parliamentary supremacy, to be followed, as parliamentary supremacy recedes, by the adoption of stronger-form systems. There is some reason to think that, in both New Zealand and Canada, systems that remain formally weak-form have become in practice rather stronger than initially appeared.

4. Adjudicatory Procedures

How do constitutional courts limit or invite access? Drawing on concepts from the common law, the US Supreme Court in the twentieth century began to articulate so-called 'standing' limitations on who could raise constitutional challenges, and related 'ripeness' and 'mootness' limitations on the timing of such challenges. These limitations were said to derive from the US Constitution's requirement that the national courts consider only 'cases', and were also said to have an irreducible constitutional—that is, legal—component. The US Supreme Court also developed a doctrine precluding it from addressing what it called 'political questions', a relatively narrow category of cases best understood as including only legal controversies the resolution of which was left by the Constitution itself to the national legislature or executive.[29]

In various ways, most other constitutional courts have rejected such limitations, at least when they are conceived of as arising from law rather than from discretionary choices by the judges about which cases warrant full consideration. Many constitutional courts are generous in allowing persons not directly affected by a statute to challenge its constitutionality, typically on the ground that those directly affected face practical impediments in presenting their challenges. Some will issue advisory opinions on the constitutionality of proposed legislation, usually at the instance of some political actors such as the legislature's leadership. Rather than dismissing challenges to government actions as raising questions not committed to judges, constitutional court judges will give the political actors a wide range of discretion and defer to their decisions within that range while reserving the power to overturn as unconstitutional actions that are truly arbitrary.

Limitations on access to constitutional courts are in tension with the modern

[28] Gardbaum (n 22), (2001) 49 *AJCL* 707 ff.

[29] For a discussion, see Joel B. Grossman and T. J. Donahue, 'Political Questions', in Kermit L. Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (2nd edn, 2005) 754–7.

idea, noted earlier, that all citizens should see themselves as active participants in the entire process of governance according to constitutional norms. And, indeed, even in the United States the limitations on access are more theoretical than real. Individuals or groups troubled by some statute or executive action can usually construct a constitutional challenge that surmounts the procedural hurdles the US Supreme Court has erected, although often it will take quite careful lawyering to do so.

VII. Generic Constitutional Law

Constitutions of course vary widely in their specific provisions. Cataloguing the differences between the ways in which constitutional systems provide protection for freedom of expression, guarantee equality, or authorize or restrict affirmative action programmes might identify some themes important for comparative constitutional analysis. For example, the Indian and US experiences with affirmative action show how constitutional language might affect outcomes. In both nations, courts initially took constitutional provisions dealing with equality in general terms to impose substantial limits on affirmative action. The Indian Constitution was then amended to authorize affirmative action expressly, after which the courts upheld affirmative action programmes that arguably fell outside the specific terms of the authorization. In the United States, the courts came to accept some degree of affirmative action, but it may be that the presence of only a general equality provision inhibited the development of a more robust jurisprudence of affirmative action there.

1. The Justifications for Proportionality Analysis in Constitutional Law

Beyond the specifics of a particular constitution, there is the possibility that what one scholar calls 'generic constitutional law' (Law) has begun to emerge.[30] Generic constitutional law deals with the ways in which constitutions protect individual rights, and specifically with the ways in which constitutions identify when and how such rights can be limited.

The 'when' question arises because no rights can sensibly be absolute, subject

[30] David S. Law, 'Generic Constitutional Law', (2005) 89 *Minnesota LR*, 652–742.

to no limitation whatsoever. One uncontroversial limitation is that one person's rights must sometimes be limited to avoid violations of another's rights. More troublesome are situations, universally encountered, in which it seems that exercises of individual rights will interfere with important social or public interests. A right of privacy in the home may interfere with the government's ability to identify criminals; exercises of a right of free expression may cause public disorder.

Prior to the emergence of generic constitutional law, constitutional systems used either a balancing or a categorical approach to determining when rights can be limited. The balancing approach asked judges to consider all the interests at play in the circumstances, public interests as well as individual rights, and to determine whether, on balance and taking all the relevant considerations into account, a limitation on the individual rights was justified. This approach had important flaws. It proved easy to proliferate public interests that could outweigh the individual rights and, perhaps more important, judges frequently seemed to give excessive weight to asserted public interests and therefore overrode individual rights more often than seemed appropriate, at least in retrospect. Further, the relatively unstructured nature of balancing seemed at odds with basic requirements of the rule of law, because neither the components of the balancing nor the weights to be given them could readily be specified in advance of a decision dealing with a particular problem.

The categorical approach avoided most of balancing's difficulties, but came with its own costs. Under the categorical approach, courts would identify entire areas of activity that simply were not covered by the relevant constitutional right. Commercial advertising, for example, simply would not count as 'speech' protected by guarantees of free speech. Among the difficulties of categorical approaches were these: Explaining why some activities were protected by constitutional provisions while others that seemed closely related were categorically excluded from protection proved difficult. It mattered a great deal that an activity fell on one or the other side of the line dividing protected from unprotected activities. That meant that identifying the location of the line was extremely important, often seemingly beyond the capacity of language to capture effectively.

Generic constitutional law offers a formula for limiting rights that, its defenders argue, does not require the courts to identify categories of unprotected activities in order to ensure that the proper projects of a constitutional government not be thwarted by overly broad protections of individual rights, and that also provides more structure to legal analysis than balancing does. The Canadian Charter of Rights and Freedoms, which drew upon formulations in the European Convention on Human Rights and the Indian Constitution, provides a lucid version of the formula: Rights are guaranteed, according to the Charter, 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[31] Each component in this formula provides structure for analysing the permissibility of limitations. 'Prescribed by law' means that an executive official can invoke a limitation only when the official's action is authorized by legislation (or by what should be taken to be a rather narrow category of prerogative powers). The kinds of public interest that can be invoked must be consistent with the requirements of 'a free and democratic society'. Restrictions must be 'demonstrably justified', placing the burden on the government to explain why the limitation on rights is a reasonable one.

The second component of generic constitutional law addresses *how* limitations can be justified, or, put another way, what it takes to demonstrate that a limitation is justified. Many constitutional systems articulate the test for justification as a requirement of proportionality, which David Beatty describes as the 'ultimate rule of law'.[32] The Canadian Supreme Court's formulation provides further structure to the proportionality inquiry.[33] First, the government interest must be an important one. If so, it must be reasonable to think that the restriction actually advances that interest. Beyond that, though, the restriction must limit the right as little as possible in doing so (sometimes referred to as a 'minimal impairment' or 'least restrictive means' requirement). Finally, the test requires a direct evaluation of proportionality, that is, whether the benefits obtained from the restriction, in terms of the amount to which the restriction advances the government's interests, are large enough to outweigh the costs of limiting the affected right.

Proportionality requirements do give some structure to inquiries that seek to balance protected rights and government interests. They do not, though, entirely avoid the concern that balancing approaches allow judges to substitute their evaluation of the importance of government goals for that of the legislature. Consider the 'least restrictive means' requirement. It is well-known that one can always show that the means chosen are the least restrictive ways of accomplishing a complex set of government goals, or, put another way, that any alternative would inevitably do worse in advancing that set of goals than the one chosen; the usual example is that it may be more expensive to administer the proposed alternative, so that the chosen means is indeed the least restrictive method of accomplishing some substantive goal at a specified cost. Finding a restriction disproportionate because there is a less restrictive alternative therefore amounts to substituting the court's judgment about the importance of government policies for the legislature's different judgment.

Whatever the analytic difficulties of the proportionality test, it has become an important component of generic constitutional law. Even courts that refrain from

[31] Constitution Act, 1982, enacted as Schedule B to Canada Act 1982, ch 11, Charter of Rights and Freedoms § 1.

[32] David Beatty, *The Ultimate Rule of Law* (2004).

[33] *Regina v Oakes* [1986] 1 SCR 103 (Supreme Court of Canada).

using the language of proportionality and the carefully staged analytic structure developed by the Canadian Supreme Court not infrequently invoke the concepts that go into a proportionality inquiry. Notably, the US Supreme Court, which has not adopted any general test of proportionality, is the origin of the phrase 'least restrictive means'.[34]

2. The Issue of Horizontal Effect

A third component of generic constitutional law is the resolution of the question of a constitution's 'horizontal effect', that is, the extent to which constitutional norms directly and without legislative implementation bind non-governmental actors such as corporations and private employers. The question of horizontal effect arises when, for example, a private employer refuses to hire a person because of the applicant's race or gender. The question was most pressing when constitutions were widely understood in classical liberal terms, as mechanisms for empowering yet limiting government institutions. Giving a constitution horizontal effect expands the scope of normative regulation, from government institutions to the entire society. Such an expansion might seem incompatible with the aspirations of classical liberal constitutions: Designed to *limit* government power, such constitutions would seemingly grant enormous power to the courts charged with enforcing constitutional norms.

The practical consequences of giving a constitution horizontal effect were greatly diminished by the expansion of the legislative authority of the modern social welfare state. Horizontal effect might be important when legislative regulation of the private economy was rare, but as such regulation increased, as for example with the adoption of statutes prohibiting discrimination in employment, the doctrine of horizontal effect came to play a residual role, dealing only with those areas in which statutory regulation had not taken hold. As a result, the practical stakes of having an expansive doctrine of horizontal effect were reduced.

The ideological stakes, that is, the conception of the constitution's purposes, remain important, though, and most constitutional systems have had difficulty directly addressing the question of horizontal effect. The formulation in the Constitution of South Africa exemplifies the difficulties. According to that constitution, a constitutional norm 'binds . . . juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[35] To the extent that this formulation expresses some enforceable doctrine, it seems to urge on the courts some sort of balancing approach, but precisely what is to be balanced remains unclear.

[34] See *Shelton v Tucker* (1960) 364 US 479 (using the phrase 'less restrictive means').
[35] Constitution of the Republic of South Africa, § 8(2).

The difficulty of articulating a clear doctrine of horizontal effect has led many constitutional courts to a solution in which constitutional norms are given indirect effect. First developed by the German Constitutional Court, the doctrine of indirect effect has two components, the first an insistence that constitutional norms do not apply directly to non-government actors, and the second and more important, a rule that the ordinary courts must develop the ordinary law applicable in controversies between non-government actors in a way that fairly takes constitutional norms into account.[36] Libel cases have been a primary vehicle for the development of doctrines of indirect horizontal effect. Constitutional courts direct the ordinary courts to develop the law of libel in a way that is sensitive to the effects of libel doctrine on free expression. Constitutional courts that themselves have the power to develop the ordinary law take the same approach. Rather than saying that constitutional norms apply directly to non-government actors, they hold that the law regulating such actors must be sensitive to constitutional norms. Again, the South African Constitution is exemplary. It states, 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.[37]

It should be noted that the US Supreme Court is unable to adopt a doctrine of indirect horizontal effect when it confronts the problem, known in the United States as that of 'state action'. The reason arises out of the structure of the US court system: Many state action problems arise in the application of the ordinary law developed in state courts, that is, the courts of the subnational units in the United States. And, as a matter of both constitutional and statutory law, the US Supreme Court has no power to direct state courts to alter the ordinary law except when that law is itself unconstitutional and not merely inadequately sensitive to constitutional norms.

VIII. Comparative Constitutional Law and National Identity

In contrast to studies of comparative constitutional law focusing on a universalistic idea of constitutionalism, other studies pursue the Montesquiean theme that each nation's constitution is distinctively suitable to that nation alone. Preambles and

[36] BVerfGe 7, 198 (1958) (Federal Constitutional Court of Germany) (The Lüth Case).
[37] Constitution of the Republic of South Africa, § 39(2).

similar components of constitutions are particularly useful sources for discerning the vision of national identity embedded in the constitution. The preamble to the Irish Constitution of 1937, for example, begins with the invocation of 'the Most Holy Trinity' as the 'final end' to whom 'all actions both of men and States must be referred', linking the nation's identity as tightly as possible to its Roman Catholic heritage. It continues by '[g]ratefully remembering [the] heroic and unremitting struggle to regain the rightful independence of our Nation', indicating how the constitution embodies the nation's radical break with its colonial legacy. The preamble to the South African Constitution, in successive phrases, acknowledges the injustices of apartheid and attempts to incorporate all South Africans, black and white, into the nation's new constitutional project: 'We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity.'

Studies of the way in which specific subjects are dealt with in different constitutional systems can also reveal aspects of national identity. The German Constitutional Court alluded to the nation's experience during the Nazi regime in explaining why the provision in the Basic Law guaranteeing a 'right to life' to 'everyone' required that the legislature make it a criminal offence to obtain an abortion: 'Underlying the Basic Law are principles . . . that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism'. Article 9 of the Japanese Constitution of 1946 states that 'the Japanese people forever renounce war as a sovereign right of the nation', and purports to ban the maintenance of 'land, sea, and air forces'. As Japan recovered its place in the international domain, the ban on maintaining armed forces was unsustainable, and the supreme court approved the creation of what were denominated 'self defence forces', eventually becoming one of the largest military forces in the world, sometimes deployed outside the nation's boundaries. By the turn of the twenty-first century, a substantial campaign developed to eliminate Article 9, a campaign that was controversial precisely because constitutional revision would entail a reconceptualization of the nation's identity. An astute analysis of the constitutional (and related) law of privacy and dignity in the United States and Europe locates the origin of differences in the doctrinal treatments of those doctrines in different social and ideological understandings of the way in which equality can best be achieved—in Europe, by making available to everyone the privileges previously available only to the elite, in the United States, by eliminating those privileges and subjecting everyone to the same low level of dignity and privacy previously accorded the less privileged classes.[38]

[38] James Q. Whitman, 'Enforcing Civility and Respect: Three Societies', (2000) 109 *Yale LJ* 1279–398.

An additional feature of comparative constitutional law as made by national courts is the extent to which they advert to constitutional developments elsewhere (and international law that might not be directly effective domestically) in interpreting the nation's constitution. The South African Constitution states that the constitutional court must consider international law, and may consider foreign law.[39] The Canadian Supreme Court alluded to the nation's role in promoting international human rights in explaining why it could no longer allow routine extradition of those subject to the risk of a death sentence.[40] The United States Supreme Court's modest references to non-US law in decisions dealing with the death penalty and gay rights provoked a substantial political controversy,[41] with proponents of such references urging that reasonable decision-makers take guidance and information from whatever sources seem helpful, and opponents charging that such references undermine national sovereignty. Beneath this controversy one can see a dispute about national self-understanding, between those who see the United States as a cosmopolitan nation fully participating in the world's law-making processes, and those who emphasize the distinctive place the United States has as an 'exceptional' nation in the world. A similar dispute occurs with respect to the claim that some Asian nations have a distinctive understanding of human rights, justifying their departures from human rights norms widely enforced elsewhere.

The controversy over so-called Asian values illustrates one of the limits of comparative constitutional law. Everyone acknowledges that different nations face different problems, and that an acceptable resolution of a problem in one nation might entail restrictions on liberty that would be unjustified in another nation. The European Court of Human Rights, which enforces a continent-wide set of rights, recognizes this fact in its doctrine giving each nation a 'margin of appreciation' in the application of those rights. Except in federal systems where subnational units are defined not by accidental geographical features but by real cultural or other diversity, the margin-of-appreciation doctrine cannot be an element in domestic constitutional law, and for that reason it is not truly a concern of the study of comparative constitutional law. But the idea that underlies the doctrine—that national differences can explain and justify differences in the interpretation of seemingly similar provisions—surely is.

[39] Constitution of the Republic of South Africa, § 39(1).

[40] *United States v Burns* (2001) SCR 283.

[41] See, most recently, *Roper v Simmons* 543 US 551.

IX. Conclusion

Innumerable comparative studies address the ways in which different constitutions and constitutional systems deal with specific topics, such as privacy, free expression, and gender equality. However valuable such studies have been in bringing information about other constitutional systems to the attention of scholars versed in their own systems, their analytic payoff is sometimes questionable. Indeed, enumeration of provisions and summaries of court decisions may sometimes obscure more than they illuminate. Scholarship in comparative constitutional law is perhaps too often insufficiently sensitive to national differences that generate differences in domestic constitutional law. Or, put another way, that scholarship may too often rest on an implicit but insufficiently defended preference for the universalist approach to comparative legal study over the particularist one.

As noted in Section VIII, in some areas national history obviously matters a great deal. More subtly, so do institutional and doctrinal structures. So, for example, the position taken with respect to the constitutionality of regulating hate speech in the United States on the one hand and in Canada and Great Britain on the other might be affected by the much greater centralization of prosecutorial authority in the latter nations, a centralization that limits the possibility of abusive hate speech prosecutions much more substantially than the highly dispersed prosecutorial authority in the United States.

Comparisons across systems must also be sensitive to differences in doctrinal structures. For example, systems fairly described as constitutionalist may tend to impose a reasonably high standard before the government can punish speakers who merely criticize government policy. Yet, the precise doctrinal formulation of that standard might be quite consequential. Constitutional scholars in the United States, for example, know that there is a real difference between the 'clear and present danger' test, well-known around the world, and the less well-known test requiring that the government show that speech critical of government policy uses words of incitement, must be intended to incite, and must be likely to bring about imminent lawless conduct (*Brandenburg v Ohio*, 1969). Scholars of comparative constitutional law might be less sensitive to those doctrinal differences. Still, the twenty-first century might well see a convergence among constitutionalist systems, prodded in part by the emergence of universal norms of international human rights and a gradual decrease in the size of the margin of appreciation for local variation, and in part by exchanges among constitutional court judges.[42]

The growth of scholarship on comparative constitutional law in the late twentieth century deepened the field's analytic foundations. Enumeration and juxtaposition began to be replaced by genuinely comparative studies, informed by insights from political science, sociology, and related fields. Scholars must be cautious about inferring too much about specific constitutions, specific constitutional provisions, and constitutionalism itself from the early years of experience with the constitutions whose adoption in the 1990s provided such energy for the field. Taken together with the knowledge available from longer established constitutional systems, though, this new information seems likely to continue to infuse the field of comparative constitutional law with analytic rigour.

[42] See Anne Marie Slaughter, *A New World Order* (2004). For a recent example, see the conversations transcribed in Robert Badinter and Stephen Breyer, *Judges in Contemporary Democracy: An International Conversation* (2004).

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