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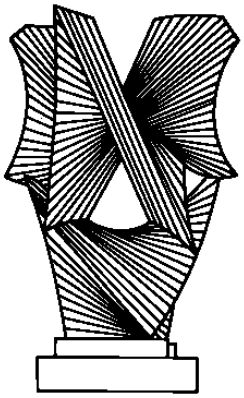

COMPARATIVE CONSTITUTIONAL LAW: INTRODUCTION

Tom Ginsburg and Rosalind Dixon

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Comparative Constitutional Law

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RESEARCH HANDBOOKS IN COMPARATIVE LAW

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1. Introduction

Rosalind Dixon and Tom Ginsburg

Comparative constitutional law is a newly energized field in the early 21st century. Never before has the field had such a broad range of interdisciplinary interest, with lawyers, political scientists, sociologists and even economists making contributions to our collective understanding of how constitutions are formed and how they operate. Never before has there been such demand from courts, lawyers and constitution-makers in a wide range of countries for comparative legal analysis. And never before has the field been so institutionalized, with new regional and international associations providing fora for the exchange of ideas and the organization of collaborative projects.

This *Handbook* is one such collaborative project, a small effort to provide an overview of the field. It is inherent that any such effort will be incomplete, and we surely recognize the limitations of any effort to distill such a rich field into a single volume. But we also believe that the time has come for some organization of the various issues and controversies that structure academic and legal debate. As the field matures, such efforts will help to advance scholarship to the next level, by focusing attention on outstanding questions as well as raising awareness of issues worth pursuing in under-analyzed jurisdictions.

This Introduction provides a brief history of the field, and wrestles with the definitional issues of the boundaries of the constitution. It then draws out the common themes that emerge from a reading of the chapters, particularly as they relate to patterns of constitutional similarity versus difference, or convergence versus divergence. The conclusion briefly speculates on future directions for the field.

1 COMPARATIVE CONSTITUTIONAL LAW: A THUMBNAIL HISTORY

The field of comparative constitutional studies can be traced back at least to Aristotle's *Politics*, which systematically evaluated the constitutions of the Greek city states to inform normative theorizing on optimal design. Classical thinkers in Imperial China, India and elsewhere also spent some time thinking about the fundamental principles of statecraft, arguing about matters that we would call constitutional. In the Western intellectual tradition, such analysis continued through many of the great political thinkers, from Machiavelli to Montesquieu to John Stuart Mill. In the 17th century, state-builders in the Netherlands undertook extensive study of ancient and contemporary models to resolve constitutional problems of the nascent Dutch republic, finding particular inspiration in the proto-federalism of the biblical Israelites (Boralevi 2002). In the 18th century, besides Montesquieu's foundational exploration, lesser known figures such as Gottfried Achenwall and Johann Heinrich Gottlieb von Justi undertook surveys of political forms (Marcos 2003: 313). Comparative constitutional study thus has a long and distinguished lineage.

It is the rise of the written constitutional form, conventionally understood to have emerged in full flower in the late 18th century, that spurred the field to develop more systematically and to become distinct from political theory *per se*. The enlightenment thinkers of the French, Polish and American projects saw written constitutions as acts of purposive institutional design, for which wide study was a desirable, even necessary, feature. They thus engaged in extensive examination and debate about the appropriateness of particular models. In turn, the models they produced, as channeled through the liberal 1812 Spanish Constitution of Cadiz, influenced the early constitutions of Latin America: the 1821 Constitution of Gran Colombia, the 1830 and 1832 Constitutions of New Granada, the 1830 Constitution of Venezuela, the 1823 and 1828 Constitutions of Peru, the Argentine Constitution of 1826, the Uruguayan Constitution of 1830, and the Chilean Constitution of 1828.

Throughout the 19th century, new state-builders, initially in Latin America and Western Europe but also in Japan, sought to adopt the new technology of the written constitution, and in doing so needed to engage in practical comparisons about which institutions were optimal. As a result, constitutional compilations became more popular, focusing on both European and Latin American countries (Marcos 2003: 314–16). The method involved a mix of normative and positive analysis, and in turn informed drafting exercises in new states and old (Takii 2007).

The 19th century also saw the rise of the academic discipline of comparative law, culminating in the International Congress of Comparative Law in 1900 (Riles 2001; Clark 2001). The zeitgeist was captured by the notion of legal science, an internal and autonomous study of law, using distinctively legal forms of reasoning to determine the answers to normative questions. Scholars sought to examine the scientific principles of law that provided a universal underlying structure to inform the drafting of civil codes. The comparative method was also used by those who sought to link legal science to social science, exemplified by Henry Sumner Maine's (1861) monumental efforts to discover the origins and development of legal institutions. Comparison, then, was a natural part of the milieu of 19th century jurisprudence, but the relative dearth of constitutional adjudication meant that there was little attention to that topic.

Perhaps as a legacy of this era, comparative law was to focus heavily on the private law core of Western legal systems for much of the next century. By and large, the great figures of Western comparative law did not place public law in their sights, preferring to ascribe to the public law a particularity and responsiveness to *local* values. In contrast, private law was seen as embodying common and universal features, derived ultimately from the Roman tradition. There was, to quote one such effort, a common core of private law (Bussani and Mattei 2002). The only comparable 'core' in the public law sphere was embodied in international human rights law, which formed a template of minimum content that constitutions were encouraged to adopt into local law. In the early 1950s, there was a burst of interest in the field in the United States, with many law schools offering a course in comparative constitutions, and such figures as Erwin Griswold and William Douglas writing on the topic (Fontana 2011). But for the bulk of the 20th century, comparative constitutional law was not a vigorous or prominent field for writing by academic lawyers.

Other disciplines, however, did focus on constitutional comparison. With the formation of political science as a modern discipline in the United States in the early 20th century, constitutional studies formed an important part of the core curriculum, with comparison being at least a part of the approach. The sub-discipline of public law spent a good deal of energy

examining constitutional texts and describing the various political institutions they created, both to inform potential borrowing and also to understand how systems operated (Shapiro 1993).

With the behavioral revolution in the 1940s and 1950s, however, social scientists turned away from formal texts as objects of study, and instead sought to examine the 'science' of government decision-making. Public law scholars turned to judicial behavior, examining the micro-foundations of legal decisions rather than the broader structures within which judges were embedded. This necessarily involved a turn away from formal institutions and toward individual agents. Formal institutions such as law were seen to some degree as façades masking interests and 'real' politics.

Two developments in the late 20th century – one academic and one in the world – coalesced to provide a fruitful environment for the growth of comparative constitutional studies. The academic development was the revival of various institutionalisms in the social sciences (March and Olsen 1989; Powell and DiMaggio 1991; Clayton and Gilman 1998). Sociologists and some political scientists began to emphasize that individual agents were embedded in broader institutional structures, and that these structures helped to determine outcomes. From another angle, economists moving away from neoclassical models began to understand that rules were important (Buchanan and Tullock 1961; North 1991). Institutions were defined as the rules of the game that structured behavior. Constitutions, as the social devices that structure the creation of rules, were the ultimate institutions worthy of analysis. Hence there was a turn in economics to understanding constitutional structures. With some exceptions (Brennan and Pardo 1991; Voigt 1999), the literature in constitutional political economy focused more on theory than empirics, but it did provide a set of working assumptions and hypotheses for analyzing constitutions.

The late 20th century also saw epochal changes in the real world that made it hard for academics to ignore constitutions. The third wave of democracy beginning in the mid-1970s brought new attention to constitutions as instruments of democratization, and the emergence of new states following the end of the Cold War prompted a new round of efforts to theorize and analyze institutional design (Elster et al. 1998; Sunstein 2001; Holmes 1995). In particular, constitutional design became a central focus for ethnically diverse states in the hope that proper institutions could ameliorate conflict (Choudhry 2008; Ghai 2001; Horowitz 1991). There was a revival of interest in federalism and other design techniques (Le Roy and Saunders 2006).

A related development was the secular increase in the role of courts in many societies, a phenomenon known as judicialization (Tate and Vallinder 1995). Designated constitutional courts were prime locations for judicialization in many countries, and the phenomenon was examined by lawyers and political scientists interested in particular countries (Kommers 2002; Stone 1992; Volcansek 1990). The spread of judicialization and constitutionalization meant that there were both many more contexts in which the operation of the constitutional system 'mattered' as well as much more demand for comparative analysis. Some of this work was implicitly comparative, but most of the work in the 1990s considered a single jurisdiction (but see Baun and Franklin 1995).

With the rising prominence of constitutional courts as loci of major social and political decision-making, it became apparent that some of the problems courts were confronting were recurring in different countries. Many new democracies, for example, had to deal with lustration and other issues of transition (Teitel 2002), economic transformation, and electoral

issues. These courts quite naturally began to pay attention to how the issues were resolved in other countries, especially the established democracies with well-developed jurisprudence on similar questions. Courts were also in dialogue about the interpretation of international human rights instruments, and what limitations might be acceptable within a free and democratic society. This phenomenon of transnational judicial dialogue was in fact quite old, but received renewed attention and was heavily criticized by judicial conservatives in the United States. The critique prompted a spate of work on the appropriate role for judicial borrowing across jurisdictions (see Chapter 31 by Saunders in this volume). Indeed, in part for this reason, the early 21st century has seen a veritable explosion of interest in the field.

2 COMPARATIVE CONSTITUTIONAL LAW: BOUNDARIES OF THE FIELD

An important question raised by the growth of the field of comparative constitutional law is how to define the outer boundaries of the phenomenon to be studied. The study of comparative constitutional law, most scholars agree, is something distinct from the study of comparative private law or non-constitutional law, but scholars also differ significantly in how they draw this distinction. Furthermore, the increasingly global context of constitution-making, in which norms are developed across borders, requires some attention to the relationship between constitutions and international law.

Perhaps the most straightforward way in which to define the constitutional domain is by reference to the text of legal instruments that are expressly labeled by their drafters as 'constitutional'. This is the approach taken, almost by necessity, by those scholars in the field who do large-scale empirical work: a good example in the *Handbook* is Chapter 7 by Tom Ginsburg on constitutional endurance. It is also an approach frequently adopted by scholars engaged in more qualitative research: the clearest examples of this are found in Part I of the *Handbook*, in those chapters dealing with questions relating to constitutional design and redesign, but such an approach is also an important definitional starting point for several later chapters, such as those by Sujit Choudhry and Nathan Hume, Dennis Davis, Donald Kommers, Ron Krotozynski, Vicki C. Jackson and Jamal Greene, and Kim Rubenstein and Niamh Lenagh-Maguire.

A second approach focuses on the idea of entrenchment, or the degree to which certain legal rules are immune from change by ordinary as opposed to super-majority legislative processes, either as a matter of legal form or political convention. While formal entrenchment may often coincide with a text-based approach (i.e. whether a norm is included in a written document labeled constitutional), other norms can be informally entrenched as a practical matter, and hence might be considered constitutional in some sense. A focus on the entrenchment criterion may offer quite distinctive answers as to the scope of the comparative constitutional field. Few contributions to the *Handbook* in fact adopt this approach, however, likely because it is difficult in the space of a short chapter to give detailed consideration to the degree to which such informal conventions exist.

A third approach, which is more common among contributors to the *Handbook*, is more functional, and defines the constitutional domain by reference to the role of constitutions in both 'checking' and 'creating' government power. This understanding is most explicit in Rick Pildes' contribution to the *Handbook*, but also runs through a number of other chapters,

including those by Tom Allen, Nicholas Bamforth, Claire Charters, Oren Gross, Janet Hiebert, Kate O'Regan and Nick Friedman, Kent Roach, and Mark Tushnet. Perhaps the strongest evidence of this approach by these authors is their attention to statutes such as the UK Human Rights Act 1998, New Zealand Bill of Rights 1990 and the 1992 Israeli *Basic Law* on Human Dignity and Liberty, without detailed inquiry as to the informal entrenchment of such instruments. Another indication is the treatment of constitutions, or constitutionalism, as having an inherently 'pro-rights' orientation: this is implicit, for example, in Kent Roach's suggestion (following Kim Lane Scheppele 2006) that international law may have an 'anti-constitutional' dimension in the anti-terrorism context (see Chapter 29), and Tom Allen's suggestion that constitutional instruments tend to exhibit an intrinsic – as opposed to purely instrumental – commitment to individual rights (see Chaper 27). David Schneiderman, for his part, criticizes this kind of teleological approach to the definition of the field – which he labels 'global constitutionalism "as project" ' – but in doing so ultimately goes on to propose a functional definition of the 'constitutional' domain, whereby constitutional norms are defined by reference to their role in allocating political power.

A fourth approach is more sociological and open-textured, and linked to the way in which national actors understand domestic legal norms as constitutional. This approach is implicit in Gary Jacobsohn's chapter on constitutional identity; Victor Ferreres Comella's chapter on constitutional courts; Frank Michelman's chapter on the interplay between constitutional and ordinary jurisdiction; Stephen Gardbaum's chapter on the structure and scope of constitutional rights; Adrienne Stone's chapter on freedom of expression; Cheryl Saunders' chapter on comparative engagement by courts; and David Fontana's chapter on the way in which courts do (and ought to) control their docket.

Each of these approaches involves a somewhat different trade-off between objectivity and clarity, on the one hand, and the potential for under- and over-inclusiveness, on the other (compare Dixon and Posner (forthcoming). The lack of agreement, even at this preliminary definitional level, illustrates both the methodological pluralism of the field, but also our contention that significant work still remains to be done by scholars in the field.

3 COMPARATIVE CONSTITUTIONAL LAW: A STUDY IN DIFFERENCE OR SIMILARITY?

A central question almost all of the contributors to the *Handbook* take up is the degree to which, in various constitutional sub-fields, one observes patterns of constitutional similarity or even convergence over time.

For some authors, this is largely a question of identifying patterns of constitutional similarity, or difference, within a particular sub-group of countries. These authors' very careful and detailed consideration of the constitutional position in a number of countries makes it challenging to address the issue of convergence on a truly global scale (see e.g. the chapters by Jackson and Greene, and Rubenstein and Lenagh-Maguire). However, even for these authors, the different constitutional models or archetypes they identify may suggest at least some tentative conclusions about global constitutional patterns. Other authors explicitly aim to consider the degree to which there is general constitutional similarity or convergence, in a particular area, across the globe.

The most common pattern that authors in the *Handbook* identify is one of broad similarity at an abstract constitutional level, together with significant heterogeneity or polarization (i.e. similarity only among countries in a particular constitutional sub-group, and not across different sub-groups of countries) at a more concrete or specific level of constitutional comparison. For example, in Part I, Dixon notes that while almost all countries worldwide now include formal provision for constitutional amendment (Chapter 6), the frequency and function of formal constitutional amendment varies significantly across countries, as does the way in which countries' constitutions make it more difficult for legislatures to pass constitutional amendments as opposed to ordinary legislation. Ginsburg notes both a pattern of broad similarity across countries when it comes to the life-span or endurance of constitutions – most constitutions for most countries die quite young, but there is significant regional and other variation in both the observed and predicted rate of endurance (Chapter 7).

In Part II, in exploring questions of constitutional identity and membership, Gary Jacobsohn suggests important commonalities across countries in how they have forged a 'constitutional identity' over time, by confronting various sources of disharmony within their own constitutional system or traditions, but also notes important differences among countries in the role played by constitutional text, history, and different institutions and understandings of constitutionalism. Claire Charters identifies a similar pattern in constitutional responses to indigenous peoples: she notes the way in which, in all three countries she studies, there has been a period of 'official respect for indigenous peoples' sovereignty and control over their land' followed by a period of retreat in the state's willingness to recognize enforceable obligations towards indigenous people; a later period of expanded rights-based recognition, followed by political backlash; and the persistence of major differences on more specific constitutional questions, such as the status of treaties with indigenous peoples, issues of sovereignty and jurisdictional control. And Kim Rubenstein and Niamh Lenagh-Maguire again identify a pattern of only very abstract similarity among countries in their definition of citizenship and the boundaries of the constitution: they show that Australia, Canada and Israel all share a quasi-constitutional approach to the regulation of citizenship, as compared to the explicitly constitutional approach taken in the United States, but they also show that the jurisdictions vary greatly in how they see the relationship between statutory definitions of citizenship and constitutional norms.

In Part III, a number of authors reach similar conclusions in the context of questions of constitutional structure. In the context of legislative-executive relations, Ronald Krotoszynski suggests that 'even though concerns over the constitutional separation of powers are widely shared in other democratic republics, the specific US concern with the conflation of legislative [and executive] power, and the concomitant commitment of enforcement of this separation of powers by the federal judiciary, has failed to gain much traction' (Chapter 13). In the context of constitutional emergency regimes, Oren Gross likewise suggests that the pattern in democratic societies 'has almost invariably been [one based on] "models of accommodation" ' (Chapter 19), and that, in most democracies, there is 'explicit constitutional reference to emergencies', but that there are also both clear exceptions to this pattern of explicit constitutional regulation (such as in the US, Japan and Belgium) and also significant differences among countries in their approach to questions such as which institutions are authorized to declare an emergency, and by what means; whether to adopt a unitary or multi-level approach to the definition of emergencies; and the effects of declaring an emergency, particularly on the enjoyment of individual rights.

In Part IV, in exploring constitutional rights protections, many authors identify a similar pattern. Donald Kommers, for example, in writing about abortion rights suggests that there is a seeming 'transnational consensus that unborn life (at some stage) and personal self-determination are both worthy of constitutional protection', and also increasing convergence among countries such as the US and Germany in exactly how they balance these competing commitments. But he also finds significant differences between Germany, the US, and Ireland in how they treat the constitutional status of the fetus and the nature of the right at stake for women: in Ireland, both the fetus and women are understood to enjoy a 'subjective' right to life; in Germany, women are understood to have a right to dignity or development of the person, whereas the fetus is protected by the state's duty to affirm the value of fetal life, as an objective constitutional value; and in the US, women's rights are understood largely in terms of liberty, rather than dignity, and the protection of fetal life as a compelling state interest – rather than constitutional duty. In the context of constitutional protections of human dignity, Paolo Carozza, in turn, notes a high degree of global consensus on the importance of respect for such a right, but also enormous variation among countries in how they understand the concept and its relationship to different sides of various rights debates.

Similarly, in writing about constitutional equality rights, while (former Justice) Kate O'Regan and Nick Friedman note that 'the right to equality is found in nearly all modern democratic constitutions' (Chapter 26), they also suggest that there is significant heterogeneity among countries in the way in which this right is implemented. They identify four distinct approaches in four different countries (i.e. the US, Canada, the UK and South Africa): in the US, at least under the 14th Amendment as opposed to statutory anti-discrimination provisions such as Title VII of the Civil Rights Act 1964, they note 'an equal treatment approach'; in Canada, a 'disparate impact' approach; in the UK a disparate impact plus 'ambit' test; and in South Africa, what they label a 'substantive equality' approach. In writing about constitutional responses to terrorism, post 9/11, Kent Roach likewise argues that there has been quite significant constitutional similarity – though in a quite different form to what many commentators suggest: rather than being generally deferential, courts have in fact, he suggests, not been particularly deferential in this area (Chapter 29). However, the precise way in which this has played out has also varied significantly by country with the use by various courts of administrative law and statutory interpretation tools, as well as more conventional forms of constitutional review. And in the context of gay rights, while Nicholas Bamforth devotes much of his attention to identifying institutional and substantive parallels between countries, he also stresses that 'the levels of moral controversy and social disagreement surrounding the legal recognition of same-sex partnerships var[ies] between jurisdictions' (Chapter 30).

In Part V, in writing about the way in which constitutional courts control access to their docket, David Fontana suggests the existence of broad – albeit hitherto under-appreciated – similarities among courts in their ability to control access to their docket, while also noting a range of more concrete differences among courts in the mechanisms they have for exercising such control.

Some authors put more emphasis on constitutional similarity across countries, arguing that there is in fact far greater similarity, in their particular field, than is generally thought to be the case. Helen Irving, for example, argues in Part I that when it comes to women's participation in constitution-making, there is a much longer history, and thus broader pattern of similarity, concerning such participation than many constitutional commentators appreciate: while (unlike modern constitutions) many older constitutions were drafted without direct

female involvement, the US and Australian experience, she argues, shows that this was not universally so.

Stephen Gardbaum, in analyzing the scope and structure of constitutional rights in Part IV, argues that the US Supreme Court, rather than being a clear outlier in this context, is similar to almost all courts in approaching the justifiability of limitations on rights via the lens of 'balancing' or proportionality, and the 'horizontal' application of rights as a question of degree only (Chapter 21). Similarly, Adrienne Stone, in the context of freedom of expression, argues that there are important similarities among countries not simply in their recognition of this right, but also at a more concrete constitutional level. She finds similarities in the way in which courts generally give broad coverage to the right (for example, by including expressive activity in its scope), uphold implied as well as express limitations on the enjoyment of such rights, and in the way in which such rights have more or less direct horizontal effect (Chapter 22). And Tom Allen, in analyzing constitutional protection of property, suggests important similarities among countries not only in the sense that 'most constitutions impose restrictions on eminent domain' and 'follow a common structure' whereby 'government may only acquire property by a process laid down by law, for a public purpose, and on terms that provide the owner with compensation' (Chapter 27), but also in that, at a more concrete level, most courts tend to interpret such provisions in a way that distinguishes between 'takings' and other forms of regulatory interference with property rights, and to defer to the executive in its definition of the public interest.

Even these authors, however, still stress a range of ongoing constitutional differences among countries. Gardbaum, for example, notes a range of differences among countries at the more specific level of, for example, whether the limitation of rights is express or implied, is highly formalized or not, or includes attention to true cost-benefit judgments (Chapter 21); or whether their approach to horizontal application is so-called 'direct' versus 'indirect', or imposes duties on private individuals, and courts, as well as other government actors. Stone suggests that there are important differences in the way in which courts approach the justifiability of limitations on this right (Chapter 22), both in particular cases, and in their use of a 'categorical' as opposed to more open-ended 'balancing'-style approach. While the US is currently an outlier in preferring the latter to the former, Stone also hesitates to label this as a stable form of qualified similarity – given the potential for other countries to move toward a more heavily doctrinalized approach over time. And Allen notes significant variation among countries in how they define the 'minimum core' of a right to property, and thus also the line between takings and regulation.

Other contributors to the *Handbook* identify an even lesser degree of constitutional similarity across constitutional systems worldwide, even at the most abstract level – and instead, broad similarity only among distinct groups of countries (i.e. polarization).

In some cases, this pattern is one whereby countries can be divided into two rough categories or groups. In Part I, Justin Blount, for example, suggests (contra Helen Irving) that when it comes to norms of popular participation in constitution drafting there is a fairly clear distinction between old and new constitutions: in the former, there was limited provision for popular involvement in the drafting process; whereas in the latter, there has tended to be both a clear norm of and set of formal procedures for popular participation (Chapter 3). Zaid Al-Ali notes a similar difference between old and new constitutions when it comes to external influences in the constitutional drafting process, as well as a bifurcated pattern in the degree to which such influence tends to enforce, or depart, from international best practices in differ-

ent contexts. And Ruti Teitel urges us to see constitution-making processes in terms of a parallel distinction between traditional state-centered forms of constitutionalism and newer, more civil society-focused forms of 'transformative' constitutionalism in societies facing challenges of transitional justice.

In Part III, Victor Ferreres Comella describes the two different canonical models of constitutional court structure – one in which ordinary courts exercise constitutional jurisdiction and the other in which constitutional courts are separate from the rest of the judiciary – and suggests that the latter model is common in Europe (18 out of 27 states in the European Union have such a model) and also Latin America, Africa and Asia, but not elsewhere. Frank Michelman, of course, asks us to think more critically about whether this pattern of polarization is in fact meaningful, given the instability inherent in any attempt strictly to divide constitutional from ordinary jurisdiction, but certainly also acknowledges the basic existence of such a pattern.

Rick Pildes suggests a bifurcation between old and new constitutions when it comes to the constitutional regulation of political parties (recent constitutions tend to reference political parties, older ones do not), as well as significant variation among more recent constitutions, such as in the degree to which they restrict or prohibit certain kinds of party, and recognize a general constitutional right to party autonomy (Chapter 14). Janet Hiebert and Mark Tushnet also note the increasing competition between two distinct models of constitutional rights protection: one based on judicial supremacy and another based on shared judicial and legislative responsibility for rights protection, or the idea of 'weak-form' judicial review (which, as Mark Tushnet notes, itself has at least three varieties).

In Part IV, in discussing constitutional rights protections, Dennis Davis suggests in the context of second generation rights that, while there are broad similarities among South Africa, India and Brazil in their courts' approach to the implementation of second generation rights (including a general pattern of restraint and commitment to 'fusing' positive and negative rights enforcement), this sub-set of countries remains a distinct minority even among signatories to the International Covenant on Economic, Social and Cultural Rights (ICESCR). (Indeed, one of Davis' key aims is to show how such a model could be extended to other countries, consistent with commitments to democracy and limits on judicial capacity.) Stephen Gardbaum also makes a similar observation, noting that while 'some constitutions contain no or very few positive rights, others include both negative and positive rights and some constitutional courts give positive interpretations to certain seemingly negatively-phrased rights but not others' (Chapter 21). In a similar vein, in Part V, in considering how courts themselves engage comparatively, Cheryl Saunders suggests that courts in common law countries are in fact quite likely to cite foreign law in the course of their opinions, whereas courts in civil law countries are less likely to do so (Chapter 31).

Some authors identify an even more diverse range of constitutional types in the context of constitutions' approach to questions of fundamental structure or rights protection. In Part III, for example, José Cheibub and Fernando Limongi note not only the prevalence of both presidential and parliamentary systems (the category of semi-presidential he regards as less useful), but also argues that both systems can be further sub-divided into those presidential systems that give strong legislative power to the president, versus those that do not (Chapter 12); and parliamentary systems that require formal assembly confidence for the executive to continue in office, versus those that do not. Sujit Choudhry and Nathan Hume likewise suggest in the context of constitutional federalism that, even among federal systems (which

are far from the only model in global terms), there is significant variation between 'classical' and 'post-conflict' varieties (Chaper 20); and also between systems designed to address different forms of political conflict, such as those based on race/ethnicity, language and religion.

Ran Hirschl, in discussing the constitutional protection of religion, suggests in Part IV the existence of eight archetypal models governing relations between religion and state – (i) the atheist state; (ii) 'assertive secularism'; (iii) separation as state neutrality toward religion; (iv) weak religious establishment; (v) formal separation with de facto pre-eminence of one denomination; (vi) separation alongside multicultural accommodation; (vii) religious jurisdictional enclaves; and (viii) strong establishment. While he identifies at least one country in which each model is more or less dominant, he also suggests that there is significant cross-country variation in the interpretation of each model, so that there is meaningful constitutional similarity or convergence in this domain among countries only in the 'increasing reliance on constitutional law and courts to contain, tame and limit the spread and impact of religion-induced politics' (Chapter 23).

Vicki C. Jackson and Jamal Greene, in considering comparative approaches to constitutional interpretation in Part V, note at least three distinct approaches to interpretation: a 'historically focused positivist' approach; a 'purposive' approach; and a 'multi-valenced' approach; and suggest that while in the five countries they study (i.e. the US, Canada, Australia, Germany and France) there is 'considerable interpretive overlap' in various courts' approaches; there are also significant differences both 'within courts and their scholarly communities …. [and] across courts' and countries (Chapter 32).

Various authors also provide a number of explanations for these patterns of constitutional similarity and difference. As to patterns of constitutional similarity or convergence, while constitutional scholars have advanced a number of explanations for this (see e.g. Law 2008, Tushnet 2009, Dixon and Posner 2010), the most consistent explanation provided by contributors to the *Handbook* is the increasing influence on domestic constitutional practices of constitutional comparison itself – and also international law. Donald Kommers, for example, suggests that 'comparative constitutional law has come to play a central role in domestic constitutional adjudication', and that this is linked to patterns of legal harmonization or constitutional convergence (Chapter 24). Cheryl Saunders likewise notes the influence of both informal networks for constitutional comparison, such as transnational judicial networks, and the internationalization of constitutional law as 'catalysts' for what is likely an increasing pattern of comparative citation by many constitutional courts (Chapter 31). Ruti Teitel suggests that constitutionalism in societies facing issues of transitional justice has been influenced by 'the growing area of overlap' between constitutional norms and international law, particularly areas in which 'international law has been informed by precepts of international humanitarian law' (Chapter 4). In a less optimistic mode, Kent Roach notes the role of international law in prompting states to converge in their treatment of the assets of suspected terrorists (Chapter 29).

For some authors, the increasing overlap – and also parallel – between transnational and constitutional norms is such that comparative constitutional scholars should increasingly turn their attention toward the transnational domain. Victor Ferreres Comella, for example, suggests that while there are clear differences between transnational tribunals and domestic constitutional courts, the parallels are also sufficiently strong that it would be fruitful to include them in the scope of future comparative constitutional scholarship on constitutional

courts. Kent Roach argues that 'the increased impact of the UN on domestic constitutional norms invites constitutional analysis of the UN itself' (Chapter 29). And David Schneiderman argues, in a similar vein, that because international trade law now plays a sufficiently central role in defining the scope of national government power, it too should be included in the scope of an appropriately critically-oriented form of comparative constitutionalism.

Some contributors in fact seem already to have heard this call: in thinking about gender equality and agency, Helen Irving, for example, engages in a fascinating analysis of the potential differences and similarities between federal/state and international/national jurisdictional divisions (Chapter 2). Tom Allen and Nicholas Bamforth also provide a similarly illuminating analysis of the comparative significance of the European Court of Human Rights jurisprudence on the right to property, and right to family life and non-discrimination (Chapters 27 and 30).

At the same time, as various authors show, there are also important limits in many areas on the degree to which international legal norms ultimately exert concrete influence on domestic constitutional norms. In the context of second generation rights, for example, while the ICESCR has been ratified at nearly the same rate as the International Covenant on Civil and Political Rights (with 160 as compared to 166 countries ratifying each covenant), at a constitutional level Dennis Davis notes, 'only first generation rights … enjoy universal appeal' (Chapter 28). When it comes to the practice of constitutional law by courts and other domestic decision-makers, various authors also provide clear evidence that such a practice need not be convergent (see particularly Stone, Chapter 22).

When it comes to sources of ongoing constitutional difference among countries, contributors to the *Handbook* also provide a number of explanations for such patterns. One factor that several authors point to is the persistence of differences in the background legal system. Victor Ferreres Comella, for example, suggests that, when it comes to the difference between systems with specialized constitutional courts and ordinary courts exercising constitutional jurisdiction, at least one logical explanation is the difference in training of judges in ordinary courts in the common law and civil law world, which makes the former better situated to exercising constitutional jurisdiction (Chapter 15). Tom Allen also notes the common law/civilian distinction as a central factor relevant to explaining differences in countries' approach to regulatory takings (Chapter 27). Cheryl Saunders makes a similar argument in connection with courts' approach to comparative constitutional materials, suggesting that differences in the reasoning style of courts in the two systems may also help explain differences in their approach to foreign law (Chapter 31).

A related factor, which several authors highlight, is the way in which the system of constitutional review is structured. Differences in how courts are structured and appointed seem an obvious explanation for ongoing polarization at a substantive or interpretive level (see e.g. Stone, Chapter 22; Saunders, Chapter 31). And even differences in the way in which constitutional opinions are structured may help explain differences at the level of interpretation, given clear differences in different countries' traditions in this regard. Vicki C. Jackson and Jamal Greene, for example, note that in Australia the High Court's seriatim opinion practice seems to contribute to it adopting a multi-valenced approach to constitutional interpretation (Chapter 32); whereas in France, the Conseil Constitutionnel's tradition of writing short, unanimous opinions seems to contribute to its more formalist, positivistic approach.

Conversely, as Frank Michelman notes, choices regarding judicial institutional arrangements may themselves also be influenced by parallel or prior substantive constitutional

choices. For example, the broader the application of constitutional norms, the less sense it makes for a constitutional system to adopt a system of 'strict concentration and specialization of constitutional review powers' (Michelman, Chapter 16); whereas the narrower their scope, the more feasible it is for a country to create a stable system of either concentrated or specialized judicial review.

A quite different set of factors are cultural and historical, rather than institutional in nature. As authors such as Adrienne Stone, Ran Hirschl and Vicki Jackson and Jamal Greene note, history and past experience cast a long shadow over a constitution's text, as well as its subsequent interpretation. Cultural factors also play a central role in a constitution's drafting and how it is thereafter interpreted (see e.g. Stone; O'Regan and Friedman; and Kommers). Cultural understandings about the nature of the state and indeed even the constitution itself may also be important in this context. For example, as Donald Kommers notes, how a culture understands the nature of its own democratic commitments (e.g. as communal, social or liberal) may be an important factor influencing how it approaches the constitutional regulation of abortion (Chapter 24). The more particularistic a nation's constitution is understood to be by its citizens, the less support there will also tend to be, as Cheryl Saunders notes, for the kind of comparative and international engagement that can often lead to constitutional similarity (Saunders, Chapter 31).

In some areas, as Adrienne Stone argues in her chapter on freedom of expression, the 'sheer complexity' of constitutional law – and the commitments of members of the constitutional culture (see Post 2003) – also help explain constitutional heterogeneity (Stone, Chapter 22). An allegiance to multiple different constitutional values creates scope for significant disagreement on how to resolve constitutional questions even within countries, and across countries, the scope for such disagreement will be even larger (see Stone, Chapter 22; Dixon 2008).

Time is also an important factor in explaining constitutional differences in many areas. As Tom Ginsburg notes in his chapter in the *Handbook*, as well as elsewhere (see Elkins et al. 2010), constitutions have tended to have very different rates of endurance, so that even in mature democracies, there is significant variation in the time at which national constitutions were adopted. The time at which a constitution is adopted is an important predictor of many key formal features of a constitution (see e.g. Elkins et al. 2010). As Rick Pildes notes in Chapter 14 in the *Handbook*, this may reflect learning or 'transformations over time in the understanding of what the practice of democracy means in large societies', but also potentially the force of peer pressure or mere imitation on the part of constitutional drafters.

4 CONCLUSION: A MATURING FIELD OF INQUIRY

As the variety of these contributions helps demonstrate, comparative constitutional law is a rapidly maturing field. Yet as Venter (2000: 19) and other thoughtful observers have noted, the field is hardly complete. There are still numerous areas of constitutional law in which there is little truly comparative scholarship; and many areas in which, while there is a growing comparative literature, there is relatively little critical engagement among comparative scholars of the kind we generally associate with domestic constitutional scholarship, particularly in the US.

To some degree, this has constrained us in compiling the *Handbook*, so that there are some areas – such as the relationship between constitutions and the environment – in which there

are obvious gaps in the *Handbook*'s coverage, even beyond those dictated by the constraints of space. In other respects, it has motivated us to use the *Handbook* as a means of challenging the current boundaries of the field.

One way in which we have done this is to invite several contributors to address topics that, more than in many volumes of this kind, overlap to some real degree. This is evident in the chapters by Janet Hiebert and Mark Tushnet (on alternatives to court-centered forms of constitutionalism); Victor Comella and Frank Michelman (on the idea of a court with specialized constitutional jurisdiction); Stephen Gardbaum and Dennis Davis (on the notion of state action and positive rights); and Oren Gross and Kent Roach (on constitutional emergencies and responses to terrorism). By encouraging this form of overlap among these authors with their diverse perspectives, we have hoped to show the possibilities for the future deepening, as well as broadening, of the current scope of the field.

By reading the *Handbook*, however, we also hope that comparative constitutional scholars will be encouraged to address gaps at both these levels. With this in mind we conclude with some suggestions for where the field might go in the future.

We certainly need a broader empirical base. It is probably the case that 90% of comparative work in the English language covers the same ten countries, for which materials are easily accessible in English. Some 'globalized' constitutional courts have made a special effort to have their decisions translated – South Korea is a good example here. But the field needs many more studies of the operation of constitutions and constitutional law in less well-studied contexts, including non-democracies (Barros 2002). A good example, as Kent Roach notes in his chapter, is the current gap in comparative constitutional scholarship on anti-terrorism law in the Arab world (Chapter 29). Indeed, work of this kind might help to inform broader theorizing on the nature of constitutions in general.

It is also the case that much of the work to date has focused heavily, and quite naturally, on constitutional courts. Valuable as this work has been in laying the groundwork, not much of it has examined how constitutions actually function in a systematic way. There are many other constitutional institutions that use and make law: human rights commissions, corruption commissions, trial judges, ombudsmen, and legislatures, to name only a few. Legal actors outside the courtroom – such as non-governmental organizations, religious groups, police, prosecutors – all have internalized constitutional understandings. These other sites of constitutional legal practice have not been subject to many comparative studies, though surely they ought to be.

We also could use work with more methodological variety. Some scholarship has started to apply large-sample approaches to constitutional law, and case analysis remains the method of choice. But we surely could learn a good deal from constitutional law by utilizing other social science methods, including experiments and surveys (Law 2010). Studies of particular courts and other constitutional institutions can also draw on ethnographic methods which emphasize particular internal understandings over generalization (Scheppele 2004). Pluralistic social science, in other words, can enrich the field even more than it already has, both to inform doctrinal scholarship and to engage in fruitful inquiry for its own sake.

We close with an expression of optimism. It is an exciting time for the field of comparative constitutional law, and we hope that the chapters here convey some of the energy being brought to bear by scholars around the world. We are confident, and heartened, by the knowledge that the contents of this volume only begin to scratch the surface of what the field will look like in the future.

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