
THE AGENDAS OF COMPARATIVE CONSTITUTIONALISM

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If the past is a foreign country, how much more foreign are the pasts of foreign countries!¹ But getting a grip on constitutions and what they mean requires a knowledge not only of foreign countries, but also of their pasts.

Comparative historical constitutional scholarship runs up against two current tendencies in the law and courts field – the tendency to work on America and the tendency to work on the present. While quite a few law and courts scholars have by now become committed to exploring America’s constitutional past, fewer have ventured to foreign lands, and even fewer have attempted to explore the histories of foreign constitutions. But constitutionalism has not been a single-country project, nor is it fully possible to understand the present diversity and tensions in constitutional systems around the world without some understandings of the historical distances that constitutionalism has traveled. In this short essay, I hope to provide a brief introduction to the history of comparative constitutionalism, with the particular aim of orienting those who are interested but need a broad overview to get started.

In many ways, this essay is indebted to the previous forays in the pages of the Law and Courts section newsletter made by both Lee Epstein (1999) and Neal Tate (2002a, 2002b). Both Epstein and Tate have traced the intellectual history of the discipline of political science and its understandings of comparative law. I can, therefore, take a different tack. Instead of concentrating on a disciplinary history, I will look at the history of constitutional development itself, using sources that are more interdisciplinary. After all, if political scientists haven’t been doing this work (as Epstein and Tate both noted), then who has? The answer is historians, academic lawyers, sociologists and anthropologists, along with some political scientists. In this essay, I will outline the main events that have left their traces on contemporary forms of constitutionalism using an interdisciplinary range of sources.

But why study comparative constitutional history in the first place? One reason is that many of the taken-for-granted fixed starting points of our field are actually variables connected to time and place, variables whose variable quality is obscured if we do not know the counterexamples. Consider

the tension between democracy and constitutionalism, the association of constitutionalism with judicial review, the assumption that constitutionalism is importantly about relations between framers and their political descendents, and the idea that all functioning constitutions worthy of the name are both liberal and democratic. In historical-comparative perspective, each of these ideas can itself be shown to be quite local and specific. Comparative historical study prevents us from “naturalizing” our ways of seeing the world and allows us to be more flexible theorists of constitutional processes.

Then why not just study political development instead of constitutional history? In countries without formal written constitutions – like Britain – the two sorts of histories tend to overlap in large measure. But in countries that mark sharp breaks in political development with written texts having legal (and not just traditional or prudential) force, constitutionalism and political development generally have different emphases and may in fact take divergent paths – as happened, for example in 19th and 20th century Germany (Hucko, 1987) and Egypt (Brown, 2002).

The idea that legal force stands behind constitutionalism connects political development to our field of law and courts. Constitutionalists worry about the relationship between law and politics, exploring the way that politics runs outside the boundaries of law as well as the way that law runs outside the boundaries of politics. For all their necessary interaction, law and politics do not collapse into each other, and the study of constitutional history shows why it is both conceptually useful as well as pragmatically necessary to leave theoretical space for law and politics to come apart, as well as for each to be considered as an influence upon the other. The circumstances under which law constrains politics as well as the circumstances under which politics colonizes law are empirically fruitful to examine. Significantly, seen historically, the study of law in politics doesn’t always collapse into the study of courts. Legal force can be expressed in a variety of ways, from the earliest constitutional documents authorizing the nobility to rebel against the king if the king broke his promises to the later ones in which independent judiciaries are tasked with judging whether parties have legal justification for what they do. But the

relationship between law and politics varies across countries and historical moments, and it is therefore useful to see political development itself through the lens of constitutional history, which puts this relationship at the center of its attention.

A few disclaimers. No one could write the history of world constitutionalism in a lifetime of effort, though there have been some excellent recent attempts by van Caenegam (1995), Lane (1996) and Gordon (1999). A short essay can only point to the major features and even then in small fractions of the world. In addition, since my own specialty is European constitutional development (particularly East European constitutional development), I know I have given less attention to the rest of the world in this essay than it deserves. I hope some other members of the section with different backgrounds can fill in the gaps I have left. In the areas that I do cover in this essay, the bibliography should help readers who want to know more on any particular point. I have confined the bibliography to sources in English; rich literatures exist in the languages of the countries under consideration but are not included here. While the article can't satisfy all appetites, I hope it can whet them.

The Prehistory of Modern Constitutionalism

Our story of constitutionalism begins, as with so many ideas in the Western tradition, in the ancient world.² The "aspiration to make power impersonal" (Castiglione, 1996:11) motivated ancient discussions about various types of possible constitutions (for example, Aristotle, 1992: Books IV-VI). But constitutionalism in the ancient world showed only glimmers of the primary idea that came to dominate later constitutional history – that certain political agreements can come to have legal force, and that that legal obligation can move political actors to act in particular ways even if their immediate self-interest pulls them to act otherwise. Gordon's recent book (1999) shows how much formal structure both Ancient Athens and the Roman Empire had, but his account also reveals how little of that structure was understood to be maintained by law rather than through appeals to tradition or through literal force. As a result, ancient examples have had relatively little impact on the practice or study of modern constitutionalism, precisely because the idea of the constitution in the ancient world was used more or less synonymously with all organized political structure (McIlwain, 1940).

As some historians have started to document, however, the fluid period in European history between the fall of the Roman Empire and the rise of the early forms of the modern European state produced important appeals to a constitutional (rather than an ethnic) vision of membership in a political community

as a practical political matter (Geary, 2001). This conception of constitutionalism revealed a growing commitment to the idea of a collective personhood that came with sharing a common politics and a common law. The recovery of that tradition of constitutional belonging links up well both with the current debates over the nature of citizenship in the world today and with Jürgen Habermas' elaboration of the idea of "constitutional patriotism" as an alternative to a purely ethnic conception of the modern state (Habermas, 1997).

The ideas and events of the medieval period in Europe were much more consequential than the ancient ones among the political actors responsible for constitutionalism's later development and most modern ideas about constitutionalism can be traced to this period. The tension between an increasingly powerful (Christian) church and the jurisdiction of increasingly powerful kings grew into a major conflict at the end of the 11th century – the Investiture Crisis – when both pope and king claimed the power to appoint lesser clergy. The conflict was resolved through a negotiated institutional separation. Still, throughout the medieval period, the difficulty of sorting out the relative competencies of church and state led to much interaction and also much friction which constantly threatened to threaten to break out into open conflict between the two institutions (Tierney, 1964, 1979; Downing, 1988).

In addition, the facts of political life by the 13th century meant that precarious kings who had overreached their powers were forced to concede at least some privileges to increasingly uppity nobilities. The formal written agreements that resulted from these royal stand-downs produced some of the earliest models of bills of rights – for example, the Magna Carta in England (1215) and the Golden Bull in Hungary (1222). Both documents significantly gave the nobility the right to resist the king if the king failed to carry through on his promises, provisions that also mark the beginnings of accountable government. The personal power of kings was, at the same time, increasingly institutionalized in ways that outlasted the personal reign of particular persons, an important step in the depersonalization of political office (Kantorowicz, 1957). Both accountability of leaders and depersonalization of politics are important elements of the modern mix of legal constitutionalism, though neither one required that the agreements reached to accomplish these purposes be interpreted or directly enforced by courts.

The victories of clergy and nobilities against kings were instantiated in the proto-parliaments that emerged following these agreements in the late Middle Ages (from the 13th to the 15th centuries). The parliament in Britain, established in the 13th century, represented the nobility in one chamber and the "people" (an only slightly larger class of the politically

empowered) in the other. On the continent, where the Investiture crisis had taken its toll, parliaments tended to be divided into three chambers: the clergy, the nobility and the "people." In addition, as a sign of the relative weakness of the monarchies in much of central and eastern Europe, the principle that the royal dynasty was elected by the nobility was established during this time. While it was concretely the weaknesses of the monarchies that brought about these concessions of power, the commemoration of these concessions in agreements that were held to be binding on later leaders was the crucial step toward constitutionalism.

The age of absolutism in European monarchy (16th to 18th centuries) generally brought an abrogation of, or at least a vacation from, these earlier power-sharing agreements as monarchs regained their power and their audacity – and claimed the right to govern without constraint. The constitutional accomplishments of the medieval period were obliterated by these absolutist claims. But by the 17th century in England, the 18th century in Western Europe and the 19th century in Russia, powerful kings were again increasingly challenged by the upper classes of their own societies who were seeking to share power through constitutional means, often harkening back to medieval agreements as their models. Following various uprisings, wars and prolonged power struggles, kings were once again forced to concede power, and a series of formal agreements documented these new resolutions. For example, following a bloody civil war in England during which the king was beheaded and a short-lived republic announced, the 1689 Bill of Rights emerged. Resulting more from intellectual persuasion than from fighting in the streets, the codification of law and the creation of an independent judiciary under the Frederick II the Great in Prussia (1740-1786) gave real meaning to Frederick's pledge that "I am resolved never to interfere with the course of a judicial process, for in the courts the laws should speak and the sovereign keep silent" (van Caenegem, 1995: 135). Frederick's innovations moved significantly toward the modern German conception of the *Reichsstaat* (the constitutional state under the rule of law) as it developed in the 19th and 20th centuries (Böckenförd, 1991).

Constitutional experiments, of course, did not always succeed (and that remains true to the present day). But practically speaking, constitutionalism had its origins when powerful sectors of society used their power to push the monarchy and the monarchy pushed back with only limited success. If the monarchy could crush its opposition, absolutism prevailed over constitutionalism. If the opposition could wrest concessions and hold the monarch to them over time, constitutionalism won. Early constitutions tended to be formal grants of power from kings to others, once the kings realized that their own rule was threatened if they failed to

meet the demands of those who possessed sufficient resources to mount a real challenge. The written texts that provide the early models for modern written constitutions tended to be peace treaties after major battles in domestic or international wars, or they were concessions granted by weakened kings to the forces of political opposition in order to avoid open violence. The "progress" of constitutionalism, however, was by no mean uniform over most of European history.

The constitutional forms we may take for granted now have their origins in concrete battles over political power between kings and their competition in particular parts of the world. The modern doctrines of separation of powers and of separation of church and state were born in actual political struggles to set clear boundaries between different political groups contesting power (Vile, 1967). Federalism grew out of the challenges to royal power made by previously autonomous political subdivisions that were swallowed up by expanding empires. Rights were originally privileges granted by a king to some sector of his subjects, often after those subjects had demanded such privileges in exchange for loyalty. All of the major features of modern constitutions, then, had their origins in hard-fought struggles to call political power to account and to spell out in clear agreements just how the power of the king was to be constrained. These agreements did not last because times changed, the powers of those who wrested concessions declined, those from whom power had been wrested became more dominant again. But then newly absolutist rulers were in turn challenged by organized sectors of the society and the process of constitutional negotiation continued. The resulting arrangements of power-sharing, in the places where it occurred, left their mark on constitutional theory. Constitutional theory – the concepts and categories taken to be central to modern constitutional practice – is what was left behind when the history dropped away.

The Age of Written Constitutions

Against this background, the American constitution written in 1787, ratified in 1789 and amended by the Bill of Rights in 1791 was still a revolutionary development. The American constitution was the first written national constitution to deliberately create a new government from scratch by formal agreement among relative equals. The Philadelphia convention brought elected representatives together to produce a compromise agreement to share power among different political interests. Of course, the reality was more complicated than the romantic picture usually painted. Some states didn't send delegates; some of those elected left early or failed to come at all; fundamental disagreements were never fully resolved even among those who were present.

Still, the peaceful creation of a new government was an attractive alternative to the violence or threatened violence which had been the normal method of constitutional change before then. After the American experience, the model of the constitutional convention became widely emulated.

In many ways, however, the American experience was unique and, for more than a century, unrepeatably elsewhere. As part of the “new world,” America had no indigenous nobility and relatively little social inequality compared to the “old world,” something that made the task of constitution-creation manifestly easier (Arendt, 1965). Slavery of course provided one of the most egregious exceptions to the otherwise relatively egalitarian society, and it was eventually over the issue of slavery that the constitution foundered in its most extreme way (Brandon, 1998). Built on top of the structures of relatively successful state governments, most of which had their own written constitutions before the Philadelphia convention (Tarr, 1998), the American constitution had the great advantage of starting with a political safety net. If the new federal government had failed, as indeed the Articles of Confederation had already, the state governments would have prevented the free fall that might have resulted. And though the framers feared the country’s weakness should it be attacked by foreign powers, the foreign threat was minor compared to that faced by nations undergoing other constitutional experiments around the same time. Though the framers were powerfully influenced by what they knew of the British model from Blackstone (Blackstone, 1938) and Montesquieu (Montesquieu, 1977), the constitution they wrote was distinctive to the unusual circumstances of the new world.

But America was not the only country at the end of the 18th century that bet heavily on the view that a written constitution could minimize the destabilizing effects of a change in governmental form. Both the Polish Constitution of 1791 and the French Constitution of 1791 were very real attempts to provide a political transition without bringing the old government down completely to do it. In both cases, these liberal constitutional experiments failed, but not necessarily because the constitutions themselves were inadequate. External events intervened in Poland and the king resisted in France.

In Poland, the nobility had possessed the formal power to elect the king since the medieval period. But successive Polish kings had become too weak to fend off their neighbors, who were themselves aggrieved from previous Polish aggressions. In 1772, Poland lost one third of its territory to Prussia, Russia and Austria, and the subsequent crisis produced a constituent assembly to draw up a plan to strengthen the Polish state against future predations. The 1791 constitution was the first written constitution in Europe.

This “May 3 Constitution” embraced a constitutional monarchy, made the king’s ministers responsible to the parliament, enhanced the powers of the parliament itself and created an independent judiciary. But the new constitution seemed only to provoke Prussia and Russia into further attacks on Poland. After only a brief period under this new constitution, Poland fell to the armies of its neighbors and vanished from the political map of Europe altogether for more than a century (Fizman, 1998).

The convulsions of the French Revolution brought France four constitutions in nine years. Each constitution documented another phase of the revolution; each failed in turn until Napoleon’s rise to power brought a temporary halt to constitutional changes. The decade of the 1790s in France produced a rough draft of nearly every major constitutional model that would be on offer in Europe for the next 200 years – from a constitution for a constitutional monarchy (1791), to a parliamentary republic (1793), to a closely controlled central committee (1795) to personalistic and imperial rule (1800).

The 1791 French Constitution was a document that bore strong resemblances to the Polish and the English models; a constitutional monarchy would govern with a powerful parliament itself accountable to the most elite sectors of the population. But unlike the Polish constitution, which lacked a bill of rights, the French Constituent Assembly, convened in 1789, began with the Declaration of the Rights of Man and the Citizen,³ which (together with the declaration on the abolition of feudalism) set the tone for the rest of their constitutional effort. Though the Constituent Assembly had radical ambitions, inspired by Abbé Sièyes’ crucial pamphlet, *What Is the Third Estate?* (Sièyes, 1963; Sewell, 1994), the assembly eventually produced a moderate constitution that preserved the position of the king, but forced him to govern with a parliament (Fitzsimmons, 1994; Elster, 2000). The 1791 Constitution might well have worked were it not for the fact that the king never really agreed to be bound by it.

Louis XVI’s obvious constitutional violations under the 1791 text strengthened the hand of the radicals who had argued for abolishing the monarchy altogether. As the leading radical Robespierre came to power, the revolution cut loose from the 1791 constitution. The hastily drafted 1793 constitution never went into effect, but it formalized the abolition of the monarchy and (at least on paper) created a republican government with parliamentary supremacy and an elected judiciary (Moore, 1962). But violence replaced constitutionalism altogether and the Terror ended only with the rise of the Directorate, a central committee of all-powerful leaders, thinly disguised by huge parliamentary assemblies that were too unwieldy to function as a proper check on the collective executive. This structure was entrenched in the

constitution of 1795. The Directory proved in practice to be unstable and the various coup attempts launched against it produced extreme repressions in response. Finally, Napoleon's successful coup was institutionalized in the 1800 constitution, a constitution that gave up on any attempt to provide general frameworks and specifically named Napoleon as leader. This constitution radically centralized power, though frequent plebiscites (all of which went Napoleon's way) gave some democratic veneer to his rule. The 1804 revisions to Napoleon's constitution formally made him emperor (van Caenegem, 1995: 174-193).

Throughout the 19th century, much constitutional change in Europe was motivated by the desire on the part of newly empowered classes – empowered either by Enlightenment ideas or by the money made from the profits of industrialization – to force kings to share power. In the first decades of the century, a few European countries formalized the constitutionalization of monarchies, requiring them to govern with increasingly powerful parliaments. For example, the Netherlands got its first written constitution establishing a unified constitutional monarchy in 1815, but the king was forced by the uprisings in 1848 to introduce parliamentary government and ministerial accountability. In Belgium, the combined protests of the bourgeoisie and the clergy against the king culminated in the constitution of 1831, which refused general popular sovereignty but substantially strengthened the narrowly representative parliament. Britain adopted further constitutional changes in the Reform Act of 1832 which substantially expanded the democratic base of British government.

But at this time too, there was a backlash against the various efforts at constitutional modernization. France brought back and propped up the monarchy in the 1814 and 1830 constitutions, though not in the pure absolutist form France had previously known. The Decembrists in Russia demanded a constitutional monarchy in an uprising in 1825, but some were executed and others were exiled, and absolutism prevailed. Eventually, however, the czar did bring in liberal reforms, like the abolition of serfdom (1861) and reform of the judiciary (1864) (Wortman, 1976). Perhaps the greatest spur to reform, however, were the losses in the Crimean war, when the czar's power was weakened rather than appeals to constitutionalism per se. Elsewhere on the continent, German-speaking Europe generally retained its kings and refused constitutional limits on them until well into the 19th century.

In general, however, the demands on the part of the privileged classes throughout Europe to share power with the monarch collided with the increasing radicalization of ever-wider sectors of the population as the 19th century progressed. Industrial poverty coupled with the blowing winds of

socialism overtook some parts of the continent and budding nationalisms brought hatreds that were claimed to be of ancient origins into the mix. The result was the sweep of revolutions that took place across Europe in 1848. While each of these revolutions had distinctly local causes, there was also a common theme that political power had to be democratized and that previously disenfranchised groups had to be given the right of political self-determination (Namier, 1992; Robertson, 1952). The threats from the lower classes caused a temporary unification of interests among nobility and monarchy, which joined together to fight off the challenge from below. The revolutions in the streets were accompanied by movements among intellectuals to write constitutions to mediate the conflict by consolidating new political forms. In the space of a year or two, nearly 60 new constitutions were written. Most were either stillborn or died in infancy when the monarchies struck back.⁴ But the boom in constitution-writing produced some lasting ideas that still have their effects in modern constitutionalism, and it also produced some ominous signs of things to come.

Perhaps the most intellectually important of the 1848 constitutions was the one produced by the Frankfurt Parliament (Eyck, 1968). Dominated by academics, the parliament strove mightily to create a constitution that would unite German-speaking Europe into a single political entity. The effort ultimately foundered when Austria withdrew from the planned union and the King of Prussia, offered the kingship, refused the constitution's terms (Breuille, 1998). But the constitution contained a bill of rights that ahead of its time in figuring a relationship between the citizen and the state that would not come into its own until the second half of the 20th century.

Less liberal in 1848 were the constitutional efforts of the French. In a constituent assembly popularly elected to draft a constitution in response to revolutionary demands, the conservatives surprisingly dominated. While the revolution created havoc in the streets, the assembly became ever more reactionary in its support for a strengthened monarchy. One of the representatives, himself a cranky monarchist, was Alexis de Tocqueville, whose *Reflections* provide a gripping account of both the assembly and its disdain for the revolutionaries (de Tocqueville, 1990). The French assembly showed the continuing viability of the monarchical idea, which in the immediate aftermath of 1848 was ultimately victorious. It was to take another series of dislocations in Europe before real political power was to be wrested from the royal families and their supporters in many of the most powerful European states.

The 1848 convulsions within the Hapsburg Empire, extending over a large part of central and eastern Europe, witnessed the rise of nationalism as a rallying point for new

constitutional demands. The uprisings of the Hungarians and the Czechs, who had long been submerged in this transnational empire – as well as continued agitation on behalf of restored statehood for the Poles – featured curious mixes of liberalism and nationalism in their constitutional plans. From these efforts, only the Hungarian one eventually succeeded in establishing a constitutional system of power sharing between Budapest and Vienna, and then only in 1867 (Deák, 1979). But the idea that every “people” deserved a “nation” was not lost on the colonies of European powers abroad, many of whom began their own agitation for constitutional independence in the mid-19th century as well. Generally speaking, the revolutions of 1848 opened the Pandora’s box containing both socialism and nationalism, which could not help but affect the popular constitutionalism of that day and since.

By century’s end, the intersection of international trends with distinctly national events produced a new wave of constitutions that bore striking similarities across very different constitutional regimes. German unification was accompanied by the Constitution of 1871, establishing Bismarck as emperor. The constitution conceded universal, equal (male) suffrage and featured a bicameral parliament designed to represent in the upper house the princes – whose principalities had been swallowed up with unification – and in the lower house (some of) the people – whose ability to elect this chamber was tempered by the parliament’s inability to seriously challenge the emperor. Japan’s emperor agreed to the Meiji Constitution of 1889, a constitution that borrowed explicitly from the new German model, creating both a strong and unassailable emperor and a bicameral parliament structured along the same lines. Showing how far the spirit of constitutionalism had become the norm for political change by the end of the 19th century, the preamble of the Meiji Constitution noted: “In consideration of the progressive tendency of the course of human affairs and in parallel with the advance of civilization, We deem it expedient . . . to establish fundamental laws.”

In Russia, still a bastion of absolutist rule, the revolution of 1905-1907 finally caused Czar Nicholas II to give ground, agreeing reluctantly to govern with a parliament upon the insistence of his determined minister Sergei Witte (Witte, 1921; Hosking, 1973; Szeftel, 1976; Sohrabi, 1995). One of the revolution’s keenest observers was Max Weber, who had followed political developments in Russia in active correspondence with close friends there. Commenting on the Russia he saw after the new “pseudo-constitution” (as he put it) came into effect without much actual political change, Weber observed, “The machinery grinds on as if nothing has happened. And yet things have been done which cannot be undone” (Weber, 1995: 173).

Weber’s words might have described much of the constitutionalized world at the end of the 19th century. On one hand, the 19th century brought a major legal transformation: while written constitutions were absolutely novel at the start of the century, political change (whether real or merely aspirational) was nearly always signaled by the adoption of a written constitution by century’s end. But, on the other hand, in many ways the machinery of government ground on as if little had really changed. Despite the 19th century’s upheavals and presses for popular democracy, republicanism, socialism and nationalism, most countries that started the century with monarchies ended with only slightly more constitutionalized and democratized monarchies. Very few made the leap into outright parliamentarism and truly democratic structures were limited to elite groups and only a few places. Rights provisions in constitutions were more decorative than functional. The countries that had thrown off monarchy usually took the short step to having an emperor instead of a king. Though there was a growing move for parliaments to constrain royal power, monarchs (or their imperial equivalents) had proved themselves to be surprisingly resilient to the more radical elements of the constitutional revolution. Constitutionalism as a binding legal basis for political power was widely recognized, but had yet to establish itself in most of the world.

Twentieth Century Constitutions

The 20th century changed all that. While the 19th century flirted with and rejected the most radical changes on offer, the 20th century embraced sometimes devastating constitutional experiments in a variety of extreme ideologies. The reason? Wars more thoroughgoing and devastating than any known before, revolutions more brutal and repressive than previous efforts, whipped-up nationalisms and grand hatreds that rose to new levels of intolerance and violence – these were the ultimate engines of constitutional change.

The First World War brought to an end the last of the European empires – the Ottoman and the Hapsburg Empires – and it also forced Imperial Germany under the Kaiser to accept defeat. As a result, new republics were created in Austria, Turkey and Germany in the previous imperial cores. The newly liberated parts of these empires outside of Europe became colonies (much of the modern Middle East, for example). But in the newly liberated areas of the imperial periphery within Europe, new ethnically based states (for example, Hungary, Czechoslovakia, Bulgaria, Yugoslavia) were carved out of the Austro-Hungarian Empire and the European parts of the Ottoman Empire. Many of these states were forbidden from recognizing indigenous monarchies by the terms of the peace treaties they signed – so monarchy

was ultimately killed off not by its own domestic opposition, but by international insistence. As with medieval constitutionalism, the most radical changes in the basic shapes of the new nation-states were brought about by wars and the peace treaties that followed rather than by rational deliberation of domestically constituted bodies. In Russia, the reaction was even more radical: the First World War weakened both the country and the czar, creating an opportunity for revolution which produced first a liberal government (in February 1917) and then a Bolshevik one (in October).

All of these developments had important constitutional consequences. The Weimar Constitution, adopted in 1919 in Germany, featured some of the most enlightened constitutional thinking of its day. Hugo Preuss, who led the expert commission that produced the first draft, had the considered advice of authorities like Max Weber, who energetically participated in the process (Mommsen, 1984: 332-389). German public law at the time was also influenced by the major codification of civil law that had occurred two decades earlier and which itself was animated by reconsideration of European historical models (Ewald, 1995). The Weimar constitution borrowed its initial rights provisions from the failed constitution of the Frankfurt Parliament and also attempted to create a far more effective parliamentary government than the German lands had ever seen. Unfortunately, Germany was badly divided politically in the inter-war period and successive governments fell for lack of broad support. Mechanisms put into the constitution to ensure the representation of even tiny interests ultimately split the political world into irreconcilable fragments. A liberal amendment provision that was designed to ensure that the constitution could retain its flexibility ultimately proved to be the constitution's downfall. Into the breach caused by a series of unstable governments came Nazism. A constitutionally cunning Adolf Hitler was able to use the flexibility of the Weimar constitution against itself, constitutionally suspending both federalism and core rights protections and then launching more indiscriminate attacks on the foundations of constitutional government and human rights (Caldwell, 1997). As a result of its evident weaknesses in the face of assault, the Weimar constitution went from being the model for liberal constitutional government to being the leading negative example of how *not* to write a constitution (Kennedy, 2003).

The Austrian constitution constructed between 1920 and 1930 is known primarily for having created the institution of the constitutional court, the brainchild of legal philosopher Hans Kelsen (Kelsen, 1942). The constitutional court, unlike supreme courts, was to have specialized jurisdiction over constitutional questions and, as such, was to be the primary arbiter of constitutionality in the new king-less state. The

Austrian constitutional court was not very active at first, mostly because the constitution had no rights provisions to provide a basis for an active jurisprudence. But the Austrian court nonetheless provided an important model for a variety of constitutions written later in the century (Andrade, 2001).

In Russia, the liberal government that took office after the February Revolution in 1917 followed what was by now the normal European script for governmental change: They set elections for a constituent assembly to write a new constitution. But the assembly was overtaken by events. Even though the October Revolution swept away the government that had called the assembly, the election of the members of the assembly proceeded as planned shortly thereafter. The constituent assembly actually met briefly in early 1918 before being forcibly dispersed. Later in 1918, the first soviet constitution was drafted by a committee whose most prominent members were Yakov Sverdlov, the party secretary; Nikolai Bukharin, a prominent member of the left communist opposition; and Josef Stalin, who at that time was minister of nationalities (Bunyan, 1936). Vladimir Lenin, himself trained as a lawyer, drafted the section on the "Declaration of Rights of the Toiling and Exploited People," a deliberate contrast to the Declaration of the Rights of Man and the Citizen that had been proclaimed in the early days of the French Revolution (Unger, 1981: 11). The defining marks of the new communist constitution were its denial of the separation of powers through "ensuring complete supremacy of power for the toiling masses" (Art. 3g), its insistence that "there can be no place for the exploiters in any organ of power" (Art. 7), and the preservation of the state's ability to "deprive individuals and groups of rights used to the detriment of the interests of the socialist revolution" (Art. 23). The first in what became a long series of soviet-style constitutions outlined the key features that were to remain as part of this particular constitutional constellation as long as the Soviet Union existed (Sharlet, 1992). Soviet constitutions revealed that constitutionalism was not necessarily a vehicle for liberal ideas.

In Turkey after the collapse of the Ottoman Empire, the sultanate was abolished and the new state took on the ideology of its modernizing, secular and charismatic leader, Atatürk. The constitution of 1924 established the Turkish republic; amendments in 1928 abolished the caliphate and established mandatory secularism as a state principle. By 1937, the six principles of the modern Turkish state – republicanism, nationalism, populism, statism, secularism and reformism – were all incorporated prominently in the text. Turkey had managed to create a constitutionalism that was neither liberal nor monarchical, neither socialist nor fascist, but based on a unique sort of nationalism that embraced Atatürk as something akin to a secular deity with an agenda of modernizing reform.⁵

In the interwar period of the 20th century, then, major national constitutions were created that adopted radically different models of governance – from the anti-liberal communist constitution of the Soviet Union to the republican constitution of Germany to the juridical constitutionalism of Austria to the personalistic and nationalistic constitutionalism of Turkey. Whereas the variation in 19th century constitutions had been relatively small because all confronted the central structural problems of limiting the monarchy, early 20th century constitutions covered a much greater ideological span, with a proliferation of constitutional ideas and structures that no longer looked like variants on a common theme.

The catastrophic military conflagration, the movement and destruction of peoples, and the redrawing of the political map associated with the Second World War created an even more sweeping constitutionalist counter-reaction at the end of that war. But unlike the centrifugal forces let loose by the First World War, the constitutionalism that followed the Second World War started to pull modern constitutions toward variants on a single model characterized by: 1) a half-century-long transformation of constitutions in a surprising variety of places toward liberal democratic regimes based on the separation of powers and judicial enforceability of rights claims, 2) the emergence of juridical control over the other branches of state through the increasing delegation of what had been political questions to courts and 3) the increasing interdependence of national constitutional systems through the borrowing of basic principles of constitutional governance from one system to another across a wide array of different political contexts including, prominently, human rights. Though the United States had arguably gotten there first in the development of a liberal democratic regime with a constitutional core made manifest in writing, the US was left behind as new constitutional regimes pushed past American constitutional ideas to incorporate these post-war changes, particularly the development of both more far-reaching rights protections through newly empowered courts and a more robust version of parliamentarism.

The most substantial postwar changes in constitutionalism occurred in Germany (Hucko, 1987). Defeated and divided, a constitutional assembly under the watchful eye of the occupying powers in the West met in Bonn to draft a new constitution (Merkl, 1962). The result was the present German Basic Law, a constitution that attempted to fix in a new structure of government safeguards against Germany's recent "regime of horror" (Scheppelle, 2003b). The constitution visibly promoted rights, by listing a generous complement of them first in the new text, and by making the most crucial ones unamendable and unalterable, even in times of crisis. The supremacy of rights in the new German

constitutional order was an attempt to say "never again" to the horrors perpetrated by Germany during the war and the Holocaust. It was also an attempt to hold out an alternative model to the newly severed Eastern Germany, which had been forced along another political (and constitutional) course. At the insistence of the occupying Allied Powers, the West German Basic Law also firmly entrenched federalism by making it a strong and unamendable feature of the new government, dividing power across a set of institutions that would make it hard to reawake Germany's previous imperial ambitions without forces of resistance from within. And perhaps most importantly, the new constitution created a constitutional court on the Austrian model, but with more powers (Singer, 1982; Landfried, 1992). The new Court was able to perform the role of the "guardian of the constitution" because it had broad jurisdiction and more detailed constitutional provisions to use as a resource for its decisions. The jurisprudence of the Federal Constitutional Court of (Western) Germany became a crucial international model, at first rivaling and then surpassing the influence of the US Supreme Court on the developing jurisprudence of new democratic governments. As one looks around the international constitutional landscape today, the German Constitutional Court is probably the single most important constitutional expositor in the world (Kommers, 1997; Currie, 1994; Rogowski and Gawron, 2002).

But West Germany was not the only country to get a new constitution after the Second World War. Japan, too, went through a constitutional transformation under the more intrusive guidance of the United States as an occupying power after the war (Moore and Robinson, 1998; Inoue, 1991). Back in defeated Europe, Italy struggled to recover from fascism after the war. The constituent assembly organized to draft a new constitution put the question of governmental form to a referendum, and Italian voters chose a republic over a constitutional monarchy. The political system that resulted was notoriously unstable, but the Constitutional Court frequently performed first aid on the new structure, enabling it to limp along (Volcansek, 2000).

France's constitution of the Fourth Republic, written after the war, quickly fell under the combined weight of political fragmentation and the crisis in its colonies caused by the drive for independence (particularly in Algeria). The charismatic war-time leader Charles de Gaulle was urged to take over the government. But de Gaulle would only agree if a new constitution were written specifically for him, and the French Constitution of 1958, still in effect, was written to entrench a president with few constraints on his power (Hoffman, 1959; Rogoff, 1997). After several decades, however, the edges of this strongly presidentialist document have been softened (Bell, 1992). Elections produced parliaments and presidents of different political parties, which

created the need for political compromise. And the Constitutional Tribunal, itself created to keep the parliament from encroaching on the powers of the president, began to reconsider its role and radically increase its own powers to declare laws unconstitutional (Stone, 1992). Just recently, the constitution was amended to reduce the term of the president from seven years to five, a clear sign that the extreme presidentialist system has been modified. In the meantime, the Constitutional Tribunal has become substantially more active in French politics (Lindseth, 1996-7). Since 1981, the tribunal has nullified slightly more than half of all of the laws referred to it for review (Stone Sweet, 2000: 63).

In the post-war period, there was an explosion of constitutional drafting beyond the European center, as decolonialization produced newly independent countries which, in turn, needed to institutionalize their new governments. The wave of post-colonial constitutions was led by the new constitutions of India and Pakistan after their independence and partition in 1948. While both constitutions created democratic governments with strong parliaments, independently elected presidents and Supreme Courts possessing the power of judicial review on the American model, their fates were very different. The Indian Constitution has been amended, even suspended during the emergency in the mid-1970s, but it has by and large held a vast and diverse and imperfect democracy together (Kashyap, 1994; Johari, 1996; Austin, 1999; Jacobsohn, 2003). The Indian Supreme Court has alternatively engaged in judicial activism in an effort to defend propertied interests and then (after the constitution was changed to remove the right to private property) in activist attempts to rectify social inequality and to make law accessible to the disadvantaged (Galanter, 1984; Kusum, 2001), though the practical effects of this latter set of court decisions have been questioned (Epp, 1998). The Pakistani Constitution has coped less well though under more stress – the partition of the country with the independence of Bangladesh, successive military takeovers of civilian institutions (and often forced amendment of the constitution while the country was under martial law) and major struggles over the role of Islamic law in the constitutional order (Mahmud, 1993).

In general, post-colonial constitutions tended to model themselves after those of the colonial powers they had recently broken free of, only to find that the imported structures did not continue to be adequate under the new pressures of self-governance (Go, 2003). As a result, many post-colonial governments have gone through radical changes repeatedly in search of an appropriate constitutional model (Gambari, 1990; Klug, 2003; Mamdani, 1993). Judges, often the carriers of the new constitutionalism to post-colonial Africa, for example, have not always had an easy

time of it, since they were often educated in the former colonial centers and as a result have not seen the world the same way as their political counterparts without such experience (Widner, 2001). In the post-colonial Middle East (as well as in places like Iran without a colonial past), some states have been moving toward increased constitutionalization of politics (Arjomand, 1992; Brown, 1999; Brown, 2003), though this may be constitutionalism directed not at the liberal purpose constraining government but instead at pronouncing sovereignty, entrenching ideology and augmenting the power of leaders (Brown 2002). Arab countries in particular have been strongly influenced by the intersection of international constitutional developments, the drive toward political modernization and the spread of human rights ideology throughout the world, but there are strong domestic oppositions to constitutionalism as well.

After post-colonial constitution-making, four other major geographical/political changes have produced governmental reconstruction and associated constitution writing – in Southern Europe, Latin America, Eastern Europe and South Africa. In Southern Europe, the fall of fascist governments and military dictatorships in Spain and Greece produced new constitutions, new constitutional courts and a strong commitment to liberal constitutionalism in the 1970s (Bonime-Blanc, 1987; Goldwin and Kaufman, 1988). In Latin America starting in the 1980s, the fall of military dictatorships and the rise of democratic governments has also signaled a shift toward liberal constitutionalism (Stepan and Skach, 1993; Hilbink, 2003).

In Eastern Europe, the collapse of the Soviet Empire created a large number of newly independent states in the 1990s, and constitutions were produced nearly everywhere (Dahrendorf, 1990; Ackerman, 1992; Elster, 1996, 1998; Ludwikowski, 1998; Schwartz, 2000). In Hungary (Tökes, 1996; Arato, 2000), in Bulgaria (Melone, 1998), in Poland (Brzezinski, 1998), in Russia (Ahdieh, 1997; Semler, 1993-4; Sharlet, 2001) in the various pieces of the former Czechoslovakia (Priban, 2002), and all around the region, new constitutions were eagerly written and new constitutional courts established (Sólyom and Brunner, 2000; Dimitrov, 1999; Brzezinski and Garlicki, 1995; Hausmaninger, 1995). In Bosnia-Herzegovina, where a constitution was imposed from the outside as part of an effort to stop the civil war, many of the basic features of this new international constitutional consensus can be found, but they have generally failed to take hold (Hayden, 1999). The extreme federalism of the prior Yugoslav constitution, probably didn't help (Ramet, 1992). Changes wrought by German unification brought West German constitutionalism to Eastern Germany (Quint, 1997) but the arrogance that came with it was not so welcomed (Markovits, 1996).

The extraordinary constitutional revolution in South Africa produced a widely respected constitution which, despite facing enormous domestic problems, has lodged itself firmly in the contemporary politics of the place (Klug, 2000; Jung and Shapiro, 1995). By the turn of the millennium, it is fair to say, constitutionalism had not only come into its own, but – after having gone through a proliferation of experiments in the 20th century – settled in much of the world on an extraordinarily small range of options.

Even countries whose constitutional development has been marked by the absence of a single constitutional text have followed the same general development in the period following the Second World War. In the countries of the former British Empire, like Canada and Australia, increasing constitutional independence has been achieved through a variety of negotiated agreements, and domestic high courts have increasingly focused their attention on the progressive elaboration of rights. In Canada, the 1982 Charter of Rights revolutionized Canadian jurisprudence in the area of promoting human rights even as it spurred new groups to enter the political process (Hogg, 1997; Knopff and Morton, 1992).

Still shaped by British constitutional understandings from the mandate period (Shamir, 2000), Israel has never had a single written constitution. War and domestic disagreement postponed the initial drafting; since then, a series of “basic laws” has formed the backbone of a constitutional order (Jacobsohn, 1993, but see Hirschl, 2002b). Here too, judicial activism plus the increasing recognition of constitutional rights as a basis of liberal government has kept Israeli constitutional jurisprudence in clear dialogue with the rest of the constitutionalizing world even as its particular situation has been unique (Dotan, 1999; Hirschl, 1998; Hofnung, 1996; Shamir, 1990; Sharfman, 1993).

While there are still illiberal constitutions left in the world – communist constitutions, religious constitutions and dictatorships with constitutional fig leaves – many constitutional regimes at present aspire to the key tenets of liberalism: separation of powers, separation of secular and religious authority, a separation of civilian and military authority, a powerful and independent constitutional judiciary, a broad commitment to widespread popular democracy and a strong preference for regular, electoral, and peaceful political change. Most striking has been the extraordinary levels of commitment to judicially protected rights, though this development has not been without its critics (Glendon, 1992; Hirschl, 2000b). This recent convergence on a particular model of constitutional form has been noted as a “rise in world constitutionalism” (Ackerman, 1997; Stone and Shapiro, 1994; Weiler, 1999).

There are still meaningful choices to be made within this structure between presidentialism and parliamentarism (Elster et al., 1998; Preuss, 1995; Sartori, 1994; Stepan and Skatch, 1993). And there is still major disagreement about the wisdom of the extraordinary levels of judicial activism which are typically found within this new constitutional order (Tate and Vallinder, 1995; Shapiro, 1996; Gavison, 1999; Grimm, 1999; Stone Sweet, 2000; Bugarcic, 2002; Hirschl, 2000a; Hirschl, 2003; Scheppele, 2002; Scheppele, 2003c). How constitutional orders should respond to terrorism and other fundamental challenges is another subject of lively disagreement (Finn, 1991). But the range of constitutional questions that create important controversies is simply much smaller now than was the case for much of the last century. While no constitutional order lives up to its highest aspirations (and many fail to achieve even a minimum correspondence between constitutional promises and actual quality of life), what is striking about the present international situation is how similar the publicly expressed constitutional aspirations have become.

Agendas for Comparative Constitutionalism

With this breathless world survey, what have we learned? And especially for those who are primarily interested in the American constitutional present, what does knowing about the foreign constitutional past add?

If one focuses only on the present era of one of the most anomalous constitutional orders in the world, which this survey has shown America to be, then it is easy to believe in both the inevitability and the generalizability of the American model of constitutional order. Without a comparative reference, the primary taken-for-granted features of the American constitution – for example, its unusual persistence, its reliance on a distinctive and unusual form of judicial review, its particularly complicated forms of separation of powers, its relatively cramped guarantees of rights, its easy ability to assume the absence of military government or theocracy, its general remoteness from foreign law – can appear as if they are normatively obvious theoretical constructs rather than one of a series of possible results that could have developed out of a different history of political struggles. Counterfactuals are always difficult. But what if the American constitution entrenched far more rights (as indeed have most constitutions written in the last 50 years)? What if the Catholic Church and medieval European states had not reached a mutual accommodation about how to divide jurisdiction bequeathing a particular history of church-state separation that still has resonances in America? What if the absolutist states of Western Europe had been able to fight off all contenders longer than they did (as was the case in Russia) so that at the time of America’s founding there would

have been no functioning parliaments on display? One's own constitutional trajectory may seem inevitable in retrospect, but the particular constitutional arrangements any country has seen neither so historically inevitable nor so normatively obvious when one looks at the variety of factors that decisively shape the specifics of constitutional governance.

And of course, once one's own constitutional structures are (more or less) settled, one is less susceptible to influences that come along later. Though a descendent of earlier constitutional battles, the American constitution is an anomaly in international perspective rather than a typical case now because it froze much of its constitutional structure at the end of the 18th century.

The empirically minded among us therefore might worry about creating "constitutional theory" from a single unusual example – the contemporary United States. While there are other countries with "old constitutions" (Smith, 1995), there are few whose formal structure has responded so little to recent constitutional trends elsewhere (Scheppelle, 2003d). Just to take one clear point of difference between the US and many other modern constitutional democracies, the strong view persists in the US that a strong judiciary means a weak democracy, but in other parts of the world, the enormous political role of the judiciary is simply taken to be a sign of the triumph of democratic governance, rather than a hindrance to it, (Scheppelle, 2003c; Stone Sweet, 2000; Shapiro and Stone, 2002; for a counterpoint to these views, see Hirschl, 2002). Other commonplaces of American "constitutional theory" look similarly odd seen in comparative perspective.

A world survey like this shows that an understanding of constitutionalism must reach beyond constitutional case law and the operations of a high court. The fundamental features of a constitutional order are the results of political bargains that go beyond the interpretive capacities of courts (Scheppelle, 2003a). Comparative constitutional history alerts us to the way in which the routine practices of relatively stable constitutional orders are made possible by the absence of devastating domestic and international conflict, the presence of friendly neighbors, and the basic cooperation of most sectors of the society. These can never be taken for granted, as the examples of destabilizing challenges even in apparently secure constitutional regimes show.

The history I have just sketched portrays constitutional development as the outcome of entrenched bargains among powerful sectors of society made in response to the changing political fortunes. Some of these bargains appear

as institutional differentiation. For example, church and state, kings and nobility, citizens from different regions of a county emerge from these battles with their own political institutions defined within constitutional limits. Others bargain into a constitution as substantive guarantees of particular forms of treatment. For example, rights may protect relatively powerless minorities, but they may also protect powerful members of political majorities who need special protection as (for example) criminal defendants or as owners of property. While normative justifications may emerge to explain why it is that a particular constitution embodies the best of all possible worlds, the normative justification almost always comes after the fact of political bargaining that gave rise to the constitution in the first place. And the theoretical conceptualization of what a constitutional regime entails borrows all too easily from the normatively unquestionable.

From this history that I have traced, it is possible to see that we are in a particular historical moment when democratic and liberal constitutionalism has become a taken-for-granted part of Western democracies (and even beyond what has been the conventional "West"). This has not always been the case, and the turbulent constitutional history we have seen over several centuries might caution us that this is a moment unlikely to last. The present international constitutional order grows out of the memories of war-time devastation, genocide, authoritarian rule and human rights violations that occurred on a massive scale throughout the 20th century. Constitutionalism was considered the answer to these massive abuses of state, and various collapsed, defeated and revolutionized states adopted constitutionalism almost as penance. But if constitutionalized regimes become accustomed to their own essential goodness, one might expect that the sacrifices that constitutions entail will no longer seem to be worth it to those who feel that they have no need of constitutional tutelage. When the historical memory that provides the reason for liberal constitutionalism fades, the constitutions that sustain them may come under pressure to crack and break as well.

Law and courts scholars need to keep their eyes on these sorts of big trends in addition to the specific details of our subjects. It is hard to see large scale historical tendencies from one corner of the world or from one moment in time. Broadening our perspective may enable us to ask better questions and to better understand the answers that we find.

Constitutions and Constitutionalism: A Select Bibliography

Ackerman, Bruce. 1992. *The Future of Liberal Revolution*.
New Haven: Yale University Press.

- Ackerman, Bruce. 1997. The Rise of World Constitutionalism. *Virginia Law Review* 83: 771-97.
- Ahdieh, Robert B. 1997. *Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy 1985-1996*. State College: Pennsylvania State University Press.
- de Andrade, Gustavo Fernandez. 2001. Comparative Constitutional Law: Judicial Review. *University of Pennsylvania Journal of Constitutional Law* 3: 977-989.
- Arato, Andrew. 2000. *Civil Society, Constitution and Legitimacy*. Rowman and Littlefield.
- Arendt, Hannah. 1965. *On Revolution*. New York: Viking.
- Aristotle. 1992. *The Politics*. (Translated by T.A. Sinclair and Trevor J. Saunders.) London: Penguin.
- Arjomand, Said A. 1992. Constitutions and the Struggle for Political Order: A Study in the Modernization of Political Traditions. *European Journal of Sociology* 33(4): 39-82.
- Austin, Granville. 1999. *Working a Democratic Constitution: The Indian Experience*. Oxford: Oxford University Press.
- Bell, John. 1992. *French Constitutional Law*. Oxford: Clarendon Press, 1992.
- Blackstone, William. 1938. *Commentaries on the Laws of England*, Book I, Of the Rights of Persons. Reprinted in The William Blackstone collection, Yale University Press.
- Böckenförd, Ernst-Wolfgang. 1991. The Origin and Development of the Concept of the *Rechtsstaat*, in *State Society and Liberty: Studies in Political Theory and Constitutional Law*. (Translated by J.A. Underwood.) New York: St. Martin's Press.
- Bogdanor, Vernon, ed. 1988. *Constitutions in Democratic Politics*. Brookfield, VT: Gower.
- Bonime-Blanc, A. 1987. *Spain's Transition to Democracy: The Politics of Constitution-Making*. Boulder: Westview Press.
- Brandon, Mark. 1998. *Free in the World: American Slavery and Constitutional Failure*. Princeton: Princeton University Press.
- Breuilly, John. 1998. The German National Question and 1848. *History Today* 48(5): 13-21 (1998).
- Brown, Nathan. 1999. Islamic Constitutionalism in Theory and Practice. Pp. 491-506 in Eugene Cotran and Adel Omar Sherif, eds., *Democracy, the Rule of Law and Islam*. London: Kluwer Law International.
- Brown, Nathan. 2002. *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*. Albany NY: State University of New York Press.
- Brown, Nathan. Forthcoming, 2003. Regimes Reinventing Themselves: Constitutional Development in the Arab World. *International Sociology* 18(1).
- Brzezinski, Mark and Leszek Garlicki. 1995. Judicial Review in Post-Communist Poland: The Emergence of a *Rechtsstaat*? *Stanford Journal of International Law* 31: 13-59 (1995).
- Brzezinski, Mark. 1998. *The Struggle for Constitutionalism in Poland*. New York: St. Martin's Press.
- Bugaric, Boyan. 2002. Courts as Policy-Makers: Lessons from Transition. *Harvard Journal of International Law* 42: 247-288.
- Bunyan, James (ed.). 1936. *Intervention, Civil War and Communism in Russia: April-December 1918*. Baltimore: Johns Hopkins. Debate on the Constitution at pp. 500-507.
- van Caenegem, R.C. 1995. *An Historical Introduction to Western Constitutional Law*. Cambridge: Cambridge University Press.
- Caldwell, Peter C. 1997. *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism*. Durham: Duke University Press.
- Cappelletti, Mauro. 1989. *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press.
- Castiglione, Dario. 1996. The Political Theory of the Constitution. Pp. 6-24 in Richard Bellamy Richard and Dario Castiglione, eds. *Constitutionalism in Transformation: European and Theoretical Perspectives*. London: Blackwell.

- Currie, David P. 1994. *The Constitution of the Federal Republic of Germany*. Chicago: University of Chicago Press.
- Dahrendorf, Ralf. 1990. *Reflections on the Revolution in Europe*. New York: Random House.
- Deák, István. 1979. *The Lawful Revolution: Louis Kossuth and the Hungarians*. New York: Columbia University Press.
- Dimitrov, Hristo D. 1999. The Bulgarian Constitutional Court and Its Interpretive Jurisdiction. *Columbia Journal of Transnational Law* 37: 459-505.
- Dotan, Yoav. 1999. Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada. *Law and Society Review* 33: 319-358.
- Downing, Brian M. 1988. Constitutionalism, Warfare and Political Change in Early Modern Europe. *Theory and Society* 17(1): 7-56.
- Elster, Jon, and Rune Slagstad, eds. 1988. *Constitutionalism and Democracy*. New York: Cambridge University Press.
- Elster, Jon, ed. 1996. *The Roundtable Talks and the Breakdown of Communism*. Chicago: University of Chicago Press.
- Elster, Jon et al. 1998. *Institutional Design in Post-communist Societies. Rebuilding the Ship at Sea*. Cambridge: Cambridge University Press.
- Elster, Jon. 2000. Arguing and Bargaining in Two Constituent Assemblies. *University of Pennsylvania Journal of Constitutional Law* 2: 345-421.
- Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.
- Epstein, Lee. 1999. The Comparative Advantage. *Law and Courts: Newsletter of the Law and Courts Section of the American Political Science Association* 9:1, 3-6.
- Ewald, William. 1995. Comparative Jurisprudence I: What Was It Like to Try a Rat? *University of Pennsylvania Law Review* 143: 1889-2149.
- Eyck, Frank. 1968. *The Frankfurt Parliament 1848-1849*. New York: St. Martin's Press.
- Finer, S.E., Vernon Bogdanor, Bernard Rudden, eds. 1995. *Comparing Constitutions*. Oxford: Oxford, Clarendon.
- Finn, John E. 1991. *Constitutions in Crisis*. New York: Oxford University Press.
- Fizman, Samuel, ed. 1998. *Constitution and Reform in 18th Century Poland: The Constitution of 3 May 1791*. Bloomington: Indiana University Press.
- Fitzsimmons, Michael P. 1994. *The Remaking of France: the National Assembly and Constitution of 1791*. Cambridge: Cambridge University Press.
- Galanter, Marc. 1984. *Competing Equalities: Law and the Backward Classes in India*. Berkeley: University of California Press.
- Gambari, Ibrahim A. 1990. Constitutionalism in Africa. Pp. 27-53 in Kenneth W. Thompson (ed.), *The U.S. Constitution and Constitutionalism in Africa*. Lanham, MD: University Press of America.
- Gavison, Ruth. 1999. The Role of Courts in Rifted Democracies. *Israel Law Review* 33: 216-258.
- Geary, Patrick. 2002. *The Myth of Nations: The Medieval Origins of Europe*. Princeton: Princeton University Press.
- Glendon, Mary Ann. 1992. Rights in Twentieth Century Constitutions. *University of Chicago Law Review* 59: 519-538.
- Go, Julian. Forthcoming, 2003. A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000. *International Sociology* 18(1).
- Goldwin, R.A. and A. Kaufman (eds.). 1988. *Constitution-Makers on Constitution-Making*. Washington, D.C.: American Enterprise Institute.
- Gordon, Scott. 1999. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge: Harvard University Press.
- Grimm, Dieter. 1999. Constitutional Adjudication and Democracy. *Israel Law Review* 33: 193-215.
- Habermas, Jürgen. 1997. *A Berlin Republic*. Lincoln: University of Nebraska Press.

- Hausmaninger, Herbert. 1995. Towards a 'New' Russian Constitutional Court. *Cornell International Law Journal* 28: 349-386 (1995).
- Hayden, Robert. 1999. *Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflicts*. Ann Arbor: University of Michigan Press.
- Hilbink, Lisa. Forthcoming, 2003. An Exception to Chilean Exceptionalism: The Historical Role of Chile's Judiciary and Prospects for Change. In Susan Eva Eckstein and Timothy Wickham-Crowley, eds., *What Justice? Whose Justice?* Berkeley: University of California Press.
- Hirschl, Ran. 1998. Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging New-Liberal Economic Order. *American Journal of Comparative Law* 46: 427-452 (1998).
- Hirschl, Ran. 2000a. The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities. *Stanford Journal of International Law* 36: 73-118.
- Hirschl, Ran. 2000b. The Political Origins of Judicial Empowerment through the Constitutionalization of Rights: Lessons from Four Polities. *Law & Social Inquiry* 25: 91-149.
- Hirschl, Ran. 2002. Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend. *Canadian Journal of Law and Jurisprudence* 15: 191-218.
- Hirschl, Ran. Forthcoming, 2003. *Towards Juristocracy: A Comparative Inquiry into the Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press.
- Hoffman, Stanley. 1959. The French Constitution of 1958. *American Political Science Review* 53: 332-257.
- Hofnung, Menachem. 1996. The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel. *American Journal of Comparative Law* 44: 585-604.
- Hogg, Peter. 1997. *The Constitutional Law of Canada*, 4th Ed. Scarborough, Ontario: Carswell Publishing.
- Hosking, Geoffrey A. 1973. *The Russian Constitutional Experiment: Government and Duma 1907-1914*. Cambridge: Cambridge University Press.
- Hucko, Elmar M., ed. 1987. *The Democratic Tradition: Four German Constitutions*. Hamburg: Berg.
- Inoue, K. 1991. *MacArthur's Japanese Constitution*. Chicago: University of Chicago Press.
- Jackson, Vicki C. and Mark Tushnet. 1999. *Comparative Constitutional Law*. Foundation Press.
- Jacobsohn, Gary. 1993. *Apple of Gold: Constitutionalism in Israel and the United States*. Princeton, N.J.: Princeton University Press.
- Jacobsohn, Gary. 2003. *The Wheel of Law: India's Secularism in Comparative Constitutional Context*. Princeton: Princeton University Press.
- Johari, J.C. 1996. *The Indian Political System*. New Delhi: Ammol Publications Pvt Ltd.
- Jung, Courtney, and Ian Shapiro. 1995. South Africa's Negotiated Transition: Democracy, Opposition, and the New Constitutional Order. *Politics and Society* 23:269-308.
- Kantorowicz, Ernst. 1957. *The King's Two Bodies*. Princeton: Princeton University Press.
- Kashyap, Subhash. 1994. *Our Constitution: An Introduction to India's Constitution and Constitutional Law*. New Delhi: National Book Trust.
- Kelsen, Hans. 1942. Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution. *Journal of Politics* 4: 183-200.
- Kennedy, Ellen. Forthcoming, 2003. *Constitutional Failure: Schmitt in Weimar*. Durham, NC: Duke University Press.
- Kenney, Sally, William Reisinger and John Reitz, eds.. 1999. *Constitutional Dialogues in Comparative Perspective*. New York: St. Martin's Press.
- Klug, Heinz. 2000. *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction*. Cambridge: Cambridge University Press.
- Klug, Heinz. Forthcoming, 2003. Post-Colonial Collages: Patterns of Division of Powers and Constitutional Models in State Reconstruction, with special reference to South Africa. *International Sociology* 18(1).

- Knopff, Reiner, and F. L. Morton. 1992. *Charter Politics*. Scarborough, Canada: Nelson.
- Kogacioglu, Dicle. Forthcoming, 2003. Dissolution of Political Parties by the Constitutional Court in Turkey: The Judicial Delimitation of Political Participation. *International Sociology* 18(1).
- Kommers, Donald. 1994. The Federal Constitutional Court in the German Political System. *Comparative Political Studies* 26: 470-491.
- Kommers, Donald. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2d Ed. Durham, NC: Duke University Press.
- Kusum, S.K. Verma ed. 2001. *Fifty Years of the Supreme Court of India: Its Grasp and Reach*. Oxford: Oxford University Press.
- Landfried, Christine. 1992. Judicial Policymaking in Germany: The Federal Constitutional Court. *West European Politics* 15: 50-67.
- Lane, Jan-Erik. 1996. *Constitutions and Political Theory*. Manchester: Manchester University Press.
- Lindseth, Peter. 1996-7. Law, History and Memory: 'Republican Moments' and the Legitimacy of Constitutional Review in France. *Columbia Journal of European Law* 3: 49-83 (1996/7).
- Ludwikowski, Rett R. 1998. "Mixed Constitutions"—Product of an East-Central European Constitutional Melting Pot. *Boston University International Law Journal* 16: 1-70 (1998).
- Mahmud, Tayyab. 1993. Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan. *Utah Law Review* 1993: 1225-1305.
- Mamdani, Mahmood. 1993. Social Movements and Constitutionalism: The African Context. In Douglas Greenberg, Stanley Katz, Melanie Beth Olivero and Stephen Wheatley, eds., *Constitutionalism and Democracy*. New York: Oxford University Press.
- Markovits, Inge. 1996. *Imperfect Justice: An East-West Diary*. New York: Oxford University Press.
- McIlwain, Charles Howard. 1940. *Constitutionalism: Ancient and Modern*. Ithaca: Cornell University Press.
- Melone, Albert P. 1998. *Creating Parliamentary Government: The Transition to Democracy in Bulgaria*. Columbus: Ohio State University Press.
- Merkel, Peter. 1963. *The Origin of the West German Republic*. Oxford: Oxford University Press.
- Mommsen, Wolfgang. 1984. *Max Weber and German Politics 1890-1920*. Translated by Michael S. Steinberg. Chicago: University of Chicago Press.
- Montesquieu 1777. *The Spirit of the Laws* (translated by Anne Cohler, Basia Carolyn Miller and Harold Samuel Stone). Berkeley: University of California Press.
- Moore, James Maxwell. 1962. *The Roots of French Republicanism; The Evolution of the Republican Ideal in French-Revolutionary France and its Culmination in the Constitution of 1793*. New York: American Press.
- Moore, Ray A. and Donald L. Robinson. 1998. *The Constitution of Japan: A Documentary History of Its Framing and Adoption 1945-1947*. Princeton: Princeton University Press (on CD-ROM).
- Murphy, Walter F. & Joseph Tanenhaus. 1977. *Comparative Constitutional Law: Cases and Commentary*. New York: St. Martin's Press.
- Namier, Lewis. 1992. *1848: The Revolution of the Intellectuals*. London: The British Academy.
- Preuss, Ulrich. 1995. *Constitutional Revolution: The Link Between Constitutionalism and Progress* (Translated by Deborah Lucas Schneider). Atlantic Highlands, NJ: Humanities Press International.
- Priban, Jiri. 2002. *Dissidents of Law: On the 1989 Velvet Revolutions, Legitimations, Fictions of Legality, and Contemporary Version of the Social Contract*. Burlington VT: Ashgate.
- Quint, Peter. 1997. *The Imperfect Union: Constitutional Structures of German Unification*. Princeton: Princeton University Press.
- Ramet, Sabrina P. 1992. *Nationalism and Federalism in Yugoslavia 1961-1991*, 2d. Ed. Bloomington: Indiana University Press.
- Robertson, Priscilla. 1952. *Revolutions of 1848: A Social History*. Princeton: Princeton University Press.

- Rogoff, Martin. 1997. A Comparison of Constitutionalism in France and the United States, *Maine Law Review* 49: 21-83.
- Rogowski, Ralf and Thomas Gawron, eds., 2002. *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court*. New York: Berghahn Books.
- Russell Peter H. and David O'Brien, eds. 2001. *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*. Charlottesville VA: University Press of Virginia.
- Sajó, András. 1999. *Limiting Government: An Introduction to Constitutionalism*. Budapest: Central European University Press.
- Sartori, Giovanni. 1994. *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*. New York: New York University Press.
- Scheppele, Kim Lane. Forthcoming, 2003a. Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe. *International Sociology* 18:1.
- Scheppele, Kim Lane. Forthcoming, 2003b. Regimes of Horror and the 'Not That' Constitution. In Susanne Karstedt (ed.), *Legal Institutions and Collective Memory*.
- Scheppele, Kim Lane. Forthcoming, 2003c. "Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)." In Wojciech Sadurski, Martin Krygier and Adam Csarnota, eds., *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses*.
- Scheppele, Kim Lane. Forthcoming, 2003d. Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models. *I-CON (International Journal of Constitutional Law)*.
- Scheppele, Kim Lane. 2002. Declarations of Independence: Judicial Reactions to Political Pressure. In Steven Burbank and Barry Friedman (eds.), *Judicial Independence at the Crossroads*. New York: Sage.
- Schwartz, Herman. 2000. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press.
- Semler, Dwight. 1993-4. The End of the First Russian Republic. *East European Constitutional Review* 2/ 3(Fall/Winter): 107-14.
- Sewell, William H., Jr. 1994. *A Rhetoric of Bourgeois Revolution: The Abbé Sieyès and What is the Third Estate?* Durham: Duke University Press.
- Shamir, Ronen. 1990. 'Landmark Cases' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice. *Law and Society Review* 24: 781-805.
- Shamir, Ronen. 2000. *Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine*. New York: Cambridge University Press.
- Shapiro, Martin. 1996. The "Globalization" of Judicial Review. Pp. 119-136 in Lawrence Friedman and Harry Scheiber, eds., *Legal Culture and the Legal Profession*. Boulder, CO: Westview Press.
- Shapiro, Martin and Alec Stone Sweet. 2002. *On Law, Politics and Judicialization*. Oxford: Oxford University Press.
- Sharfman, Daphna (1993) *Living without a Constitution: Civil Rights in Israel*. Armonk, NY: M. E. Sharp.
- Sharlet, Robert. 2001. Russia's Second Constitutional Court: Politics, Law and Stability. Pp. 59-77 in Victoria Bonnell and George W. Breslauer, *Russia in the New Century: Stability or Disorder?* Westview Press.
- Sharlet, Robert. 1992. *Soviet Constitutional Crisis: From De-Stalinization to Disintegration*. Armonk, NY: M.E. Sharpe.
- Sieyès, Emmanuel Joseph. 1788 [1788]. *What is the Third Estate?* New York: Praeger.
- Singer, Michael. 1982. The Constitutional Court of the German Federal Republic: Jurisdiction over Individual Complaints. *International and Comparative Law Quarterly* 31: 331-356.
- Smith, Eivind, ed. 1995. *Constitutional Justice under Old Constitutions*. Boston: Kluwer Law International.
- Sohrabi, Nader. 1995. Historicizing revolutions: constitutional revolutions in the Ottoman Empire, Iran, and Russia, 1905-1908. *American Journal of Sociology* 100: 1383-1447.

- Sólyom, László and Georg Brunner, 2000. *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*. Ann Arbor: University of Michigan Press.
- Stepan, Alfred, and Cindy Skach. 1993. Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism. *World Politics* 46:1-22.
- Stith, Richard. 1996. Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court. *American University Journal of International Law and Policy* 11: 47-76.
- Stone, Alec and Martin Shapiro. 1994. The New Constitutional Politics of Europe. *Comparative Political Studies* 26: 397-401 (1994).
- Stone, Alec. 1992. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. Oxford: Oxford University Press.
- Stone Sweet, Alec. 2000. *Governing With Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press.
- SzefTEL, Marc. 1976. *The Russian Constitution of April 23, 1906 : Political Institutions of the Duma Monarchy*. Bruxelles : Editions de la Librarie encyclopédique.
- Tarr, G. Alan. 1998. *Understanding State Constitutions*. Princeton: Princeton University Press.
- Tate, C. Neal and Torbjorn Vallinder, eds. 1995. *The Global Expansion of Judicial Power*. New York: New York University Press.
- Tate, C. Neal. 2002a. Past, Present and Future with the "Comparative Advantage." Part I, 1892-1989. *Law and Courts: Newsletter of the Law and Courts Section of the American Political Science Association*. Spring 2002: 1, 3-10.
- Tate, C. Neal. 2002b. Past, Present and Future with the "Comparative Advantage." Part II, 1989-present. *Law and Courts: Newsletter of the Law and Courts Section of the American Political Science Association*. Summer 2002: 1, 3-13.
- Tierney, Brian. 1979. *Church Law and Constitutional Thought in the Middle Ages*. London: Varioram Reprints.
- Tierney, Brian. 1964. *The Crisis of Church and State 1050-1300*. Englewood Cliffs, NJ: Prentice-Hall.
- de Tocqueville, Alexis. 1990. *Recollections: The French Revolution of 1848*, New Brunswick: Transaction Books.
- Tökes, Rudolf. 1996. *Hungary's Negotiated Revolution*. Cambridge: Cambridge University Press, 1996.
- Unger, Aryeh. 1981. *Constitutional Development in the USSR: A Guide to Soviet Constitutions*. New York: Pica Press.
- Vile, M.J.C. 1967. *Constitutionalism and the Separation of Powers*. Oxford: Oxford University Press.
- Volcansek, Mary. 2000. *Constitutional Politics in Italy: The Constitutional Court*. New York: St. Martin's Press.
- Weber, Max. 1995. *The Russian Revolutions* (Translated and edited by Gordon C. Wells and Peter Baehr.) Ithaca: Cornell University Press.
- Weiler, Joseph. 1999. *The Constitution of Europe: Do the New Clothes Have an Emperor?* Cambridge: Cambridge University Press.
- Widner, Jennifer. 2001. *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*. New York: W.W. Norton.
- Witte, Sergei. 1921. *The Memoirs of Count Witte*. (Translated and edited by Abraham Yarmolinsky). New York: Doubleday, Page and Company.
- Wortman, Richard. 1976. *The Development of a Russian Legal Consciousness*. Chicago: University of Chicago Press.

Internet Resources

The International Constitutional Law website
<http://www.oefre.unibe.ch/law/icl/index.html>.
 Has relatively current English translations of the constitutions of a wide range of countries.

University of Saarland
<http://www.jura.uni-sb.de/english/glsindex.html>
 Information on German Constitutional Law with a great deal in English.

The Venice Commission of the European Union
<http://venice.coe.int/site/interface/english.htm>

provides consulting advice to new democracies that may be part of the European Union one day. They monitor constitutional court activity and case law.

The University of Chicago has a website called "Researching Constitutional Law on the Internet" that contains a number of international references.

<http://www.lib.uchicago.edu/~llou/conlaw.html>

Federal Constitutional Court of Germany
<http://www.bundesverfassungsgericht.de>
this site is entirely in German.

Indian Supreme Court
<http://www.supremecourtonline.com>

<http://www.lawinc.com/SupremeCourt/supremecourtfindia.html>

There are a number of free unofficial websites with excellent search engines to search the Supreme Court of India's database of decisions.

<http://www.supremecourtfindia.com>
Another unofficial website has useful articles aimed at a general public about the Supreme Court of India:

French Constitutional Tribunal
<http://www.conseil-constitutionnel.fr>
This website is almost entirely in French with only a few explanatory notes in English.

Supreme Court of Israel - The Judicial Authority of Israel
<http://www.court.gov.il>
The decisions of this court are available through the website primarily in Hebrew with only a few English translations.

Supreme Court of Canada:
<http://www.scc-csc.gc.ca>

Hungarian Constitutional Court:
<http://www.mkab.hu>
The site has been promising English translations since it was created years ago.

Constitutional Court of South Africa:
<http://www.concourt.gov.za>

Australian Constitutional Law
<http://www.aph.gov.au/library/intguide/law/constitutionallaw.htm>

The European Constitutional Convention

[http://european-convention.eu.int/bienvenue.asp?lang=EN&Content=An English Language Website.](http://european-convention.eu.int/bienvenue.asp?lang=EN&Content=An+English+Language+Website)

(Notes)

1 I would like to thank colleagues and students who have provided feedback as I have developed my courses in constitutionalism and comparative constitutional law over the years. I am also grateful to Serguei Oushakine who read this with his historian's eye, Jennifer Hochschild who provided feedback as a thoughtful "outsider" to the field and to Ran Hirschl who provided detailed "insider" criticism. Further comment and criticism would be most welcome at kimlane@law.upenn.edu.

2 There are alternative starting points and alternative stories that I am not addressing here. Islamic constitutionalism, for example, has a different origin story (Brown, 2002, particularly Chapter 6). But the more recent the developments, the more likely alternative constitutional traditions are to engage with the European one, in part because colonialism made the connections obvious but also in part because the legal discourse of transnational institutions borrowed so heavily from these European models.

3 The Declaration was itself inspired by the Bill of Rights of Virginia (which was itself influenced by the 1689 Bill of Rights of England) The Declaration has been an important document, re-imported into modern French constitutional law with the decision of the Constitutional Council in the Associations Case of 1971. In the meantime, it influenced the various human rights documents that sprung up in the wake of the Second World War.

4 The most obvious exception to this generalization is the Swiss confederation. This constitution was also born of the upheavals of 1848 and it remained in force until Switzerland passed a new constitution in the 1990s, a constitution that simply consolidated the various piecemeal amendments that had been made over the years to the old one.

5 This constitution was ultimately replaced under the military government in 1981, after which the newly created Constitutional Court made a series of illiberal decisions to retain Turkey's commitment to liberalism (Kogacioglu, 2003).