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Introduction

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Abstract

Comparative constitutional law is today an exciting and increasingly diverse field of academic inquiry in US and Canadian law schools, as the excellent papers for this Symposium illustrate. Looking back, the 1990s were also a dynamic period for comparative constitutional law, with a predictable emphasis on constitution drafting in Eastern Europe and South Africa. As law and economics and empirical work became popular tools of legal analysis, comparative constitutional law initially drifted instead toward a focus on constitutional courts and on positive and negative liberties. Moreover, once the focus shifted away from active constitution drafting projects, questions re-surfaced about *why* we should compare constitutions and, in turn, about *how* they should be compared. Today, the field appears to have put this existential anxiety aside. Recent work is methodologically diverse with a strong focus on empirical analysis. The empirical focus is complemented by sophisticated work on informal or unwritten norms, a theme that runs through the contributions to this Symposium. Geographic diversity is becoming somewhat less challenging—at least superficially—due in part to a growth of resources available in English. The field is also diversifying in terms

Keywords

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COMPARATIVE CONSTITUTIONAL LAW IS TODAY an exciting and increasingly diverse field of academic inquiry in US and Canadian law schools, as the excellent papers for this Symposium illustrate. Looking back, the 1990s were also a dynamic period for comparative constitutional law, with a predictable emphasis on constitution drafting in Eastern Europe and South Africa. As law and economics and empirical work became popular tools of legal analysis, comparative constitutional law initially drifted instead toward a focus on constitutional courts and on positive and negative liberties. Moreover, once the focus shifted away from active constitution drafting projects, questions re-surfaced about *why* we should compare constitutions and, in turn, about *how* they should be compared. Today, the field appears to have put this existential anxiety aside. Recent work is methodologically diverse with a strong focus on empirical analysis. The empirical focus is complemented by sophisticated work on informal or unwritten norms, a theme that runs through the contributions to this Symposium. Geographic diversity is becoming somewhat less challenging—at least superficially—due in part to a growth of resources available in English. The field is also diversifying in terms of the topics studied, including an increasing overlap in comparative inquiry in private, public, and even international law. As a group, the four contributions to this Symposium illustrate the methodological, topical, and geographic diversity of the field.

The contribution by Richard Albert focuses on unwritten rules or "conventions" of constitutional amendment, a topic he has addressed in an important corpus of work on amendments and on the Canadian Constitution. In

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this article—which is not explicitly "comparative"—he considers whether there is an unwritten convention that requires a national referendum in order to amend the basic structure of the Constitution of Canada. The primary basis for such a convention is the failed Charlottetown Accord, which would have changed the position of Quebec within the Canadian constitutional system. Although not required to do so, political actors submitted the Charlottetown Accord to a non-binding national referendum. Canadians voted down the Accord and the proposed amendments were dropped. Albert explores whether these events are merely a precedent or whether they have become an unwritten convention of federal referendal consultation. Applying the reasoning from Canadian cases and from scholars, Albert concludes that, on balance, there is not (yet) such a convention, although perhaps future actions by politicians will show that one has developed. Albert concludes with the concern that such a convention would make it even harder to amend the Canadian Constitution and with the suggestion that an alternative method of constitutional amendment be developed through convention. These observations provide the platform from which the Canadian Constitution might be compared with others.

Francesca Bignami makes a methodological contribution to the Symposium. Like Albert's article, hers points to aspects of constitutionalism that are difficult to capture empirically. She argues that, in the post-Cold War period, convergence in the world's constitutional systems (in part around democracy) has made it easier to compare constitutions, at least as a formal matter. But comparing the written terms of constitutions—what Bignami calls formalism—may overlook the different social and legal contexts in which those written terms actually function. She argues that more comparative constitutional scholarship should take a "functionalist" approach to comparisons by focusing on a particular social problem and asking how different legal systems resolve it. Empirical scholarship has taken the field in the opposite direction, however. As an example, the legal oversight of social and economic policy-making is performed in Germany by constitutional courts, while in France and the United States it is more often part of administrative law. Bignami's contribution draws its methodology from private comparative law—illustrating the ways that comparative constitutional law is diversifying methodologically—while also illustrating the field's topical diversity by addressing administrative law and regulation as an aspect of comparative constitutional law.

The article for this Symposium authored by Mohammad Fadel addresses recent constitutional change in Egypt, highlighting the (hopefully) increasingly diverse geographic ambit of comparative constitutional law. Fadel's contribution

also underscores the importance of intellectual and religious history to the understanding of contemporary events—in this case, the importance of historical Islamic political thought to recent events in Egypt. Fadel argues that Egypt is witnessing not so much a battle between a secular and a theocratic society, but instead between conflicting kinds of theocracy. An ideal Islamic constitutional order requires that the state protect religious orthodoxy and its representative capacity. Today, however, political circumstances are such that a representative state undermines religious orthodoxy, creating a multiplicity of religious views. Traditionalists, who view historical institutions as essential to achieving the proper practice of Islam, may prefer orthodoxy and stability to a representative state, if forced to choose. The republican Islamic tradition holds, by contrast, that individuals may achieve religious virtue through their own study of the basic sources of Islam; this religious view permits religious heterodoxy, if necessary, to ensure a representative form of government. The latter roughly corresponds to the Muslim Brotherhood and the former to the architects of the 2013 military coup that ousted the democratically elected Muslim Brotherhood. Fadel's article reminds us of the continued significance of comparative constitutional law to the ongoing process of constitution drafting, which today has particular salience in North Africa and the Middle East.

In her contribution to this Symposium, Vanessa MacDonnell takes on "quasi-constitutional legislation,"[1] a long-standing but poorly understood category of statutes in Canada. As in the other contributions, MacDonnell focuses on aspects of constitutionalism that are overlooked by comparative constitutional texts. Drawing on German, American, Canadian, and UK sources, she argues for a broad understanding of quasi-constitutional legislation, defining it as "legislation that implements constitutional imperatives."[2] The term "constitutional imperatives" means constitutional obligations of "varying degrees of specificity."[3] The article defends this definition against those offered by other scholars and against the objection that it is too broad. MacDonnell's definition implies that many statutes would have quasi-constitutional status and that they may come into conflict with each other. She argues that courts should attempt to avoid conflicts through interpretation and that, to the extent possible, conflicts should be resolved by the political branches. The article illustrates the complex layers of entrenchment possible in modern constitutional systems.

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1. Vanessa MacDonnell, "A Theory of Quasi-Constitutional Legislation" (2016) 53:2 OHLJ 508.
2. *Ibid*, at 512.
3. *Ibid*, at 511.

Entrenchment is often considered an essential aspect of constitutional norms, but as constitutional systems mature, courts and political actors tend to entrench norms through different means than constitutional texts and with different possibilities of amendment and change—a theme of Albert's work as well. The field of comparative constitutional law is fortunate to have the excellent collection of articles brought together in this volume of the Osgoode Hall Law Journal.