Comparative Constitutional Law: Entering the Quagmire [Article]

COMPARATIVE CONSTITUTIONAL LAW: ENTERING THE QUAGMIRE

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Resumen

El derecho constitucional deriva su momentum y se sustenta en una mezcla de factores a través de los cuales la teoría y práctica de sistemas estructurales se compara y se extrapolan los resultados. La manera de interpretar una constitución dentro un país es una cuestión crítica que debe tratarse en un estudio de derecho comparado. La mayoría de la literatura de derecho constitucional comparado, sin embargo, se ha limitado a ciertas comparaciones básicas. Más que esto es necesario si el derecho constitucional ha de florecer.

Numerosos materiales de derecho constitucional comparado tratan posturas legales rudimentarias mediante la evaluación de decisiones judiciales y comparando esas decisiones por tema. Falta información y discusiones con las cuales se puedan indentificar y comparar los procesos de toma de decisiones y teorías normativas de revisión judicial. Además, falta profudidad en la mayoría de los escritos sobre derecho constitucional comparado. Deben tratarse con más frecuencia cuestiones sobre los propósitos de los formuladores de una constitución, la influencia de factores históricos en contraste con las circumstancias actuales y el efecto de estos factores en la interpretación de una constitución por un tribunal, la semántica textual, el legalismo y la lógica, y la preservación de derechos y libertades de las minorías. Este artículo propone areas que estudiosos del derecho constitucional comparado deben evaluar e investigar. Este artículo también propone, por vía de ejemplo, métodos de derecho constitucional comparado que deben evitarse. Finalmente, este artículo recomienda que se emprendan acercamientos nuevos e innovadores al estudiar el derecho constitucional comparado.

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Abstract

Comparative constitutional law derives its momentum and sustenance from a mixture of factors whereby structural systems, their theory and practice, are compared and the results extrapolated. The means of interpretation of a constitution within a country is a critical question that must be addressed in a comparative law study. Most comparative constitutional law literature, however, has limited itself to certain basic comparisons. More is required if comparative constitutional law is to flourish.

Numerous comparative constitutional law materials address rudimentary legal positions by evaluating judicial decisions and comparing those decisions by subject matter. Absent is information and probing discussions with which to identify and compare decision-making processes and postulate normative theories of judicial review. Missing from most comparative constitutional law writing is depth. Questions as to the intention of a constitution's framers, the influence of historical factors versus current circumstances and the effect of these factors on a court's interpretation of a constitution, textual semantics, legalism and logic, and preservation of minority rights and freedoms should be more frequently addressed. This Article suggests areas that should be evaluated and probed by comparative constitutional law scholars. This Article also suggests, by way of example, methods of comparative constitutional law that should be avoided. Finally, this Article urges that new and innovative approaches to studying comparative constitutional law be undertaken.

> The chief virtue of a comparative study ... is [not] ... in generalisations that emerge from it, but in the deeper insight that it offers [all participants] into their own systems. The features of each system, seen in relief against the other, stand out more sharply than they do when either is viewed in isolation. Students of each system may thus acquire enhanced understanding of the problems and prospects of their own system and, perhaps, the potential for achieving beneficial change within it.[1]

> [A] glimpse into the households of our neighbors serves the better to illuminate our own, as when by pressing hard against the pane we see not only the objects on the other side but our own features reflected in the glass.[2]

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[1]Stewart, *Foreword* to 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE at viii (T. Sandalow & E. Stein eds. 1982).
[2]Freund, *A Supreme Court in a Federation: Some Lessons from Legal History*, 53 COLUM. L. REV. 597, 597 (1953).

> Does [the existence of contingent variables such as a given society's history and traditions, the particular demands and aspirations of that society, its political structures and processes, and the kind of judges it has produced] mean that there is no place for comparative analysis of a kind that, by focusing on other societies' problems and solutions, developments, and trends, enlightens our comprehension of problems, solutions, developments and trends in our own society?[3]

Enjoying constitutional law is not oxymoronic. Intellectual sojourns to a plethora of countries, facilitated by comparative constitutional law, may even increase the fun. Ubiquitous frivolity ought not, however, to be the sole objective motivating such foreign adventures. Traversing diverse terrain—state, provincial, territorial, national and multi-national constitutions—should also engender substantial, serious and sustained scholarship. Endeavours to achieve that result must garner, synthesize and evaluate detailed factual information, specific issues and themes and basic premises, principles and postulates during any foray into comparative constitutional law. Consequently, at varying levels of specificity, comparisons and contrasts, encompassing different dimensions of constitutional law, might be available to suggest new insights and reveal novel perspectives concerning indigenous constitutions.

Endless permutations are possible. Their enunciation requires resort to the multitude of past, present and future constitutions[4] and access

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[3]Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CALIF. L. REV. 409, 412 (1980).

[4]Compilations of constitutions include Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies (A. Blaustein & G. Flanz eds. 1971-1978)(18 loose leaf binders); Constitutions of Dependencies and Special Sovereignties (A. Blaustein & P. Blaustein eds. 1975)(6 loose leaf binders); A. BLAUSTEIN & P. BLAUSTEIN, INDEPENDENCE DOCUMENTS OF THE WORLD (1977)(2 vols); THE CONSTITUTIONS OF EUROPE (E. Goerner ed. 1967); THE CONSTITUTIONS OF LATIN AMERICA (G. Fitzgerald ed. 1968); CONSTITUTIONS OF NATIONS (A. Peaslee & D. Peaslee Xydis eds. rev. 4th ed. 1974-1985)(2 vols)(rev. ed. 3d ed. 1965-1970, 4 vols); CONSTITUTIONS OF MODERN STATES: SELECTED TEXTS AND COMMENTARY (L. Wolf-Phillips ed. 1968); SELECT CONSTITUTIONS OF THE WORLD (D. Basu ed. 2d ed. 1984); BRITISH COLONIAL CONSTITUTIONS (M. Wright ed. 1951); Constitutions of the United States: National and State (F. Grad ed. 1976)(7 loose leaf binders); SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (W. Swindler ed. 1973-1979)(10 vols); SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS: SECOND SERIES (W. Swindler & D. Musch eds. 1982-1986)(4 vols); Constitutions of Canada: Federal and Provincial (C. Wiktor & G. Tanguay eds. 1979-1985)(4 loose leaf binders); Collected Legislation of the Union of Soviet Socialist Republics and the Constituent Union Republics: Constitutions and Legislation (W. Butler ed. 1979)(7 loose leaf binders); THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS (F. Feldbrugge ed. 1979). For a short history of the compilation of constitutions see CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 4, at 1-8 (vol. 1).

to, at least a portion of, the formidable repository of comparative constitutional law publications,[5] including casebooks,[6] treatises,[7]

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[5]Numerous references are provided in Kommers, *Comparative Constitutional Law: Casebooks for a Developing Discipline*, 57 NOTRE DAME LAW. 642 (1982) (now published at NOTRE DAME L. REV.). *See also* L. WOLF-PHILLIPS, COMPARATIVE CONSTITUTIONS 59-80 (1972) (select bibliography); H. MAARSEVEEN & G. TANG, WRITTEN CONSTITUTIONS: A COMPUTERISED COMPARATIVE STUDY 294-321 (1978) (bibliography); H. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE 486-509 (5th ed. 1986) (select bibliography); COMPARATIVE CONSTITUTIONAL LAW: A SELECTIVE BIBLIOGRAPHY (G. Leahy & G. Miccioli eds. 1987). *See generally* R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 577-609 (3d ed. 1985) (bibliographical information).

[6]*See, e.g.*, H. GROVES, COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS (1963); T. FRANCK, COMPARATIVE CONSTITUTIONAL PROCESS: CASES AND MATERIALS: FUNDAMENTAL RIGHTS IN THE COMMON LAW NATIONS (1968); CONSTITUTIONS AND CONSTITUTIONALISM (W. Andrews ed. 1968); W. MURPHY & J. TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES (1977); M. CAPPELLETTI & W. COHEN, COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS (1979).

[7]*See, e.g.*, D. BASU, COMPARATIVE CONSTITUTIONAL LAW (1984); H. STANNARD, THE TWO CONSTITUTIONS: A COMPARATIVE STUDY OF BRITISH AND AMERICAN CONSTITUTIONAL SYSTEMS (1949); I. SHARMA, MODERN CONSTITUTIONS AT WORK (1962); J. HENDRY, TREATIES AND FEDERAL CONSTITUTIONS (1955); L. WILDHABER, TREATY-MAKING POWER AND CONSTITUTION: AN INTERNATIONAL AND COMPARATIVE STUDY (1971); L. DI MARZO, COMPETENT UNITS OF FEDERAL STATES AND INTERNATIONAL AGREEMENTS (1980); G. MARSHALL, PARLIAMENTARY SOVEREIGNITY AND THE COMMONWEALTH (1957); G. MARSHALL, CONSTITUTIONAL THEORY (1971); C. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948 rep. 1963); S. de SMITH, THE NEW COMMONWEALTH AND ITS CONSTITUTIONS (1964); C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA (4th ed. 1968); B. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES (1973); C. FRIEDRICH, LIMITED GOVERNMENT: A COMPARISON (1974); H. SPIRO, GOVERNMENT BY CONSTITUTION: THE POLITICAL SYSTEMS OF DEMOCRACY (1959); K. WHEARE, MODERN CONSTITUTIONS (rev. 2d ed. 1971); C. STRONG, MODERN POLITICAL CONSTITUTIONS: AN INTRODUCTION TO THE COMPARATIVE STUDY OF THEIR HISTORY AND EXISTING FORMS (8th ed. 1972); G. WINTERTON, MONARCHY TO REPUBLIC: AUSTRALIAN REPUBLICAN GOVERNMENT (1986); J. Ojo, A Comparative Study of the Executive in Australia and India (1970) (doctoral thesis for Inst. Advanced Legal Studies, London University); S. DASH, THE CONSTITUTION OF INDIA: A COMPARATIVE STUDY (1968); I DUCHACEK, POWER MAPS: COMPARATIVE POLITICS OF CONSTITUTIONS (1973).

collections of essays[8] and law review symposia[9] and articles.[10] Initially, a variety of embarkation points are available. Concentration on

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[8]*See, e.g.*, STUDIES IN FEDERALISM (R. Bowie & C. Friedrich eds. 1954); A. ZURCHER, CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II: AN EXAMINATION OF SIGNIFICANT ASPECTS OF POSTWAR PUBLIC LAW WITH PARTICULAR REFERENCE TO THE NEW CONSTITUTIONS OF WESTERN EUROPE (2d ed. 1955); FEDERALISM AND SUPREME COURTS AND THE INTEGRATION OF LEGAL SYSTEMS (E. McWhinney & P. Pescatore eds. 1973); T. Sandalow & E. Stein, *supra* note 1; CONSTITUTIONAL ADJUDICATION IN A PRESIDENTIAL SYSTEM OF GOVERNMENT: A COMPARATIVE AMERICAN AND NIGERIAN EXPERIENCE (R. McKay ed. 1983); INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN EXPERIENCE (M. Cappelletti, M. Seccombe & J. Weiler eds. 1986) [hereinafter INTEGRATION THROUGH LAW].

[9]*See, e.g., Conference on Comparative Constitutional Law*, 53 S. CALIF. L. REV. 401 (1980); *Constitutional Judicial Review of Legislation: A Comparative Law Symposium*, 56 TEMP. L.Q. 287 (1983); *Symposium on Comparative Perspectives in Constitutional Law-Problems and Prospects*, 59 TUL. L. REV. 875 (1985); *Federal States in International Relations*, 17 REV. BELGE DROIT INT. 10 (1983).

[10]*See, e.g.*, Kauper, *The Constitutions of West Germany and the United States: A Comparative Study*, 58 MICH. L. REV. 109 (1960); Gunlicks, *Constitutional Law and the Protection of Subnational Governments in the United States and West Germany*, 18 no. 1 PUBLIUS 141 (1988); Lenhoff, *The German (Bonn) Constitution With Comparative Glances at the French and Italian Constitutions*, 24 TUL. L. REV. 1 (1949); Medina, *The Origination Clause in The American Constitution: A Comparative Survey*, 23 TULSA L.J. 165 (1987); Mendelson, *Foreign Reactions to American Experience With "Due Process of Law,"* 41 VA. L. REV. 493 (1955); Hughes, *The Division of Legislative Powers in the West Indian Constitution and Some Australian Precedents*, 3 U. OLD. L.J. 122 (1957); Sawer, *Political Questions*, 15 U. TORONTO L.J. 49 (1963); Nygh, *The Doctrine of Political Questions Within a Federal System*, 5 MALAYA L. REV. 132 (1963); YOKA, POLITICAL QUESTIONS AND JUDICIAL REVIEW: A COMPARISON IN THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS 1947-67, 141 (Henderson ed. 1968); Matsui, *The Reapportionment Cases in Japan: Constitutional Law, Politics and the Japanese Supreme Court*, 33 OSAKA U.L. REV. 17 (1968); Narian, *Nationalisation and the Right to Hold Property under the Indian Constitution: Lessons from Comparable Australian and U.S. Experiences*, 1959 PUB. L. 256; Coper, *Freedom of Trade in India and Australia: Introductory Thoughts on the Nature of Judicial Choice*, 10 JAIPUR L.J. 1 (1970); Ramaswamy, *Indian Constitutional Provisions Against Barriers to Trade and Commerce Examined in the Light of the Australian and American Experience*, 2 J. INDIAN L. INST. 321 (1960); Tripathi, *A Constitutional Comparativist's Cornucopia: Some Reflections on the Australian Federal System*, 3 LAWASIA 492 (1972); Auburn, *Trends in Comparative Constitutional Law*, 35 MOD. L. REV. 129 (1972); Walker, *Review of the Prerogative: The Remaining Issues*, 1987 PUB. L. 62; Gahi, *Coups and Constitutional Doctrines: The Role of the Courts*, 58 POL. Q. 308 (1987); Brietzke, *The "Seamy Underside" of Constitutional Law*, 8 LOY. L.A. INT'L & COMP. L.J. 1 (1985); Parker, *The Authority of Law in the United States and in Japan*, 33 OSAKA U.L. REV. 1 (1986); Wallach, *Executive Powers of Prior Restraint over Publication of National Security Information: The U.K. and the U.S.A. Compared*, 32 INT'L & COMP. L.Q. 424 (1983). Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891 (1988); Davis, *Where Two Systems Collide: An American Constitutional Lawyer in Hong Kong*, 20 CASE W. RES. J. INT'L L. 127 (1988). *See also infra* notes 11-27.

publications of particular comparative constitutional law scholars, such as Donald Kommers,[11] Mauro Cappelletti,[12] Chester Antieau[13] and

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[11]*See, e.g.,* Kommers, Cross-National Comparisons of Constitutional Courts: Toward a Theory of Judicial Review (paper delivered at 66th annual meeting of Am. Pol. Sci. Assoc., Los Angeles, Calf., 8-12 Sept. 1970); Kommers, *Judicial Review in Italy and West Germany,* 20 JAHRBUCH DES OFFENTLICHEN RECHTS 111 (1971) *reprinted as* Kommers, Judicial Power and Constitutional Democracy in Italy and Western Germany, in DEMOCRACY IN CRISIS: NEW CHALLENGES TO CONSTITUTIONAL DEMOCRACY IN THE ATLANTIC AREA 33 (E. Goerner ed. 1971); Kommers, *Comparative Judicial Review and Constitutional Politics,* 27 WORLD POL. 282 (1975); Kommers, *Judicial Review: Its Influence Abroad,* 428 ANNALS 52 (1976); Kommers, *The Value of Comparative Constitutional Law,* 9 J. MARSHALL J. PRAC. & PROC. 685 (1976); KOMMERS, JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT 17-26 (1976); Kommers, *Abortion and Constitution: United States and West Germany,* 25 AM. J. COMP. L. 255 (1977); Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany,* 53 S. CALIF. L. REV. 657 (1980); Kommers, *supra* note 5; Kommers, *Federalism and European Integration: A Commentary* in INTEGRATION THROUGH LAW, *supra* note 8, at 603 (Vol. 1 Book 1); Kommers & Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and European Experience* in *id.* at 165 (Vol. 1 Book 3); Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective,* 1985 B.Y.U.L. REV. 371, 379; Kommers, *Foreword,* 62 NOTRE DAME L. REV. 501 (1987). *See also* Kommers, *The Supreme Court and the Constitution: The Continuing Debate on Judicial Review,* 47 REV. POL. 113 (1985); Kommers, *Liberalism and the Supreme Court,* 49 REV. POL. 112 (1987).

[12]*See, e.g.,* M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971); Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations,* 71 HARV. L. REV. 1207 (1966); Cappelletti, *The Significance of the Judicial Review of Legislation in the Contemporary World* in IUS PRIVATUM GENTIUM: FESTSCHRIFT FUR MAX RHEINSTEIN 147 (E. von Caemmerer, S. Mentschikoff & K. Zweigert eds. 1969); Cappelletti, *Judicial Review in Comparative Perspective,* 58 CALIF. L. REV. 1017 (1970); Cappelletti & Golden, *Crown Privilege and Executive Privilege: A British Response to an American Controversy,* 25 STAN. L. REV. 836 (1975); Cappelletti, *supra* note 3; Cappelletti & Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report,* in ACCESS TO JUSTICE (Vol. 1 Book 3) (M. Cappelletti & B. Garth eds. 1978); Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis,* 8 MONASH U.L. REV. 15 (1981); Cappelletti, *"Who Watches the Watchmen?": A Comparative Study on Judicial Responsibility,* 31 AM. J. COMP. L. 1 (1983); Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 CATH. U.L. REV. 1 (1985); Cappelletti, Seccombe & Weiler, *Integration Through Law: Europe and the American Federal Experience-A General Introduction* in INTEGRATION THROUGH LAW, *supra* note 8, at 3; Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration* in *id.* at 261 (Vol. 1 Book 2); Cappelletti, Book Review, 82 AM. J. INT'L L. 421 (1988).

[13]*See, e.g.,* C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION (1982); C. ANTIEAU, STATES' RIGHTS UNDER FEDERAL CONSTITUTIONS (1984); C. ANTIEAU, ADJUDICATING CONSTITUTIONAL ISSUES (1985); C. ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND OTHER COMMON LAW WRITS (1987) (2 vols).

Edward McWhinney,[14] exposes a spectrum of topics. Comparative dimensions of single thematic issues, for example, judicial review,[15]

[14]*See, e.g.*, E. MCWHINNEY, JUDICIAL REVIEW (4th ed. 1969); E. MCWHINNEY, COMPARATIVE FEDERALISM: STATES' RIGHTS AND NATIONAL POWER (2d ed. 1965); E. MCWHINNEY, FEDERAL CONSTITUTION-MAKING FOR A MULTI-NATIONAL WORLD (1966); E. MCWHINNEY, CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE (1981); E. MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW (1986); McWhinney, *The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence*, 61 CAN. B. REV. 54 (1983); McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals*, 31 CAN. B. REV. 595 (1953); McWhinney, *The United States Supreme Court and Foreign Courts: An Exercise in Comparative Jurisprudence*, 6 J. PUB. L. 465 (1957); McWhinney, *Constitutional Review in Canada and the Commonwealth Countries*, 35 OHIO ST. L.J. 900 (1974).

[15]*See, e.g.*, C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (2d ed. rev. 1932); C. JHA, JUDICIAL REVIEW OF LEGISLATIVE ACTS (1974); CONSTITUTIONAL REVIEW IN THE WORLD TODAY: NATIONAL REPORTS AND COMPARATIVE STUDIES (H. Mosler ed. 1962); Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitutions*, 4 J. POL. 183 (1942); Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 CORNELL L.Q. 250 (1966); Deener, *Judicial Review in Modern Constitutional Systems*, 46 AM. POL. SCI. REV. 1079 (1952); Kakudo, *The Doctrine of Judicial Review in Japan*, 2 OSAKA U.L. REV. 59 (1952); Tanenhaus, *Judicial Review* in 8 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 303 (D. Sills ed. 1968); *Judicial Review Symposium*, 35 OHIO ST. L.J. 785 (1974); Alexis, *The Basis of Judicial Review of Legislation in the New Commonwealth and the United States of America: A Comparative Analysis*, 7 LAW. AM. 567 (1975); Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89 (1988); H. EHRMAN, COMPARATIVE LEGAL CULTURES 138-48 (1976); Murphy, *An Ordering of Constitutional Values*, 53 S. CALIF. L. REV. 703 (1980); Giraudo, *Judicial Review and Comparative Politics: An Explanation for the Extensiveness of American Judicial Review Offered from the Perspective of Comparative Government*, 6 HASTINGS CONST. L.Q. 1137 (1979); L. JAFFEE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS (1969); Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

constitutional rights, liberties and freedoms,[16] federalism,[17] separation

[16]*See, e.g.,* COMPARATIVE HUMAN RIGHTS (R. Claude ed. 1976); Horan, *Contemporary Constitutionalism and Legal Relationships Between Individuals,* 25 INT'L & COMP. L.Q. 848 (1976); Ratner, *Constitutions, Majoritarianism, and Judicial Review: The Function of a Bill of Rights in Israel and the United States,* 26 AM. J. COMP. L. 373 (1978); F. CASTBERG, FREEDOM OF SPEECH IN THE WEST: A COMPARATIVE STUDY OF PUBLIC LAW IN FRANCE, THE UNITED STATES AND GERMANY (1960); Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany, supra* note 11; Barendt, Book Review, 36 AM. J. COMP. L. 362 (1988) (of B. NIEKERK, THE CLOISTERED VIRTUE: FREEDOM OF SPEECH AND THE ADMINISTRATION OF JUSTICE IN THE WESTERN WORLD (1987)); E. BARENDT, FREEDOM OF SPEECH (1985); Fiss, *Two Constitutions,* 11 YALE J. INT'L L. 492 (1986); Glenn, *Limitations on Judicial Freedom of Speech in West Germany and Switzerland,* 34 INT'L & COMP. L.Q. 159 (1985); Clarke, *Freedom of Thought in Schools: A Comparative Study,* 53 INT'L COMP. L.Q. 271 (1986); PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY (P. Lahav ed. 1985); Barron, Book Review, 54 GEO. WASH. L. REV. 434 (1986); D. PANNICK, THE JUDICIAL REVIEW OF THE DEATH PENALTY (1982); P. POLYVIOU, THE EQUAL PROTECTION OF THE LAWS (1980); Beytagh, *Equality Under the Irish and American Constitutions: A Comparative Analysis,* 18 IRISH JUR. 56 (Pt. 1), 299 (Pt. 2)(1983); Docksey, *Sex Discrimination in Britain, the United States and the European Community,* 13 DEN. J. INT'L L. & POL'Y 181 (1985); McGinley, *Judicial Approaches to Sex Discrimination in the United States and the United Kingdom,* 49 MOD. L. REV. 413 (1986); Note, *A Comparative Analysis of Dudgeon v. United Kingdom and Bowers v. Hardwick,* 5 ARIZ. J. INT'L & COMP. L. 200 (1988); Morris, *Abortion and Liberalism: A Comparison Between the Abortion Decisions of the Supreme Court of the United States and the Constitutional Court of West Germany,* 11 HAST. INT'L & COMP. L. REV. 159 (1988); Ashe, *Conversation and Abortion,* 82 NW. U. L. REV. 387 (1988); Burt, *Privacy and Conception in the American and Irish Constitutions,* 7 ST. LOUIS U. PUB. L. REV. 287 (1988); Sharma, *"Law and Order" and the Protection of the Rights of the Accused in the United States and India: A General Framework for Comparison,* 21 BUFFALO L. REV. 361 (1972); Singh, Bakke & Thomas, *A Comparative Legal Analysis of Emerging Judicial Responses to the Problem of "Equality" and "Compensatory Discrimination" in U.S.A. and India,* 7 DELHI L. REV 48 (1978); Charles, *American Influence on the Indian Constitution: Focus on Equal Protection of the Laws,* 17 COLUM. HUM. RTS. L. REV. 193 (1986); Tarnopolsky, *Race Relations Commissions in Canada, Australia, New Zealand, the United Kingdom and the United States,* 6 HUM. RTS. LJ. 145 (1985); Beatty, *Constitutionalizing a Labour Code: Creative Uses of Comparative Law,* 8 COMP. LAB. LJ. 211 (1987); Zamudio, *A Global Survey of Governmental Institutions to Protect Civil and Political Rights,* 13 DEN. J. INT'L L. & POL'Y 17 (1983); LEE, *Bicentennial Bork, Tercentennial Spycatcher; Do the British Need a Bill of Rights?,* 49 U. PITT. L. REV. 777 (1988); Lobel, *The Meaning of Democracy: Representative and Participatory Democracy in the New Nicaraguan Constitution,* 49 U. PITT. L. REV. 823 (1988); Lobel, *The Meaning of Democracy: Representative and Participatory Democracy in the New Nicaraguan Constitution,* 49 U. PITT. L. REV. 823 (1988); Mahoney, *Suing the State: A Comparison of Remedies Provided for Individual Rights Violations in Great Britain and The United States,* 56 UMKC L. REV. 435 (1988).

[17]*See, e.g.,* FEDERALISM: MATURE AND EMERGENT (A. Macmahon ed. 1962); W. LIVINGSTON, FEDERALISM IN THE COMMONWEALTH: A BIBLIOGRAPHICAL COMMENTARY (1963); K. WHEARE, FEDERAL GOVERNMENT (4th ed. 1964); FEDERALISM AND THE NEW NATIONS OF AFRICA (D. Currie ed. 1964); FEDERALISM AND INTERGOVERNMENTAL RELATIONS IN AUSTRALIA, CANADA, THE UNITED STATES AND OTHER COUNTRIES: A BIBLIOGRAPHY (A. Liboiron ed. 1967); C. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE (1968); G. SAWER, MODERN FEDERALISM (rev. ed. 1970); U. HICKS, FEDERALISM: FAILURE AND SUCCESS: A COMPARATIVE STUDY (1978); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STUDIES IN COMPARATIVE FEDERALISM: AUSTRALIA, CANADA, THE UNITED STATES AND WEST GERMANY (1981); M. FORSYTH, UNIONS OF STATES: THE THEORY AND PRACTICE OF CONFEDERATION (1981); I. DUCHACEK, COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS (1970).

of powers,[18] constitutional amendments,[19] courts,[20] and jurimetrics,[21]

[18]*See, e.g.*, M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967); Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U.L. REV. 363 (1982); A. VANDERBILT, THE DOCTRINE OF SEPARATION OF POWERS: ITS PRESENT DAY SIGNIFICANCE 1-51 (1953) (comparative analysis).

[19]*See, e.g.*, W. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE (1956); Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 LAW & CONTEMP. PROBS. 283 (1983); THE POLITICS OF CONSTITUTIONAL CHANGE IN INDUSTRIAL NATIONS: REDESIGNING THE STATE (K. Banting & R. Simeon eds. 1985).

[20]*See, e.g.*, W. WAGNER, THE FEDERAL STATES AND THEIR JUDICIARY: A COMPARATIVE STUDY IN CONSTITUTIONAL LAW AND ORGANISATION OF COURTS IN FEDERAL STATES (1959); T. BECKER, COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS (1970); W. MURPHY, J. TANENHAUS & D. KASTNER, PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS (1973); B. NWABUEZE, JUDICIALISM IN COMMONWEALTH AFRICA (1977); M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); H. ABRAHAM, *supra* note 5; COMPARATIVE JUDICIAL SYSTEMS: CHALLENGING FRONTIERS IN CONCEPTUAL AND EMPIRICAL ANALYSIS (J. Schmidhauser ed. 1987); Nadelmann, *Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany*, 20 AM. J. COMP. L. 268 (1964); *Admonitory Functions of Constitutional Courts*, 20 AM. J. COMP. L. 387 (1972); *The Political Impact of Constitutional Courts*, 49 NOTRE DAME LAW. 952 (1974); Murphy & Tanenhaus, *Constitutional Courts and Political Representation* in MODERN AMERICAN DEMOCRACY: READINGS 541 (M. Danielson & W. Murphy eds. 1969); Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. COMP. L. 43 (1976); Lawson, *Comparative Judicial Style*, 25 AM. J. COMP. L. 364 (1977); Riesenfield & Hazard, *Federal Courts in Foreign Systems*, 13 LAW & CONTEMP. PROBS. 29 (1948); Cole, *Three Constitutional Courts: A Comparison*, 53 AM. POL. SCI. REV. 963 (1959); Millgramm, *Comparative Law: The Federal Constitutional Court of Germany and the Supreme Court of the United States*, 1985 Y.B. SUP. CT. HIST. SOC'Y 146; Davis, *The Law/ Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court*, 34 AM. J. COMP L. 45 (1986); Cappelletti, "*Who Watches the Watchmen?*", *supra* note 12; Anderson, *Judicial Accountability: Scandinavia, California and the U.S.A.*, 28 AM. J. COMP. L. 393 (1980); JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (S. Shetreet & J. Deschenes eds. 1985); Shetreet, *Who Will Judge: Reflections on the Process and Standards of Judicial Selection*, 61 AUST. L.J. 766 (1987); *Symposium on Judicial Election, Selection and Accountability*, 61 S. CALIF. L. REV. 1555 (1988); D. PANNICK, JUDGES (1987); Atiyah, *Judicial-Legislative Relations in England*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 129 (R. Katzman ed. 1988)(U.K.-U.S.A. Comparisons); P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987); Meador, *Appellate Subject Matter Organization: The German Design From an American Perspective*, 5 HAST. INT'L & COMP. L. REV. 27 (1981).

[21]*See, e.g.*, Schubert, *Judges and Political Leadership*, in POLITICAL LEADERSHIP IN INDUSTRIAL SOCIETIES: STUDIES IN COMPARATIVE ANALYSIS 220 (L. Edinger ed. 1967); COMPARATIVE JUDICIAL BEHAVIOUR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST (G. Schubert & D. Danelski eds. 1969); THE FRONTIERS OF JUDICIAL RESEARCH (J. Grossman & J. Tanenhaus eds. 1969); G. SCHUBERT, HUMAN JURISPRUDENCE: PUBLIC LAW AS POLITICAL SCIENCE (1975); Ray & Chakraborty, *Supreme Court Justices in India and the U.S.A.: A Comparative Study of the Background Characteristics 1969-76*, 13 J. CONST. & PARL. STUD. 35 (1979).

permeating North and South American, European, Asian and other constitutions may also be explored. Confining constitutional comparisons and contrasts to specific judicial decisions[22] or countries—Canada and Australia,[23] Canada and the United States of America[24] and Australia and the United States of America[25]—can, from an accumulation of individual studies, produce a more comprehensive panorama.[26] Focusing on the influence of a particular constitution, especially the United States Constitution, on other constitutions[27] highlights historical antecedents and lines of development.

[22]*See, e.g.*, Sheldon, *Public Opinion and High Courts: Communist Party Cases in Four Constitutional Systems*, 20 W. POL. Q. 341 (1967); Gorby, *Introduction to the Translation of the Abortion Decision of the Federal Constitutional Court of the Federal Republic of Germany*, 9 J. MARSHALL J. PRAC. & PROC. 557 (1976). In addition to publication of judicial opinions within individual countries, since 1985 selected constitutional law cases from Commonwealth countries have been reported in LAW REPORTS OF THE COMMONWEALTH: CONSTITUTIONAL AND ADMINISTRATIVE REPORTS.

[23]*See, e.g.*, references in Appendix B.

[24]*See, e.g.*, references in Appendix C.

[25]*See, e.g.*, references in Appendix A.

[26]Comparisons have also been drawn with the European Community. *See, e.g.*, Knoll, *From The Inside Looking Out: Comparing the External Capacities, Powers and Functions of the Commonwealth of Australia and the European Communities*, 15 FED. L. REV. 253 (1985); Rowe, *Aspects of Australian Federalism and the European Communities Compared* in INTEGRATION THROUGH LAW, *supra* note 8, at 415 (Vol. 1 Book 1); COURTS AND FREEMARKETS, *supra* note 1. *See also*, Mezey, *Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada*, 32 INT'L & COMP. L.Q. 689 (1983); F. ADAMS & C. CONNINGHAM, THE SWISS CONFEDERATION 260-70 (1898) (U.S.A.-Swiss comparison); A. JOACHIM, THE CONSTITUTIONS OF THE U.S. AND SWITZERLAND HISTORICALLY ANALYSED AND COMPARED (1963); M. TRIPP, THE SWISS AND U.S. FEDERAL CONSTITUTIONAL SYSTEMS (1940); P. Jolles, The Theory of Civil Liberties in Swiss and American Constitutional law (1947) (doctoral thesis, Harvard University); W. STOCKLI, CHURCH-STATE AND SCHOOL IN SWITZERLAND AND THE UNITED STATES (1970); O'BRIEN, *Church and State in Switzerland: A Comparative Study*, 49 VA. L. REV. 904 (1963); O'Brien, *Baker v. Carr Abroad: The Swiss Federal Tribunal and Cantonal Elections*, 72 YALE L. J. 46 (1962).

[27]*See, e.g.*, C. FRIEDRICH, THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD (1967); CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE (L. Beer ed. 1979); THE AMERICAN CONSTITUTION: ITS GLOBAL HERITAGE (Law Library of the Library of Congress ed. 1987); Blaustein, *Our Most Important Export: The Influence of the United States Constitution Abroad*, 3 CONN. J. INT'L L. 15 (1987); Blaustein, *The Influence of the United States Constitution Abroad*, 12 OKLA. CITY U.L. REV. 435 (1987); Gorney, *American Precedent in the Supreme Court of Israel*, 68 HARV. L. REV. 1194 (1955); Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21 (1981); Ratner, *supra* note 16; W. DOUGLAS, WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA (1956); Prasact, *Imprints of Marshallian Judicial Statesmanship on Indian Judiciary*, 22 J. INDIAN L. INST. 240 (1980); Dhavan, *Borrowed Ideas: On The Impact of American Scholarship on Indian Law*, 33 AM. J. COMP. L. 605 (1985); Charles, *American Influence on the Indian Constitution*, *supra* note 16; Black, *A Round Trip to Eire: Two Books on the Irish Constitution*, 91 YALE L.J. 391 (1981); Sutherland, *The Influence of United States Constitutional Law on the Interpretation of the Irish Constitution*, 28 ST. LOUIS U.L.J. 41

Only a fragment of legal theory and practice is devoted to comparative law.[28] Gathered beneath the comparative law rubric is, however, a conglomeration of unresolved questions, less than definitive answers and recurrent debates.[29] Within that morass comparative constitutional law is merely a minute segment. Replication of ideas and results is, therefore, inevitable. What methodical approaches to comparative analysis ought to be utilized? How can distorted perceptions of foreign legal systems, emanating from cultural, historical and personal biases, be minimized or rendered innocuous? When and why are contrasts and comparisons between constitutions useful or misleading? Grappling with such conundrums and explicitly promulgating an array of responses is not an infrequent occurrence in comparative constitutional law literature.[30]

Simultaneously, other, more immediate and tangible, rewards can be garnered by thinking comparatively about constitutional law. Individual judicial decisions, for example, involving similar facts, analogous provisions in different constitutions and entailing corresponding consequences reside in the reported opinions of a multitude of final national appellate courts.[31] Their value in assisting

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(1984); Gunther, *The Constitution of Ghana - An American's Impressions and Comparisons*, 8 U. GHANA L.J. 2 (1971); Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891 (1988); Lester, *The American Constitution: Home Thoughts from Abroad*, 49 U. PITT. L. REV. 769 (1988); Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988); Hero, *The Influence of the United States Constitution's Bill of Rights Upon the Constitutions of the Countries of the World*, 3 CONN. J. INT'L L. 31 (1987); Butler, *The 1979 Constitution of the Federal Republic of Nigeria and the Constitution of the United States of America: A Historical and Philosophical Comparison*, 30 HOW. L. J. 1025 (1987); Howard, *Constitution and Society in Comparative Perspective*, 71 JUDICATURE III (1987); THE CONSTITUTION RECONSIDERED 259-347 (C. Read Rev. ed. 1968) (Repercussions of the Constitution outside the U.S.A.).

[28]Some journals specialize in comparative law. *See, e.g.*, AMERICAN JOURNAL OF COMPARATIVE LAW; INTERNATIONAL AND COMPARATIVE LAW QUARTERLY. *See also* references under comparative law in the INDEX TO LEGAL PERIODICALS.

[29]Examples can be garnered from Winterton, *Comparative Law Teaching*, 23 AM. J. COMP. L. 69 (1975); Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985); Uswake, Book Review, 62 TUL. L. REV. 1507 (1988); Osakwe, *Rethinking The Communion Between The Common Laws of England and The United States*, 82 N.W. U. L. REV. 855 (1988).

[30]*See, e.g.*, Kommers, *supra* note 5; Kommers, *The Value of Comparative Constitutional Law*, *supra* note 11; Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, *supra* note 11, at 657-659; Brice & Simon, *Introduction*, 53 CALIF. L. REV. 401 (1980); Shapiro, *Comparative Law and Politics*, 53 S. CALIF. L. REV. 537 (1980); Lahav, *The Art of Comparative Constitutional Law*, 53 S. CALIF L. REV. 697 (1980); C. Osakwe, *The Problems of the Comparability of Notions in Constitutional Law*, 59 TUL. L. REV. 875 (1985).

[31]*See, e.g. supra* notes 6, 22; Kommers, *The Value of Comparative Constitutional Law*, *supra* note 11, at 694, 695.

resolution of equivalent problems and controversies inheres in the revelation of new and alternative options to supplement existing domestic precedential reservoirs of judicial reasons and results. Broader analogies are even more readily available.[32] Encompassing a spectrum of cases involving a particular constitutional provision or topic can, by facilitating the exposure of similarities and differences between foreign and indigenous constitutional law regimes, not only contribute to that endeavour but also explain past and present patterns of constitutional growth and add to suggestions concerning a constitution's future prospects and possibilities. A proliferating litany of such comparative studies is emerging. Enumerated legislative powers and prohibitions pertaining to interstate trade and commerce, defense and international treaties are perennial examples. Constitutional provisions promulgating executive and judicial powers have, though to a quantitatively lesser extent, been the focus of comparative scholarship. Increasingly, separate provisions in Bills of Rights appended to or included within numerous constitutions, are now engendering similar scrutiny. What ought to emerge from a collation of these studies is a broader and clearer perspective of the effect and utilization of constitutions.

Intensification, not abatement, characterizes the fascination written[33] constitutions invoke in scholarly haunts, political forums and, occasionally, in the general public. Nationalistic sentiments and sanctimonious reverence inadequately account for this multi-national phenomenon. Conundrums of more general and enduring concern provide the explanation. How, without loss of vitality, can power—political, military, economic or social—be accumulated and dispersed, directed and checked? When and why have constitutions been an integral part of the answer? Which, if any, provisions, principles, institutions or structural characteristics are necessary and sufficient to establish and maintain the requisite symbiotic relationship between constitutions and power? No single simplistic answer correctly correlates with every constitution or even a small numerical proportion

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[32]*See, e.g.,* references in these footnotes and appendices.

[33]Whether written documents constitute the totality of a 'constitution' is a matter of debate. *See, e.g.,* Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703 (1975); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,* 30 STAN. L. REV. 843 (1978); Powell, *Parchment Matters: A Meditation on the Constitution as Text,* 71 IOWA L. REV. 1427 (1986); Powell, *Constitutional Law as Though the Constitution Mattered,* 1986 DUKE L.J. 915.

of exaltant constitutions. Simultaneous definition and denudation of political power, for example, to maintain, not just in theory but in practice, tension or equilibrium, may entail sinuous interweaving of an infinite array of constantly varying factors. From that ambiguous mixture of homogeneity and heterogeneity, within and between nations, comparative constitutional law derives sustenance and momentum.

Extrapolation from the perennial examples illustrating this process of one topic—constitutional interpretation—traverses the entire domain of comparative constitutional law. The reason is obvious. Penetrating awareness of the text of a written constitution is for constitutional law the primary and, perhaps, predominant prerequisite. Words in a constitution are purveyors of power. Textual commands, prohibitions, grants of authority and, even, silence[34] in a constitution, consequently, acquire a corresponding degree of authority. What the text says[35] is, therefore, of crucial importance. Inexorably, that quest for meaning devolves into an interpretative exercise.[36]

Critical questions immediately arise: How is a constitution to be interpreted? Who interprets constitutions? How are constitutions

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[34]*See, e.g.* Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 INDIANA L.J. 515 (1982)(substantially reprinted in L. TRIBE, CONSTITUTIONAL CHOICES 29-44, 290-99 (1985)).

[35]Do words "say" or "mean" anything? Is language too indefinite, superficial, flexible or irrelevant to constitute a (neutral) medium of communication? *See, e.g.*, J. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984); Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L.J. 209 (1984); Terrell, *Conceptual Analysis and the Virtues and Vices of Professor Westen's Linguistics*, 1986 DUKE L.J. 660. *See also infra* notes 38, 49. This problem stimulates and bedevils current theories of judicial review. *See also infra* notes 37, 49.

[36]The concept of "interpretation" is itself controversial. *See, e.g.*, Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Patterson, *Interpretation in Law: Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671 (1984); Schelly, *Interpretation in Law: The Dworkin-Fish Debate (or, Soccer Amongst the Gahuku-Gama)*, 73 CALIF. L. REV. 158 (1985); S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); THE POLITICS OF INTERPRETATION (W. Mitchell ed., 1982); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Levinson, *Writing and its Discontents*, 3 Tikkun Mag., Mar.-April 1988, at 36; Haskell, *The Curious Persistence of Rights Talk in the "Age of Interpretation,"* 74 J. AM. HIST. 984 (1987); Toews, *Intellectual History After the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience*, 92 AM. HIST. REV. 897 (1987). *See also infra* note 49.

interpreted? An extravagant array of responses is available.[37] Processes of constitutional decision-making do not, either within or among countries, conform to any single or unified interpretative strategy. Fluctuation, not stability, characterizes the formulation, status, permanence and authoritativeness of principles or rules of constitutional[38] interpretation. Adherence to similar modes of

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[37]In addition to references in Thomson, *Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes*, 13 MELB. U.L. REV. 597 (1982); *see, e.g.*, W. MURPHY, J. FLEMING, & W. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION (1986); G. LEEDES, THE MEANING OF THE CONSTITUTION: AN INTERDISCIPLINARY STUDY OF LEGAL THEORY (1986); R. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985); S. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); M. EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION (1984); P. BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); E. CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987); M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1987); *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U.L. REV. 259 (1981); *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981); *Judicial Review and the Constitution: The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Interpretation Symposium*, 58 S. CALIF. L. REV. 1 (1985); *Symposium: Constitutional Interpretation*, 15 N. KY. L. REV. 437 (1988); *Does Constitutional Theory Matter?*, 65 TEX. L. REV. 766 (1987); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987); Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); L. ZINES, THE HIGH COURT AND THE CONSTITUTION (2d ed. 1987); Zines, *The State of Constitutional Interpretation*, 14 FED. L. REV. 277 (1984); Coper, *The High Court and the World of Policy*, 14 FED. L. REV. 294 (1984); P. HOGG, CONSTITUTIONAL LAW OF CANADA 312-344, 652-665 (2d ed. 1985) ; Monahan, *Judicial Review and Democracy: A Theory of Judicial Review*, 21 U.B.C. L. REV. 87 (1987); Dialogue, *Id.* at 177; Gold, *The Rhetoric of Constitutional Argumentation*, 35 U. TORONTO L.J. 154 (1985); Macklem, *Constitutional Ideologies*, 20 OTTAWA L. REV. 117 (1988); Barry, *Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Charter of Rights and Freedoms*, 60 CAN. BAR. REV. 237 (1982). *See generally*, Wiesman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical*, 10 HASTINGS CONST. L.Q. 315 (1983); Sunderland, *Constitutional Theory and the Role of the Court: An Analysis of Contemporary Constitutional Commentators*, 21 WAKE FOREST L. REV. 855 (1986). *See also infra* notes 38, 44-52.

[38]Are rules for interpreting a constitution different from those used to interpret other texts? *See, e.g.*, Symposium, *Law and Literature*, 60 no. 3 TEX. L. REV. i (1982); *A Bicentennial Symposium The Constitution and Human Values: The Unfinished Agenda*, 20 GA. L. REV. 811 (1986); *Symposium on Law and Community*, 84 MICH. L. REV. 1373 (1986). *See also* Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123; Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986); Posner, *From Billy Budd to Buchenwald*, 96 YALE L.J. 1173 (1987); R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988); Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777 (1988); La Rue, *Posner on Literature*, 85 MICH. L. REV. 325 (1986); White, *Thinking About Our Language*, 96 YALE L.J. 1960 (1987).

interpretation by different interpreters of the same constitution does not necessarily occur. Plausible expectations of a vivid contrast might, therefore, be perpetuated about interpretative methodologies utilized by similar interpreters confronting different constitutions. Replacing those expectations with reliable information and evaluations is an enterprise indisputably within the purview of comparative constitutional law.

Traces of constitutional interpretation in comparative perspective[39] are most clearly perceptible in scholarship devoted to the judiciary, usually final national appellate courts or tribunals, and their decisions reviewing the constitutionality of governmental or private acts and omissions.[40] What courts in various countries do during constitutional adjudication is a fertile source of descriptive comparative constitutional law. The manner in which litigation or an advisory opinion reference is conducted, reasons for judgment, dispositive results and consequences are the usual ingredients. Professor McWhinney's *Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review*[41] exemplifies this genre. Judicial decisions from the United States, Canada, Australia, India, West Germany, France, Japan and the International Court of Justice are collated by McWhinney not by nation but into categories of subject matter which have engendered constitutional disputation. Rudimentary materials conveying a sense of similarity and disparity where various courts have addressed analogous problems are, therefore, available.[42] Absent,[43] however, is information and probing discussions with which to identify and compare decision-making processes and postulate normative theories of judicial review.

Explication of judicial interpretative techniques for comparative analysis should begin by garnering literature articulating, in respect of individual countries, methods, principles and premises of constitutional interpretation used by or postulated for their courts. For example, what, if any, relevance to a constitution do or should judges attribute to the

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[39]*See especially* C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION, *supra* note 13; Murphy, *supra* note 15. *See also infra* notes 40, 43.

[40]*See, e.g., supra* notes 11, 15, 20.

[41]E. MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING, *supra* note 14.

[42]*See, e.g.*, references in these footnotes and appendices.

[43]Some exceptions exist. *See, e.g.*, C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION, *supra* note 13; E. MCWHINNEY, JUDICIAL REVIEW, *supra* note 14; D. BASU, *supra* note 7, at 201-348; FREUND, *Review and Federalism*, in SUPREME COURT AND SUPREME LAW 86-89 (E.Cahn ed. 1954).

intentions of its framers?[44] During judicial exegesis are more general historical antecedents or circumstances contemporaneous with the formation of a constitution or passage of amendments interpretatively influential?[45] When and how do courts resort to textual semantics including literalism, structuralism, contextualism and implications to

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[44]In addition to references in Thomson, *Constitutional Interpretation: History and the High Court: A Bibliographical Survey*, 4 U.N.S.W.L.J. 309 (1982) and Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1599 n.194 (1987); *see e.g.*, Simon, *The Authority of the Intent of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1482 (1985); Lyons, *Constitutional Interpretation and Original Meaning*, 4 SOC. PHIL. & POL'Y. 75 (1986); McAfee, *Constitutional Interpretation - The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275 (1986); *Framers Intent: An Exchange*, 10 U. PUGET SOUND L. REV. 343 (1987); Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMM. 43 (1987); Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773; *A Constitutional Bicentennial Celebration*, 47 MD. L. REV. 3, 171-238 (1987); Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177 (1987); Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 BUFFALO L. REV. 217 (1987); Fisher, *Methods of Constitutional Interpretation: The Limits of Original Intent*, 18 CUM. L. REV. 44 (1987); Belz, *The Civil War Amendments to the Constitution: The Relevance of Original Intent*, 5 CONST. COMM. 115 (1988); Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CALIF. W.L. REV. 227 (1988); *Symposium on Law and Public Policy*, 73 CORNELL L. REV. 281, 350-370 (1988); Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988); DEPT. OF JUSTICE (OFFICE OF LEGAL POLICY), REPORT OF THE ATTORNEY GENERAL: ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987); M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); Burmester, *The Convention Debates and the Interpretation of the Constitution*, in THE CONVENTION DEBATES 1891-1898: COMMENTARIES, INDICES AND GUIDE 25 (G. Craven ed. 1986); Coper, *The Place of History in Constitutional Interpretation* in *id.* at 5; Elliot, *Interpreting the Charter - Use of Earlier Versions as an Aid*, U.B.C.L. REV. 11 (1982) (Special Charter Edition). Two questions are frequently overlooked. How complete and accurate is the historical documentation? *See e.g.*, Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986); Hutson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. 441 (1987)(3rd Series); Thomson, *Drafting the Australian Constitution: The Neglected Documents*, 15 MELB. U. L. REV. 533 (1986). What interpretative rules did the framers intend should be used to interpret the constitution? *See, e.g.*, Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77 (1988).

[45]*See, e.g.*, C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Kelly, *Clio and the Court: An Illicit Love Affair*, [1965] SUP. CT. REV. 119; Wiecek, *supra* note 44; Coper, *The Place of History in Constitutional Interpretation* in THE CONVENTION DEBATES 1891-1898, *supra* note 44, at 5.

elucidate constitutional terminology?[46] Is movement towards that objective facilitated by legalism and logic? Where in constitutional law does political theory and practice, the different substantive and process orientated conceptions of politics, for example, democratic majoritarianism, republicanism or minority rights and freedoms, serve the judiciary as an interpretative device?[47] Does the nature or character of a constitution perform a similar function?[48] Might more esoteric hermeneutical theories also, at least surreptitiously, fuel judicial ruminations about constitutions?[49] Continual conversion of such questions into answers and, eventually, into comparative and, perhaps, relatively universal theories of judicial review would immeasurably enhance the intellectual sustenance and practical value of comparative constitutional law.

Complacency with that result would, however, leave analysis of constitutional interpretation bereft of comprehensive coverage. Remnants of any suggestion that interpreting a constitution is an exclusive judicial enterprise must, therefore, be dissipated. Inevitably, a clearer perception will emerge of legislative and executive

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[46]*See, e.g.*, Thomson, *supra* note 37, at 603-604 (citing references); C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Saunders, *The National Implied Power and Implied Restrictions on Commonwealth Power*, 14 FED. L. REV. 267 (1984).

[47]*See, e.g.*, Thomson, *supra* note 37, at 606-615 (citing references); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1574, 1575, 1586-1592, 1635-1645 (1988); Fitts, *Look Before You Leap! Some Cautionary Notes on Civic Republicanism*, 97 YALE LJ. 1651 (1988).

[48]*See, e.g.*, Thomson, *supra* note 37, at 601-603; Thomson, *The Australian Constitution: Statute, Fundamental Document or Compact?*, 59 L. INST. J. 1199 (1985); Lindell, *Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence*, 16 FED. L. REV. 29, 30, 43-46 (1986).

[49]*See, e.g.*, Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987); Phelps & Pitts, *Questioning the Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 ST. LOUIS U.L.J. 353 (1985); Sherman, *Hermeneutics in Law*, 51 MOD. L. REV. 386 (1988); Husson, *Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law*, 95 YALE L.J. 969 (1986); Balkih, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985); Bronson, *Serious But Not Critical*, 60 S. CAL. L. REV. 259 (1987); *Interpretation Symposium, supra* note 37; Wright, *On a General Theory of Interpretation: The Betti-Gadamer Dispute in Legal Hermeneutics*, 32 AM. J. JURIS. 191 (1987); Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 135 U. PA. L. REV. 1135 (1988).

interpretation of constitutions.[50] Comparative scholarship could then suggest to what extent legislators, executive officials and judges observe similar rules and principles of constitutional interpretation. Is, for example, fidelity to framers' intentions or originalism an ingredient in legislative or executive decisions involving the constitution? Can adherence to specified interpretative techniques in constitutional law be mandated by the legislature, executive or courts?[51] If not, how are conflicting interpretations and resulting substantive differences resolved?[52] Diverting attention to the processes of legislative and executive decision-making can obviate obsessions with judicial review and, consequently, engender other, more universal, theories of constitutional interpretation.

Illuminating any facet of comparative constitutional law, therefore, remains a difficult enterprise. Failure is not uncommon. *Australian and Canadian Federalism 1867 - 1984: A Study in Judicial Techniques*[53]

[50]In addition to references in Thomson, *supra* note 37 at 600 n.12, *see, e.g.*, Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587 (1983); Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707 (1985); Fisher, *Congress and The Fourth Amendment*, 21 GA. L. REV. 107 (1986); L. FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICS 231-274 (1988); Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986); Hickok, *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217 (1986); Levinson, *Statement Before the Government Operations Committee of the House of Representatives*, in *Constitutionality of G.A.O.'S Bid Protest Function: Hearings Before the Legislation and National Security Subcommittee of the House Committee on Government Operations, 99th Congress 1st Sess.* 29-45, 61-73 (1985); Garber & Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandisement of Power*, 24 HARV. J. LEGIS. 363 (1987); Arkes, *The Shadow of Natural Rights, or a Guide from the Perplexed*, 86 MICH. L. REV. 1492, 1495-1498 (1988); *Symposium on Law and Public Policy*, *supra* note 44, at 281, 371-400 (The Role of the Legislative and Executive Branches in Interpreting the Constitution); West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988); Barbor, *Judicial Review and the Federalist*, 55 U. CHI. L. REV. 836, 856-59 (1988); Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111 (1988).

[51]*See, e.g.*, Thomson, *Constitutional Interpretation*, *supra* note 44, at 320 n.44.

[52]*See, e.g.*, Thomson, *Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective*, 62 TEX. L. REV. 559, 661-663 (1983); Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986); Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Brest, *supra* note 50; Fay, *The Pluralization of the Supreme Court: Inciting an Interpretative Battle with the Nonpolitical Branch*, 4 J.L. & POL. 165 (1987); Greenwalt, *Constitutional Decisions and the Supreme Law*, 58 U. COLO. L. REV. 145 (1987); *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977 (1987).

[53]C. GILBERT, AUSTRALIAN AND CANADIAN FEDERALISM 1867-1984: A STUDY OF JUDICIAL TECHNIQUES (1986) [hereinafter AUSTRALIAN AND CANADIAN FEDERALISM]. Originally, this book was C. Gilbert, Judicial Interpretation of the Australian and Canadian Constitutions 1867-1982 (1983) (doctoral thesis for Osgoode Hall Law School). *See also infra* note 56.

is a conspicuous example.[54] Repetitious recitation of opinions rendered by Canadian Supreme Court and Australian High Court judges concerning insular segments of constitutional law—characterization of taxation laws, trade and commerce, legislative schemes and inconsistency between federal and provincial[55] laws—is the primary contribution of Christopher Gilbert's book[56] to comparative constitutional law literature. Nuanced analysis and penetrating insights are not proffered. Rather, upon close inspection, errors[57] and omissions[58] protrude. If Canadian-Australian comparative constitutional law scholarship is to continue[59] to flourish, paradigms other than *Australian and Canadian Federalism 1867 - 1984* must be utilized.

Contrasts and comparisons can be extrapolated from judicially endorsed answers to interpretative conundrums which bedevil

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[54]Another example is E. MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING, *supra* note 14. For reviews of *id.* see Vaughan, Book Review, 2 CJLS/RCDS 203 (1987); Klein, Book Review, 22 ISRAEL L. REV. 277 (1987); Cappelletti, Book Review, *supra* note 12. Criteria for such judgments appear in Gold, *Constitutional Scholarship in Canada*, 23 OSGOODE HALL L.J. 495 (1985). *See generally* Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988); Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189 (1988).

[55]Canada comprises ten provinces and two territories. *See, e.g.*, P. HOGG, *supra* note 37, at 832 n.6. Australia comprises six states and two internal and several external territories. *See, e.g.*, P. LANE, LANE'S COMMENTARIES ON THE AUSTRALIAN CONSTITUTION 620 (1987).

[56]In addition to *supra* note 53, *see* Gilbert, *"There Will be Wars and Rumours of Wars": A Comparison of the Treatment of Defence and Emergency Powers in the Federal Constiiutions of Australia and Canada*, 18 OSGOODE HALL L.J. 307 (1980); Gilbert, *Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme Courts*, 9 FED. L. REV. 348 (1978).

[57]For example: (1) "In Australia the Governor-General has no [disallowance] power over state laws." ¶2 §2 of the Australian constitution may, however, enable the Governor-General to exercise that power. G. WINTERTON, PARLIAMENT, THE EXECUTIVE AND THE GOVERNOR-GENERAL: A CONSTITUTIONAL ANALYSIS, 52, 246 n.78-80 (1983). (2) "[The Canadian federal parliament's power 'to make laws for the peace, order, and good government of Canada'] has no equivalent in the Australian Constitution." ¶2. The enumeration of federal legislative powers in §51 of the Australian constitution is prefaced by equivalent words: "The Parliament shall...have power to make laws for the peace, order, and good government of the Commonwealth..." For various views see *e.g.*, P. HOGG, *supra* note 37, at 367-395; P. LANE, *supra* note 55, at 79-81. (3) "The Australian constitution generally gives no specific powers to the States." ¶2. *See*, however, AUSTL. CONST. §§9 (election of senators), 12 (issue of writs for senate election), 15 (appointment of senator), 29 (electoral divisions), 111 (surrender of state territory), 112 (inspection charges). Indeed, AUSTL. CONST. §106 may provide the legal efficacy for state constitutions. *See, e.g.*, Western Australia v. Wilsmore, (1981) W.A.R. 179, 181-83. (4) "[A]ppeals in federal constitutional matters from Australia to the Privy Council were finally abolished [in 1968]." ¶2. If the High Court grants a certificate under AUSTL. CONST. §74 an appeal may be taken to the Privy Council. P. LANE, *supra* note 55, at 386-87 ("theoretical possibility").

[58]*See infra* notes 99, 100.

[59]*See, e.g.*, Appendix B.

enumerated grants of legislative power in federal constitutions. Utilizing the taxation[60] and trade and commerce[61] powers Christopher Gilbert juxtaposes the approaches of the Canadian Supreme Court and Australian High Court. Characterization of legislation—a process of statutory interpretation to determine whether laws in Canada are "in relation to"[62] or federal laws in Australia are "with respect to"[63] a specified legislative power—provides some antitheses. Two are highlighted in *Australian and Canadian Federalism.* "Pith and substance", a Canadian characterization technique,[64] is emphatically rejected in Australia where requisite conformity to constitutional descriptions of power can occur even if federal legislation possesses a multiplicity of disparate characters.[65] Exclusively focusing upon taxation powers,[66] however, sharpens, rather than blurs, this distinction. The divergence may, in theory and practice, be considerably narrower. Away from the extremities, examples of the Canadian "dual" or "double" aspect doctrine[67] and Australian cases involving other legislative powers[68] soften the image crafted by Gilbert. Similarly susceptible to less

[60]AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 7-26 (Australia), 27-38 (Canadian); *See infra* note 66. Discussion of AUSTL. CONST. §96 at ¶19 should allude to A.G. (Vic) *ex rel.* Black v. Commonwealth, 146 C.L.R. 559 (1981) and the characterization discussion at ¶23-5 is vindicated by State Chamber of Commerce and Industry v. Commonwealth, 61 A.L.J.R. 459 (1987). For other exposes see, *e.g.*, P. HOGG, *supra* note 37, at 601-25; L. ZINES, *supra* note 37, at 25-32, 265; Saunders, *Towards a Theory for Section 96,* 16 MELB. U. L. REV. 1 (Pt. 1), 669 (H,2) (1987-88).

[61]AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 39-53 (Australia), 54-72 (Canada); *See infra* note 74. Other comparative analyses include V. MACKINNON, COMPARATIVE FEDERALISM: A STUDY IN JUDICAL INTERPRETATION (1964); Hutchins & Kenniff, *The Concept of Interstate Commerce: A Case Study of Interstate Commerce in Canada, the United States and Australia,* 10 C. DE. D. 705 (1969); Herlihy, *Constitutional Restraints on Trade and Commerce in Australia and Canada,* 9 U. Queens L.J. 188 (1976).

[62]Constitution Act, 1867, §§91, 92, 92A, 93, 94, 94A, 95. *See generally* P. HOGG, *supra* note 37, at 313-32.

[63]AUSTL. CONST. §51. *See generally* L. ZINES, *supra* note 37, at 23-32.

[64]*See generally,* P. HOGG, *supra* note 37, at 314-15, 338.

[65]AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 5, 6. AUSTRALIAN AND CANADIAN FEDERALISM omits the most lucid comparison in Actors and Announcers Equity Association v. Fontana Films Pty. Ltd., 150 C.L.R. 169, 190-95 (1982) (Stephen, J.). *See generally* L. ZINES, *supra* note 37, at 23-5.

[66]Constitution Act, 1867, §91(3) ("Taxation"), §92(2) ("Direct Taxation"); AUSTL. CONST. §51(ii) ("Taxation, but so as not to discriminate between States or parts of States"). Other taxation provisions have a noticeable resemblance. Constitution Act 1867, §§53, 54, 125; AUSTL. CONST. §§53, 55, 114; Queensland v. Commonwealth, 61 A.L.J.R. 104 (1987); AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 34, 35, 36.

[67]Christopher Gilbert refers to this doctrine at 137, 170 n.8.; For greater elaboration *see* P. HOGG, *supra id.* note 37, at 137, 316-18, 338, 354 n.5.

[68]*See, e.g.* Actors and Announcers Equity Association v. Fontana Films Pty. Ltd., *supra* note 65; Commonwealth v. Tasmania, 46 AUSTL. L. REV. 625 (1983).

than rigorous application is the postulated dichotomy—overt textual literalism[69] versus ulterior parliamentary purpose or motives—in judicial methodology to characterize statutes. Both techniques are not only utilized by courts in Canada[70] and Australia[71] but ultimately share the same premise of subjective values and personal preference.[72] Within this alternative perspective is the intriguing prospect of radically realigning orthodox versions of characterization. Hopefully, other comparative analyses can, at least, be audacious enough to probe that possibility.

Explicating confrontations between courts and constitutions can also be hazardous. Elucidating judicial processes of constitutional interpretations may be the most conspicuous example. Descriptively, how do courts interpret the Canadian and Australian constitutions? Normatively, how should judges accomplish that task? *Australian and Canadian Federalism* provides some glimpses. Without encompassing constitutional prohibitions, rights, or guarantees[73] Christopher Gilbert selects, presumably as the exemplar, one provision—the trade and commerce power[74]—from which to promulgate a comparative analysis. Narrative exposition in *Australian and Canadian Federalism* of trade and commerce clause cases reveals

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[69]Although terminology such as literal, literalism and literalistic is frequently used (*see, e.g.*, at 10, 12, 18, 22, 25 and 38) no attempt is made to elucidate what is involved or hint at the difficulties involved. *See supra* notes 35, 36.

[70]AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 34-36, 38 ("far more literalistic approach"), 27-34, 36-38 (colourable, ulterior purpose).

[71]*Id.* at 9-26 (literalism), 22, 24 (purpose, ulterior motive).

[72]AUSTRALIAN AND CANADIAN FEDERALISM provides some hints at 12 ("value judgments"), 38 ("choice of objective dictates choice of weapons.")

[73]Especially from a Canadian perspective this is a serious omission. Judicial involvement with the Canada Charter of Rights and Freedoms not only is generating intriguing scholarly debates but may influence judicial consideration of other aspects of the Constitution Act 1897. *See, e.g.* P. MONAHAN, POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA (1987); Wilson, *Decision-Making in the Supreme Court*, 36 U. TORONTO L.J. 227, 244-48 (1986); Wilson, *The Making of a Constitution: Approaches to Judicial Interpretation*, 1988 PUB. L. 370; Strayer, *Life Under the Canadian Charter: Adjusting the Balance Between Legislatures and Courts*, 1988 PUB. L. 347. For the Australian perspective see *e.g.* A.G. (Vic) *ex. rel.* Black v. Commonwealth, *supra* note 60; Brown v. Queen, 64 A.L.R. 161 (1986).

[74]Constitution Act, 1897 §91(2)("regulation of trade and commerce"); AUSTL. CONST. §51(i) ("Trade and commerce with other countries, and among the States"). Despite textual similarities, Gilbert suggests without reasons (at 40, 72) that judicial interpretation of Canadian Constitution, 1897 §121 and AUSTL. CONST. §92 are radically different. *See supra* note 61; P. HOGG, *supra* note 37, at 603, 604, 736, 737; L. ZINES, *supra* note 37, at 90-145; AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 91, 92, 93. For the United States and Australia *compare* New Energy Co. of Indiana v. Limbach, — U.S. — (1988); Cole v. Whitfield, 62 A.L.J.R. 303 (1988); Bath v. Alston Holdings Pty. Ltd., 62 A.L.J.R. 363 (1988).

several principles— immunity of instrumentalities, implied prohibitions, doctrine of reserved powers, expansive and generous interpretation of federal legislative power in Australia[75] and original intention, context, relationship between powers, and narrow and restrictive interpretation of linguistic generality in Canada[76]—which courts have developed and, in some instances, discarded to attribute[77] meaning to that constitutional terminology. The clarity, precision and level of their exposition is, however, a good deal less than that which is available in standard constitutional law textbooks[78] and, at least in Canadian scholarship, description and discussion of those cases have been proffered with greater sophistication and insight.[79] Absent are indications that variable, complex and antagonistic premises and arguments inhere in judicial recognition and application of interpretative principles. Even at the more general level of correlating results and consequences of these cases with "the"[80] constitution diverse views[81] are ignored. Resulting theories and conclusions must, therefore, be imbibed with caution.

One aspect of the constitutional validity of legislative schemes—combinations of federal and provincial legislation or solely federal or provincial statutes—commands the attention of *Australian and Canadian Federalism:* judicial techniques of statutory characterization. Striking resemblances between processes characterizing taxation laws and legislative schemes are, as formulated by Gilbert, obvious.[82] Prominent in Canadian decisions is the "pith and substance" methodology, which vividly contrasts with the Australian formalistic and literal textualism. Deviations, in both countries and contexts, occur.

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[75]AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 39-52.

[76]*Id.* at 55-72. Gilbert briefly alludes to the Framers' intentions (at 54, 55, 63) but does not suggest what, if any, relevance that has or should have for judges. *See supra* note 44; P. HOGG, *supra* note 37, at 342-44.

[77]*See supra* notes 35, 36.

[78]*See, e.g.,* P. HOGG, *supra* note 37, at 309-44; L. ZINES, *supra* note 37, at 1-32, 341-370,380-86.

[79]*See, e.g.,* Monahan, *At Doctrine's Twilight: The Structure of Canadian Federalism,* 34 U. TORONTO L.J. 47 (1984).

[80]For several answers to the question what is "the" United States Constitution, *see* Saphire, *Some Reflections on the Success and Failure of the Constitution,* 12 U. DAYTON L. REV. 351 (1986); Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne,* 78 NW. U.L. REV. 1435 (1984); Amar, *Our Forgotten Constitution: A Bicentennial Comment,* 97 YALE L.J. 281 (1987).

[81]*See, e.g.,* Vaughan, *Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation,* 19 CAN. J. POL. SCI. 495 (1986); Cairns, Comment, *id.* at 521; Russell, Comment *id.* at 532; Vaughan, Reply, *id.* at 537.

[82]*Compare* AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 7-26 with 73-94 (Australia), and 27-38 with 95-118 (Canada).

Why, assuming Gilbert is correct,[83] does this similarity subsist? No intriguing suggestion, unfortunately, needs to be postulated. Repetitious recitation of the same taxation cases,[84] which dominate discussions of characterization in *Australian and Canadian Federalism*, provides the answer. Does conformity also characterize the characterization of individual statutes and legislative schemes in other cases? Without adding an analysis of judicial opinions characterizing legislation where taxation powers and statutory schemes were not involved,[85] this Canadian-Australian comparison can only engender speculative responses. Making the requisite additions should not, however, be a difficult enterprise.[86]

Patterns of contrasts and similarities, displaying remarkable resemblance to those emerging in other comparative contexts examined by Christopher Gilbert, appear in Canadian and Australian judicial attitudes with regard to inconsistency between federal and provincial or state legislation.[87] The sharpest divergence[88] is the acceptance in Australia and rejection in Canada of the covering of the field test.[89] Consequently, in areas of concurrent[90] legislative power, the potential of Australian federal laws to render state legislation inoperative[91] is significantly enhanced. A much closer resemblance occurs when federal paramountry is achieved by direct

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[83]*See* text accompanying notes 66-72.

[84]*Compare e.g.*, AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 15-19 with 81-84 and 28, 36-37 with 97-103.

[85]*See supra* note 68.

[86] *See, e.g.*, P. HOGG, *supra* note 37, at 397-599; L. ZINES, *supra* note 37, at 16-89, 244-63.

[87]AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 119-136 (Australia), 137-151 (Canada). *See generally* P. HOGG, *supra* note 37, at 353-67; P. LANE, *supra* note 55, at 571-88.

[88]There is also a textual difference. While AUSTL. CONST. §109 is an express federal legislative paramountry provision the Constitution Act, 1867 apart from §§92A and 95 "is curiously silent...though there have been occasional suggestions that paramountcy flows from the notwithstanding clause in the opening words of §91 or the concluding clause of §91." P. HOGG, *supra* note 37, at 354 n.8.

[89]AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 120-27 (Australia), 138-40, 147 (Canada). *See generally*, P. HOGG, *supra* note 37, at 358-63; P. LANE, *supra* note 55, at 585-88.

[90]"The contrast between the two exclusive lists of Canada and the single concurrent list of the United States and Australia is not as sharp as might be thought. There is, in practice, a substantial area of concurrency in Canada, even with respect to topics covered by the two lists." P. HOGG, *supra* note 37, at 338. *See also* AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 137.

[91]The word "invalid" in AUSTL. CONST. §109 means inoperative. ¶181 n.1. The same effect prevails in Canada. AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 137, 184 n.5; P. HOGG, *supra* note 37, at 367.

conflict with provincial or state legislation.[92] Even so, as *Australian and Canadian Federalism* articulates, differences in the judicial development and applications of direct inconsistency tests protrude.[93] Invariably[94] this suggests a conclusion, endorsed by Gilbert,[95] that compared to Australia, provincial laws which confront federal legislation are a good deal less vulnerable.

Reasons upon which such forthright conclusions rest are, however, much more nebulous. Attributing to judges policy preferences for vague and imprecise notions of federalism which dissolve into unspecified[96] historical, political, social, cultural and economic factors[97] cannot suffice for a scholarly comparative constitutional law inquiry into "judicial techniques."[98] Much more than *Australian and Canadian Federalism* garners is available. Judicial biographies[99] and institutional aspects of courts[100] ought, for example, to be evaluated. Adding their contribution would qualitatively enhance proffered explanations, conclusions and hypotheses. Without delay that task should be undertaken.

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[92]*Compare* AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 127-130 (Australia) with 140-42 (Canada).

[93]*Compare id.* at 130-35 (Australia) with 142-49 (Canada).

[94]Postulating a contrary view, based on a Canadian covering of the field test, cannot be sustained. P. HOGG, *supra* note 37, at 360-61.

[95]AUSTRALIAN AND CANADIAN FEDERALISM, *supra* note 53, at 136, 141, 148, 150-51.

[96]Some generalizations are provided. *Id.* at 156-57.

[97]"A host of historical, cultural, political and economic factors has *possibly* influenced members of the High Court to conclude that a centre-orientated federalism is best suited to Australian interests. Conversely, the flow of Canadian history and social development has *arguably* influenced the Canadian judiciary's attitude that, on the whole, a decentralised, province-orientated federalism best suits Canadian society." (emphasis added) *Id.* at 155.

[98]The sub-title of Gilbert's book. *See supra* note 53.

[99]Not only standard biographies but also scholarship focusing upon judges and particular cases or doctrines. *See, e.g.*, Swinton, *Bora Laskin and Federalism*, 35 U. TORONTO L.J. 353 (1985); Zines, *Sir Owen Dixon's Theory of Federalism*, 1 FED. L. REV. 221 (1965); Zines, *Mr. Justice Evatt and the Constitution*, 3 FED. L. REV. 153 (1969); Bickovskii, *No Deliberate Innovators: Mr. Justice Murphy and the Australian Constitution*, 8 FED. L. REV. 460 (1977); LIONEL MURPHY: A RADICAL JUDGE (J. Scutt ed. 1987); Burmester, *Justice Windeyer and the High Court*, 17 FED. L. REV. 66 (1987); P. Lahy, His Honour Mr. Justice Kitto; Some Aspects of a Constitutional Approach (1974)(honours thesis at Australian National University Law School); G. Rumble, Sir Garfield Barwick's Approach to the Constitution (1983)(doctoral thesis at Australian National University). *See generally*, Thomson, *Judicial Biography: Some Tentative Observations on the Australian Enterprise*, 8 U.N.S.W.L.J. 380 (1985).

[100]*See, e.g.*, P. RUSSELL, THE JUDICIARY IN CANADA: THE THIRD BRANCH OF GOVERNMENT (1987); J. SNELL & F. VAUGHAN, THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION (1985); H. RENFREE, THE FEDERAL JUDICIAL SYSTEM OF AUSTRALIA (1984); J. CRAWFORD, AUSTRALIAN COURTS OF LAW (2d ed. 1988).

Vehement exhortations to cajole production of comparative constitutional law literature are not, however, usually required. Rather, perennial fascination with power, its exercise and limitation, creates a voracious appetite for informative comparisons on a myriad of constitutional law topics. Not infrequently, the response is a proliferation of creative scholarship. So long as that endures enjoying constitutional law will be exacerbated.

APPENDIX A
AUSTRALIAN-UNITED STATES COMPARISONS

Kadish, *Judicial Review in the United States Supreme Court and the High Court of Australia*, 37 TEX. L. REV. 1 (Pt. 1), 133 (Pt. 2) (1958); 2 MELB. U.L. REV. 4 (Pt. 1), 127 (Pt. 2) (1959).

Sawer, *The Supreme Court and the High Court of Australia*, 6 J. PUB L. 482 (1957).

Z. Cowan, Australia and the United States: Some Legal Comparisons (March 1954) (James McCormick Mitchell Lecture Series-University of Buffalo School of Law).

Cowan, *A Comparison of the Constitutions of Australia and the United States*, 4 BUFFALO L. REV. 155 (1955).

Cowen, *Full Faith and Credit: The Australian Experience*, 6 JUDICATAE 27 (1952) *reprinted in* ESSAYS ON THE AUSTRALIAN CONSTITUTION 293 (R. Else-Mitchell ed.) (2d ed. 1961).

Cowen, *Diversity Jurisdiction: The Australian Experience*, 7 JUDICATAE 1 (1955).

Cowen, *Alsatias for Jack Sheppards?: The Law in Federal Enclaves in Australia*, 2 MELB. U.L. REV. 454 (1960) *reprinted in* Z. COWEN, SIR JOHN LATHAM AND OTHER PAPERS 171 (1965).

Z. COWEN & L. ZINES, FEDERAL JURISDICTION IN AUSTRALIA (2d ed. 1978).

G. Ross, The Federal System in the United States and in Australia (1942) (Ph.D. thesis, University of Minnesota).

Ross, *The Constitutional Law of Federalism in the United States and Australia*, 29 VA. L. REV. 881 (Pt. 1), 1028 (Pt. 2) (1943).

Ross, *Public Finance in Federal Systems: The United States and Australia*, 2 LOY. L. REV. 105 (1944).

Ross, *Full Faith and Credit in a Federal System*, 20 MINN. L. REV. 140 (1936).

Pannam, *Trial by Jury and Section 80 of the Australian Constitution*, 6 SYDNEY L. REV. 1 (1968).

Pannam, *Travelling Section 116 with a U.S. Road Map*, 4 MELB. U.L. REV. 1 (1963).

Pannam, *Discrimination on the Basis of State Residence in Australia and the United States*, 6 MELB. U.L. REV. 1 (1968).

Pannam, *Tortious Liability for Acts Performed Under an Unconstitutional Statute*, 5 MELB. U.L. REV. 113 (1966).

Pannam, *The Recovery of Unconstitutional Taxes in Australia and the United States*, 42 TEX. L. REV. 777 (1964).

Sackville, *The Doctrine of Immunity of Instrumentalities in the United States and in Australia: A Comparative Analysis*, 7 MELB. U.L. REV. 15 (1968).

P. Nygh, Economic Fact and Constitutional Theory in Australia and the United States: Being a comparative study of the method of judicial adjustment in the interpretation of the constitutional arrangements relating to commerce to the increasing integration of the national economy (1966)(S.J.D. thesis University of Michigan).

Nygh, *An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States*, 5 SYDNEY L. REV. 353 (1967).

Nygh, *The Police Power of the States in the United States and Australia*, 2 FED. L. REV. 183 (1967).

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