“Having relied extensively on its draft chapters to teach comparative constitutional studies, I found this book to be an excellent and innovative pedagogic tool. The exploration of specific topics as deep contextual studies, and a truly ecumenical approach that escapes the gravitational pull exerted by a handful of jurisdictions in Euro-America, avoid two of the biggest pitfalls in our discipline.”

Tarun Khaitan, Professor of Public Law and Legal Theory, Oxford

“Indispensable as a toolkit for scholars of comparative constitutionalism as well as illuminating as regards the most pressing constitutional hotspots in the contemporary world.”

J. H. H. Weiler
CONSTITUTIONALISM IN CONTEXT

With its emphasis on emerging and cutting-edge debates in the study of comparative constitutional law and politics, its suitability for both research and teaching use, and its distinguished and diverse cast of contributors, this handbook is a must-have for scholars and instructors alike. This versatile volume combines the depth and rigor of a scholarly reference work with features for teaching in law and social science courses. Its interdisciplinary case-study approach provides political and historical as well as legal context: each modular chapter offers an overview of a topic and a jurisdiction, followed by a case study that simultaneously contextualizes both. Its forward-looking and highly diverse selection of topics and jurisdictions fills gaps in the literature on the Global South as well as the West. A timely section on challenges to liberal constitutional democracy addresses pressing concerns about democratic backsliding and illiberal and/or authoritarian regimes.

David S. Law is the E. James Kelly, Jr., Class of 1965 Research Professor of Law and Courtesy Professor of Politics at the University of Virginia, and Honorary Professor of Law (formerly Sir Y. K. Pao Chair in Public Law) at the University of Hong Kong. Trained as both a political scientist and a comparative law scholar, he has taught at universities around the world including Princeton, the University of Pennsylvania, Georgetown, Washington University in St. Louis, National Taiwan University, and Seoul National University. His widely translated work has been featured in a variety of international media, including front-page coverage in the New York Times.
COMPARATIVE CONSTITUTIONAL LAW AND POLICY

Series Editors
Tom Ginsburg University of Chicago
Zachary Elkins University of Texas at Austin
Ran Hirschl University of Texas at Austin

Comparative constitutional law is an intellectually vibrant field that encompasses an increasingly broad array of approaches and methodologies. This series collects analytically innovative and empirically grounded work from scholars of comparative constitutionalism across academic disciplines. Books in the series include theoretically informed studies of single constitutional jurisdictions, comparative studies of constitutional law and institutions, and edited collections of original essays that respond to challenging theoretical and empirical questions in the field.

Books in the Series
Constitutionalism in Context Edited by David S. Law
The New Fourth Branch: Institutions for Protecting Constitutional Democracy Mark Tushnet
Constitutional Convergence in East Asia Po Jen Yap and Chien-Chih Lin
Redrafting Constitutions in Democratic Orders: Theoretical and Comparative Perspectives Edited by Gabriel L. Negretto
From Parchment to Practice: Implementing New Constitutions Edited by Tom Ginsburg and Aziz Z. Huq
The Failure of Popular Constitution Making in Turkey: Regressing Towards Constitutional Autocracy Edited by Felix Petersen and Zeynep Yanasınmayan
A Qualified Hope: The Indian Supreme Court and Progressive Social Change Edited by Gerald N. Rosenberg, Sudhir Krishnaswamy, and Shishir Bail
Constitutions in Times of Financial Crisis Edited by Tom Ginsburg, Mark D. Rosen, and Georg Vanberg
Reconstructing Rights: Courts, Parties, and Equality Rights in India, South Africa, and the United States Stephan Stohler
Constitution-Making and Transnational Legal Order Edited by Tom Ginsburg, Terence C. Halliday, and Gregory Shaffer
Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions Eric C. Ip
The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis ‘Theunis Roux
The Invisible Constitution in Comparative Perspective Edited by Rosalind Dixon and Adrienne Stone
Constitutional Courts in Asia: A Comparative Perspective Edited by Albert H. Y. Chen and Andrew Harding
Judicial Review in Norway: A Bicentennial Debate Anine Kierulf
Constituent Assemblies Edited by Jon Elster, Roberto Gargarella, Vatsal Naresh, and Bjørn Erik Rasch
The DNA of Constitutional Justice in Latin America: Politics, Governance, and Judicial Design Daniel M. Brinks and Abby Blass
The Adventures of the Constituent Power: Beyond Revolutions? Andrew Arato
Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka Dian A. H. Shah
Canada in the World: Comparative Perspectives on the Canadian Constitution Edited by Richard Albert and David R. Cameron
Courts and Democracies in Asia Po Jen Yap
Proportionality: New Frontiers, New Challenges Edited by Vicki C. Jackson and Mark Tushnet
Constituents before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions Todd A. Eisenstadt, A. Carl LeVan, and Tofigh Maboudi
Assessing Constitutional Performance Edited by Tom Ginsburg and Aziz Huq
Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka Benjamin Schonthal
Engaging with Social Rights: Procedure, Participation and Democracy in South Africa’s Second Wave Brian Ray
Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America Julio Ríos-Figueroa
Perils of Judicial Self-Government in Transitional Societies David Kosarˇ
Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea Chaihark Hahm and Sung Ho Kim
Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South César Rodríguez-Garavito and Diana Rodríguez-Franco
Unstable Constitutionalism: Law and Politics in South Asia Edited by Mark Tushnet and Madhav Khosla
Magna Carta and Its Modern Legacy Edited by Robert Hazell and James Melton
Constitutions and Religious Freedom Frank B. Cross
International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union Clifford J. Carrubba and Matthew J. Gabel
Reputation and Judicial Tactics: A Theory of National and International Courts Shai Dothan
Social Difference and Constitutionalism in Pan-Asia Edited by Susan H. Williams
Constitutionalism in Asia in the Early Twenty-First Century Edited by Albert H. Y. Chen
Constitutions in Authoritarian Regimes Edited by Tom Ginsburg and Alberto Simpser
Presidential Legislation in India: The Law and Practice of Ordinances Shubhankar Dam
Social and Political Foundations of Constitutions Edited by Denis J. Galligan and Mila Versteeg
Consequential Courts: Judicial Roles in Global Perspective Edited by Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan
Comparative Constitutional Design Edited by Tom Ginsburg
Towering Judges Edited by Rehan Abeyratne and Iddo Porat
The Constitution of Arbitration Victor Ferreres Comella
Constitutionalism in Context

Edited by

DAVID S. LAW
University of Virginia
University of Hong Kong
To my late grandmother, Shen-Chee Liew, who braved a new world to be with her grandson and never looked back, and to my mother, Margaret Yin-Yin Law, with love and gratitude and a prayer in my heart for the days ahead.
Contents by Topic

List of Figures .................................................. page xvii
List of Tables .................................................. xviii
List of Contributors ........................................... xix
User’s Guide and Preface ...................................... xxv
List of Abbreviations ........................................... xli

I INTRODUCTION TO THE FIELD ........................ 1

1 Introduction: Pedagogy and Conceptualization of the Field .... 3
   David S. Law

2 The State of the Field ........................................... 23
   Tom Ginsburg

3 Methodology and Research Design ............................. 41
   Ran Hirschl

II CONCEPTS AND DEFINITIONS ............................. 59

4 Constitutions and Constitutionalism: China .................. 61
   Albert H. Y. Chen

III CONSTITUTIONAL DRAFTING AND REVISION ........ 87

5 Constitution-Making for Divided Societies: Afghanistan ..... 89
   Clark B. Lombardi and Shamshad Pasarlay

6 Constitutional History and Constitutional Migration: Nepal .. 113
   Mara Malagodi

7 Constitutional Transformation: Hungary ...................... 136
   Yaniv Roznai
Contents by Topic

8 International Law and Constitution-Making: Sudan
Markus Böckenförde

IV CONSTITUTIONAL ADJUDICATION AND INTERPRETATION

9 Judicial Review of Constitutional Amendments: Taiwan
David S. Law and Hsiang-Yang Hsieh

10 Nonjudicial Constitutional Interpretation: The Netherlands
Maartje De Visser

11 Transnational Judicial Communication: The European Union
Elaine Mak and David S. Law

V RIGHTS

12 Social and Economic Rights: Argentina
Julieta Rossi and Daniel M. Brinks

13 LGBTQ Rights: Singapore
Lynette J. Chua

14 Indigenous Rights: New Zealand
Matthew S. R. Palmer

15 Citizenship and Nationality: Cyprus
Achilles C. Emilianides and Christos Papastylianos

16 Affirmative Action: Brazil
Adilson José Moreira

VI STRUCTURE

17 Subnational Constitutionalism: Hong Kong
Cora Chan

18 Electoral Systems: Indonesia
Simon Butt

19 Fourth-Branch Institutions: South Africa
Mark Tushnet

VII CHALLENGES TO LIBERAL DEMOCRATIC CONSTITUTIONALISM

20 Islamic Constitutionalism: Iran
Mirjam Künkler and David S. Law

21 Military Influence on the Constitutional Order: Turkey
Ozan O. Varol
<table>
<thead>
<tr>
<th>Contents by Topic</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>22 Constitutional Backsliding: Colombia</td>
<td>497</td>
</tr>
<tr>
<td>David Landau</td>
<td></td>
</tr>
<tr>
<td>23 Privatization of Constitutional Law: Thailand</td>
<td>517</td>
</tr>
<tr>
<td>Victor V. Ramraj and Thitinant Tengaummuay</td>
<td></td>
</tr>
<tr>
<td>Index</td>
<td>541</td>
</tr>
<tr>
<td>Online Supplement</td>
<td><a href="http://admin.cambridge.org/CIC">http://admin.cambridge.org/CIC</a></td>
</tr>
</tbody>
</table>
Contents by Region

I INTRODUCTION TO THE FIELD

- Introduction: Pedagogy and Conceptualization of the Field – David S. Law 3
- The State of the Field – Tom Ginsburg 23
- Methodology and Research Design – Ran Hirschl 41

II EAST ASIA

- China: Constitutions and Constitutionalism – Albert H. Y. Chen 61
- Hong Kong: Subnational Constitutionalism – Cora Chan 377
- Taiwan: Judicial Review of Constitutional Amendments – David S. Law and Hsiang-Yang Hsieh 185

III SOUTH AND SOUTHEAST ASIA

- Nepal: Constitutional History and Constitutional Migration – Mara Malagodi 113
- Singapore: LGBTQ Rights – Lynette J. Chua 281
- Indonesia: Electoral Systems – Simon Butt 403
- Thailand: Privatization of Constitutional Law – Victor V. Ramraj and Thitinant Tengaumruay 517

IV MIDDLE EAST AND CENTRAL ASIA

- Afghanistan: Constitution-Making for Divided Societies – Clark B. Lombardi and Shamshad Pasarlay 89
- Iran: Islamic Constitutionalism – Mirjam Künkler and David S. Law 449
- Turkey: Military Influence on the Constitutional Order – Ozan O. Varol 474
### Contents by Region

#### Oceania

- **New Zealand: Indigenous Rights** – Matthew S. R. Palmer 303

#### Europe

- **The European Union: Transnational Judicial Communication** – Elaine Mak and David S. Law 236
- **Hungary: Constitutional Transformation** – Yaniv Roznai 136
- **The Netherlands: Nonjudicial Constitutional Interpretation** – Maartje De Visser 216
- **Cyprus: Citizenship and Nationality** – Achilles C. Emilianides and Christos Papastylianos 330
- **Turkey: Military Influence on the Constitutional Order** – Ozan O. Varol 474

#### Latin America

- **Colombia: Constitutional Backsliding** – David Landau 497
- **Argentina: Social and Economic Rights** – Julieta Rossi and Daniel M. Brinks 263
- **Brazil: Affirmative Action** – Adilson José Moreira 351

#### Africa

- **Sudan: International Law and Constitution-Making** – Markus Böckenförde 157
- **South Africa: Fourth-Branch Institutions** – Mark Tushnet 426

**Online Supplement** – http://admin.cambridge.org/CIC
Figures

9.1 The spectrum of judicial review
12.1 Number of constitutions with at least one SER, with no SER, and average number of SER in the former, since 1900
18.1 Judicial review cases
20.1 Iran’s political system
23.1 Environmental social and governance credit assessment process
### Tables

<table>
<thead>
<tr>
<th>Table</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.1</td>
<td>Timeline of key events</td>
<td>202</td>
</tr>
<tr>
<td>23.1</td>
<td>Project finance results in 2015 and 2016</td>
<td>537</td>
</tr>
</tbody>
</table>
Contributors

Markus Böckenförde is Associate Professor for Comparative Constitutional Law and Chair of the Comparative Constitutional Law Program at Central European University in Vienna. He was previously the Head of the Africa Program of the Max Planck Institute for Cooperative Public Law and International Law. In 2006–2007, he served as the legal expert of the Assessment and Evaluation Commission in Sudan, which supported and supervised the implementation of the Sudanese Comprehensive Peace Agreement. He has worked with constitutional assemblies in Sudan, Somalia, Tunisia, and Libya and has also been involved in constitution-making processes in Afghanistan, Nepal, Yemen, and Myanmar. He holds a law degree and Ph.D. from the University of Heidelberg and an LL.M. from the University of Minnesota.

Daniel M. Brinks is Professor of Government and of Law and Chair of the Government Department at the University of Texas-Austin, and Senior Researcher & Global Scholar of the Centre on Law and Social Transformation in Bergen, Norway. He received his J.D. from the University of Michigan and his Ph.D. from the University of Notre Dame. His book The DNA of Constitutional Justice in Latin America: Politics, Governance and Judicial Design (Cambridge University Press, 2018), coauthored with Abby Blass, was awarded the C. Herman Pritchett Award for Best Book on Law and Courts.

Simon Butt is Professor of Indonesian Law and Director of the Centre for Asian and Pacific Law at the University of Sydney. He received his B.A. and LL.B. from Australian National University and his Ph.D. from the University of Melbourne. He is an expert in Indonesian law and the author or coauthor of several books in these areas, including The Constitution of Indonesia: A Contextual Analysis (Hart, 2012) (with Tim Lindsey), The Constitutional Court and Democracy in Indonesia (Brill Nijhoff, 2016), and Indonesian Law (Oxford University Press, 2018) (with Tim Lindsey).

Cora Chan is Associate Professor of Law at the University of Hong Kong. Her research interests are in constitutional law and theory. She is on the General Council of the International Society of Public Law, the Advisory Board of the International Journal of Constitutional Law, and the editorial boards of the Hart Studies in Constitutional Theory Series, Asian Journal of Comparative Law, Hong Kong Law Journal, Asia-Pacific Journal on Human Rights and the Law, and Revista de Investigações Constitucionais. She was a member of the Law Panel for Hong Kong’s Research Assessment Exercise in 2020.
List of Contributors

Albert H. Y. Chen is Cheng Chan Lan Yue Professor and Chair of Constitutional Law at the University of Hong Kong. He holds an LL.B. from the University of Hong Kong and an LL.M. from Harvard Law School. He is the author of over 200 publications in English and Chinese, including An Introduction to the Legal System of the People's Republic of China, now in its fifth edition (LexisNexis, 2019) and The Changing Legal Orders in Hong Kong and Mainland China (City University of Hong Kong Press, 2021). He is also the editor of numerous volumes including Constitutionalism in Asia in the Early Twenty-First Century (Cambridge University Press, 2014).

Lynette J. Chua is Associate Professor of Law at National University of Singapore. She holds a B.Sc. from Ohio University, an LL.B. from the National University of Singapore, and an M.A. and Ph.D. from the University of California at Berkeley. She is the author of Mobilizing Gay Singapore: Rights and Resistance in an Authoritarian State (Temple University Press, 2014) and The Politics of Love in Myanmar: LGBT Mobilization and Human Rights as a Way of Life (Stanford University Press, 2019).

Maartje De Visser is Associate Professor in the YPH School of Law and Office of Core Curriculum, Singapore Management University. Her research centers on two broad themes: constitutional engagement by courts as well as non-judicial actors, and transnational judicial dialogue and networking. She sits on the editorial board of the Hart Studies in Constitutional Theory Series and the European Yearbook of Constitutional Law and is the author of several books, including Constitutional Review in Europe: A Comparative Analysis (Hart, 2015).

Achilles C. Emilianides is Professor of Law and Dean of the School of Law of the University of Nicosia, as well as a practicing advocate. He is a Founding Member and the Secretary-General of the Cyprus Academy of Sciences, Letters, and Arts, an ordinary member of the European Academy of Sciences and Arts, and a member of ALLEA (All European Academies). He is also the Chair of the Royal Commonwealth Society Cyprus Branch. His recent monographs include Competition Law in Cyprus (Wolters Kluwer, 2021), Civil Procedure in Cyprus (Wolters Kluwer, 2020), Tort Law in Cyprus (Wolters Kluwer, 2020), Constitutional Law in Cyprus, 2nd ed. (Wolters Kluwer, 2019), Labour Law in Cyprus, 2nd ed. (Wolters Kluwer, 2019), Family and Succession Law, 2nd ed. (Wolters Kluwer, 2019), Religion and Law in Cyprus, 3rd ed. (Wolters Kluwer, 2019), and Media Law in Cyprus, 2nd ed. (Wolters Kluwer, 2019).

Tom Ginsburg is Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar, and Professor of Political Science at the University of Chicago, and a member of the American Academy of Arts and Sciences. He received his B.A., J.D., and Ph.D. degrees from the University of California at Berkeley. He is the author or editor of numerous books and articles in the fields of comparative constitutional law and politics, including Judicial Review in New Democracies (Cambridge University Press, 2003), The Endurance of National Constitutions (Cambridge University Press, 2009, with James Melton and Zachary Elkins), How to Save a Constitutional Democracy (University of Chicago Press, 2019, with Aziz Z. Huq), and Democracies and International Law (Cambridge University Press, 2021). Professor Ginsburg is Codirector of the Comparative Constitutions Project, an effort funded by the National Science Foundation to gather and analyze the constitutions of all independent nation-states since 1789. He also serves as a Research Professor at the American Bar Foundation.
Ran Hirschl is Professor of Government and the Earl E. Sheffield Regents Professor of Law at the University of Texas at Austin. He was previously Professor of Political Science and Law and the Canada Research Chair in Constitutionalism, Democracy and Development at the University of Toronto, and held the Alexander von Humboldt Professorship in Comparative Constitutionalism at the University of Göttingen. His research interests focus on comparative public law, and in particular comparative constitutional law and its intersection with comparative politics and society. He is the author of over 120 articles and book chapters as well as major books such as *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004), winner of the APSA Law & Courts’ Lasting Contribution Award; *Constitutional Theocracy* (Harvard University Press, 2011), which was awarded the Mahoney Prize in Legal Theory; *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014), recipient of the APSA’s C. Herman Pritchett Award for the Best Book on Law & Courts; and *City, State: Constitutionalism and the Megacity* (Oxford University Press, 2020), winner of the Stein Rokkan Prize in Comparative Social Science Research. He is Fellow of the Royal Society of Canada (FRSC).

Hsiang-Yang Hsieh is a partner at the Formosa Transnational Law Firm and Adjunct Assistant Professor at Soochow University School of Law in Taipei. His legal practice, teaching, and writing are focused in the areas of constitutional law, administrative law, intellectual property, and competition law. He holds an LL.B. from National Taiwan University, an LL.M. from Soochow University, and an LL.M. and J.S.D. from Washington University in St. Louis.

Mirjam Künkler is a Research Professor at the Swedish Collegium for Advanced Study (SCAS) and holds a Ph.D. in Political Science from Columbia University. Her books include *Democracy and Islam in Indonesia* (Columbia University Press, 2013), *A Secular Age Beyond the West* (Cambridge University Press, 2018), *Female Religious Authority in Shi’i Islam: Past and Present* (Edinburgh University Press, 2021), and *The Rule of Law and the Politics of the Judiciary in Contemporary Iran* (Cambridge University Press, forthcoming). Before joining SCAS, she taught Near Eastern Studies at Princeton University, where she also directed the Oxford–Princeton research cluster on “Traditional authority and transnational religious networks in contemporary Shi’i Islam,” and codirected the Luce Program on Religion and International Affairs for many years. She is a founder and principal investigator of the Iran Data Portal.

David Landau is Mason Ladd Professor and Associate Dean for International Programs at Florida State University College of Law. He received his A.B., J.D., and Ph.D. from Harvard University. He writes primarily in the field of comparative constitutional law, with a focus on Latin America, and has served as a consultant on constitutional issues to the Truth and Reconciliation Commission of Honduras.

David S. Law is the E. James Kelly, Jr., Class of 1965 Research Professor of Law and Courtesy Professor of Politics at the University of Virginia and Honorary Professor of Law (formerly Sir Y.K. Pao Chair in Public Law) at the University of Hong Kong. He holds a B.A. in public policy and M.A. and Ph.D. in political science from Stanford University, a B.C.L. in European and Comparative Law from the University of Oxford, and a J.D. from Harvard Law School. Other institutions where he has taught include Washington University in St. Louis (as the Charles Nagel Chair in Constitutional Law and Political Science),
List of Contributors

National Taiwan University (as a Fulbright Scholar), Keio University (as an International Affairs Fellow in Japan), Seoul National University, and Princeton University (as the Martin and Kathleen Crane Fellow in Law and Public Affairs). His translated works include *Nihon no saikosai wo kaibou suru* [The Japanese Supreme Court and Judicial Review] (Gendajinbunsha, 2013) and *Constituciones aparentes* (with Mila Versteeg) (Universidad Externado de Colombia, 2018).

Clark B. Lombardi is the Dan Fenno Henderson Professor of Law and Director of Islamic Legal Studies at the University of Washington in Seattle. He received his M.A., J.D., and Ph.D. in Religion from Columbia University. A specialist in Islamic law and constitutional law, he also teaches courses in federalism, comparative law, and development law. He has advised on numerous constitutional and legal reform projects and is a member of the Council on Foreign Relations.

Elaine Mak is Professor of Legal Theory and Vice-Dean for Education at Utrecht University. She studied law in Rotterdam and Paris and obtained her Ph.D. at the Erasmus University Rotterdam in 2008. She is the author of *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart, 2015) and currently leads a research project on European judicial cultures.

Mara Malagodi is Assistant Professor of Law at the Chinese University of Hong Kong (CUHK). She holds a Ph.D., an M.A. in South Asian Studies, and a B.A. in Nepali & Politics from SOAS, a Laurea Degree in International Relations and Diplomacy from the University of Trieste, and a Graduate Diploma in Law from the University of Law. Prior to joining CUHK, Dr. Malagodi was Senior Lecturer at The City Law School, University of London, and British Academy Postdoctoral Fellow in the Department of Law at the London School of Economics. She is the author of *Constitutional Nationalism and Legal Exclusion in Nepal* (Oxford University Press, 2013) and co-editor of *Gender, Sexuality and Constitutionalism in Asia* (Hart, forthcoming). She has worked as a consultant for various United Nations agencies and is a non-practicing barrister in England and Wales and an award-winning documentary filmmaker.

Adilson José Moreira is a professor in the Faculty of Law at Mackenzie Presbyterian University in São Paulo. He holds a Ph.D. from the Federal University of Minas Gerais and an LL.M. and S.J.D. from Harvard Law School.

The Honourable Matthew S. R. Palmer, Q.C., is a judge of the High Court of New Zealand and the author of *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, 2008) and the volume on New Zealand in Hart Publishing’s *Constitutional Systems of the World* series. Justice Palmer was admitted as a barrister and solicitor of the High Court of New Zealand in 1987 and to the inner bar in 2014. He holds a B.A. in economics and political science from the University of Canterbury, an LL.B. with first class honors from Victoria University of Wellington, and an LL.M. and a J.S.D. from Yale Law School. Justice Palmer has served as Pro Vice Chancellor, Dean of Law, and Director of the New Zealand Centre for Public Law, at Victoria University of Wellington, and has also taught at the University of Hong Kong Faculty of Law, Yale Law School, the Australian and New Zealand School of Government, National University of Singapore, and the University of Chicago Law School.
List of Contributors

Christos Papastylianos is Associate Professor of Public Law and Head of Department at the University of Nicosia School of Law. He holds a Ph.D. from the European University Institute in Florence and has previously taught at Aristotle University of Thessaloniki, the University of Crete, the National and Kapodistrian University of Athens, and Panteion University. His recent publications include *Conditions and Limits Regarding the Evolution of the EU towards a Distinct Constitutional Order* (Sakkoulas, 2008) and *The Republic of Cyprus and the Doctrine of Necessity* (with Achilles Emilianides and Costas Stratilatis) (Sakkoulas, 2016).

Shamshad Pasarlay is a research fellow at the Max Planck Foundation for International Peace and the Rule of Law and former adjunct lecturer at Herat University School of Law. He holds a bachelor’s degree from Kabul University School of Islamic Law and an LL.M. and Ph.D. from the University of Washington School of Law. His research interests involve constitutional design in divided societies, religion and constitution-making, and Afghanistan’s constitutional history.

Victor V. Ramraj is Professor of Law and Chair in Asia-Pacific Legal Relations at the University of Victoria in British Columbia, Canada. Since 2017, he has been the Director of the of the Centre for Asia-Pacific Initiatives. Earlier in his career, he spent sixteen years at the National University of Singapore and served as a codirector of the Centre for Transnational Legal Studies in London in 2010–2011. His published research spans comparative constitutional law, transnational regulation, and emergency powers, including *Emergency Powers in Asia* (Cambridge University Press, 2020) (coedited with Arun K. Thiruvengadam) and *Covid-19 in Asia: Law and Policy Contexts* (Oxford University Press, 2020) (edited).

Julieta Rossi is Director of the Human Rights Master’s Program and Associate Professor and Researcher at the National University of Lanús and Professor in the School of Law at the University of Buenos Aires (UBA) and in the human rights master’s programs at UBA and the National University of General San Martín. She is also Legal Advisor at the Federal Prosecutor’s Office (Ministerio Público Fiscal de la Nación). She was Director of the International Network for Economic, Social and Cultural Rights, a member of the Board of Directors, and Director of the Program on Economic, Social and Cultural Rights at the Center for Social and Legal Studies (CELS). She has published on domestic application of international human rights law, economic, social, and cultural rights, and human-rights-based approaches. She graduated from the University of Buenos Aires School of Law and holds an LL.M. from New York University.

Yaniv Roznai is Associate Professor at the Harry Radzyner Law School, Reichman University (IDC Herzliya). He holds a Ph.D. and LL.M. (Distinction) from the London School of Economics, and LL.B. and B.A. degrees (magna cum laude) from the IDC. Dr. Roznai is co-chair of the Israeli Section of ICON-S and an elected board member of the Israeli Association of Public Law and the author of *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017), which won the ICON-S Book Prize, and *Constitutional Revolution* (Yale University Press 2020, with Gary J. Jacobsohn).

Thitinant Tengaumnuay is Lecturer in the Faculty of Law at Chulalongkorn University, Thailand. After graduating from Chulalongkorn University with an LL.B. (First Class Honors), she passed the Thai barrister examination with the second-highest score in the
country. She also holds an M.Jur. from the University of Oxford and an LL.M. in environmental law from New York University.

Mark Tushnet is the William Nelson Cromwell Professor of Law Emeritus at Harvard Law School. Professor Tushnet, a graduate of Harvard College and Yale Law School and law clerk to Justice Thurgood Marshall, is widely known for his work in constitutional law and theory (including comparative constitutional law) and legal history. His current projects include a history of the Supreme Court in the 1930s for the Holmes Devise. His books in the field of comparative constitutional law include Advanced Introduction to Comparative Constitutional Law, 2nd ed. (Edward Elgar, 2018) and the third edition of Comparative Constitutional Law (Foundation Press 2014, with Vicki Jackson).

Ozan O. Varol is the author of The Democratic Coup d’État (Oxford University Press, 2017). He received his bachelor’s degree in astrophysics from Cornell University and his law degree from the University of Iowa College of Law before clerking for the Honorable Carlos Bea of the U.S. Court of Appeals for the Ninth Circuit.
User’s Guide and Preface

What is the point of this book? Constitutionalism in Context is a hybrid creation that invites a variety of uses and thus requires some explanation. On the one hand, it is a research handbook consisting of original work by leading scholars on a broad selection of topics and jurisdictions. On the other hand, it incorporates a variety of features (such as this user’s guide-cum-preface) to facilitate use as either a primary or supplemental textbook for students in law and social science. It also aims to combine the deep and diverse expertise of an edited volume with the structural coherence and consistency of a monograph. To borrow a much-abused turn of phrase, one might call it a research handbook with textbook characteristics, or an edited volume with monograph characteristics.

Many instructors already turn to research handbooks as a source of course readings or even in lieu of conventional textbooks, but most handbooks are not designed with teaching use in mind. Thus, for example, they usually do not expose readers to primary materials, and they may assume a level of background knowledge that many students lack. There are ways, however, of incorporating support for classroom use into a research handbook, as this book aims to demonstrate.

Much of the versatility of this volume derives from the unique chapter template, which makes possible a number of other distinctive features for both research and teaching use. Apart from a trio of introductory chapters that survey various aspects of the field, every chapter adheres to a three-part modular structure consisting of (1) an overview of a topic, (2) an overview of a jurisdiction, and (3) a case study of the topic in the context of the jurisdiction. As a result, each chapter functions as a two-for-one reference on both a topic and a jurisdiction, combined with a case study that uses each to contextualize the other. For maximum flexibility, each module can be read by itself for freestanding coverage of either the topic or the jurisdiction, and the case study can be included for added depth. Moreover, because the jurisdiction modules and case studies are so rich in context, they tend to span multiple topics and can be reconfigured in different ways for coverage of additional topics.

Sections 1 and 2 of this user’s guide-cum-preface introduce the distinctive features of this book for research and teaching use, respectively. Section 3 briefly describes the coverage of each chapter and offers recommendations for classroom use. Section 4 suggests alternative ways of grouping and sequencing the chapters to cover additional areas not enumerated in

xxv
either version of the table of contents, and to flesh out areas and themes that are particular strengths of the volume as a whole.

1 FEATURES FOR RESEARCH USE

Constitutionalism in Context involves a couple of twists on the usual handbook format. The first twist is organizational: it is organized by both topic and jurisdiction at the same time. The modular chapter structure means that each chapter does double duty as a reference on a topic and a reference on a jurisdiction. For coverage by region, one can select or sort by the appropriate jurisdiction modules; for coverage by subject matter, one can select the corresponding topic modules. To facilitate this choice of approaches, there are two versions of the table of contents – one organized by subject matter and another by geographical region. Likewise, the suggested reading lists are bifurcated between topic and jurisdiction. All of this means that the volume works equally well for those who need topic-driven coverage and those who need jurisdiction-driven coverage.

The second twist is substantive: the coverage of this book aims at the frontiers rather than the traditional core of the scholarly literature. The field of comparative constitutional law has traditionally emphasized the study of judicial approaches to “the protection of universal human rights within a liberal democratic constitutional order.” At the core of this enterprise are a handful of established democracies in Europe and the common law world that generate verbose judicial opinions, aptly dubbed the “usual suspects.” This volume, by contrast, goes out of its way to ensure a healthy representation of underrepresented jurisdictions and up-and-coming topics. For example, a typical casebook might have little more to offer on Asia than some discussion of India and perhaps the odd mention of Japan, but in this volume, over half the case studies are drawn from Asia, befitting its heft and heterogeneity as home to the bulk of the world’s population and economic growth and a dizzying variety of wildly dissimilar constitutional and political systems coexisting cheek by jowl. Likewise, the Muslim world accounts for one-quarter of humanity but barely registers in the comparative constitutional law literature; here, it accounts for one-quarter of the case studies.

2 FEATURES FOR TEACHING USE

Constitutionalism in Context incorporates a variety of features to meet both the practical and substantive needs of classroom users. On the practical side, it invites use as either a primary or supplemental text. Like a traditional textbook, it contains brief primary material excerpts and comes with an online supplement that contains longer excerpts and supports easy updating down the road. The design of the book supports multiple approaches to syllabus construction. As a primary text, it is compact enough to be assigned in its entirety over the course of a semester, at the plausible rate of roughly two chapters per week. Another approach is to combine a chapter with supplemental readings for greater depth. The two lists of suggested readings at the end of each chapter – one on the topic, one on the jurisdiction – are meant to


\[\text{Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (Oxford University Press, 2014) at 4, 79, and 241.}\]

\[\text{The Online Supplement is available at http://admin.cambridge.org/CIC.}\]
provide readymade solutions. They have deliberately been winnowed down to simplify the task of identifying additional readings that complement the chapters. The suggested reading lists are intended to offer a convenience that extensive bibliographies do not – namely, a bottom-line sense of where to start if time is limited and readings must be heavily curated, as is the case in the classroom.

Alternatively, this volume lends itself to supplemental use in conjunction with a conventional casebook. Its generous selection of underexplored topics and jurisdictions offers many options for expanding in a targeted way on the substantive and geographical coverage of other books. Meanwhile, consistent adherence to the three-part modular chapter structure enables instructors to select specific modules within specific chapters for self-contained coverage of the precise topic, jurisdiction, or case study of interest, as all of the modules have been written with freestanding usage in mind.

On the substantive side, the most distinctive characteristics of this volume for teaching purposes are its use of a case study approach and the diversity of its coverage. The pedagogical value of a contextual approach to legal materials is widely recognized and is only heightened in the context of comparative law: the more a legal system differs from our own, the greater the need for context to make sense of it. As its name implies, Constitutionalism in Context is designed to provide that context. Whereas the country-specific information in textbooks and handbooks is often piecemeal and scattered across various topics, the consistent use of the case study approach firmly situates the discussion of each topic in the political, legal, and institutional context of a particular jurisdiction.

The chapter-by-chapter pairing of topics with jurisdictions also gives instructors the built-in option of organizing their course content along either substantive or jurisdictional lines. In lieu of a topic-driven syllabus, some might prefer the equivalent of a world tour or a course that emphasizes a particular region or type of jurisdictions. This volume is uniquely well suited to such an approach, to the point of offering two versions of the table of contents, one organized by subject matter and another by geographical region. (Other possible ways of grouping and sequencing the chapters are suggested below in Section 4.)

3 A TOUR OF THE BOOK

3.1 Overview of the Field

The most likely starting point for teaching purposes is some portion of the first four chapters, which together set the stage by surveying the academic field known as comparative constitutional law or, depending on the emphasis, constitutional studies. These chapters survey the main substantive, methodological, and definitional debates in the field, and they are intended to provide a starter kit for aspiring academics on how the field looks, how to conduct and critically evaluate research in the field, and how to teach the subject.

The introductory chapter explores different answers to the question of what instructors should try to teach and why, which cannot be separated from the broader question of how the field should be defined. It identifies and contrasts five competing visions of how the field might be conceptualized and taught: instrumentalism, tourism, immersion, abstraction, and

6 Ran Hirschl, ‘Methodology and Research Design,’ Chapter 3 in this volume, at Section 1.
Instead of suggesting a single correct answer, it argues for a pluralistic embrace of multiple approaches to teaching the subject, and for serious consideration of the representation approach – exemplified by this volume – which aims to represent as much of the diversity of contemporary constitutionalism as possible.

Tom Ginsburg’s chapter on the state of the field describes a vibrant and expanding field that has been boosted by a confluence of academic and real-world developments, such as the institutionalist turn in the social sciences and the growing judicialization and constitutionalization of politics. It suggests that the field may be in the midst of an “encyclopedic turn” – again exemplified by this volume – in which the proliferation of scholarship and data drives demand for organization and distillation of knowledge.

Ran Hirschl’s chapter on methodology and research design canvasses the research methods that scholars in this field have used and should be using. As Hirschl explains, the methodological issues with much of the existing literature, such as a lack of adherence to basic principles of research design, reflect in part a disciplinary divide between the legal and sociopolitical approaches to the study of constitutionalism and underscore the need for collaborative and interdisciplinary scholarship.

Albert Chen’s chapter serves as a bridge between the three survey chapters and the case studies that make up the bulk of the book. It uses the case of China to explore the evolution and use of two foundational concepts that define the scope of the field – namely, “constitution” and “constitutionalism” – and to illustrate that these concepts are, for better or for worse, deployed in nontraditional and continually evolving ways. It thus invites debate over whether and how the field will adapt and expand in the face of real-world constitutional diversity.

Instructors using this book as a primary text may want to start by assigning at least Ginsburg’s survey chapter and Section 1 of the China chapter to give students a big-picture sense of what they have signed up to learn. The balance of the China chapter, if covered at the beginning of the course, serves the dual purpose of problematizing core concepts and pushing students beyond the comparison of liberal constitutional democracies with one another to the comparison of liberal constitutional democracy itself with other systems. Alternatively, the discussion of China fits equally well into the unit on “Challenges to Liberal Democratic Constitutionalism,” given both its substance and geographical focus. For prospective academics, Hirschl’s methodology chapter is probably indispensable, as it will prompt them to think critically about the design of their own research as well as that of others, while the pedagogy chapter may help them to think through the pros, cons, and underlying assumptions of different classroom approaches.

3.2 Constitutional Drafting and Revision

The unit on constitutional drafting and revision begins with a chapter on constitution-making for divided societies, which also provides a point of entry into the study of constitution-making more generally. Clark Lombardi and Shamshad Pasarlay use the experience of Afghanistan to illuminate two of the thorniest and most fundamental debates in the areas of process design and institutional design. The first debate concerns process and pits a "constitutional

7 David S. Law, ‘Introduction: Pedagogy and Conceptualization of the Field,’ Chapter 1 in this volume.
8 Tom Ginsburg, ‘The State of the Field,’ Chapter 2 in this volume.
9 Hirschl, ‘Methodology and Research Design’ (n. 5).
10 Chen, ‘Constitutions and Constitutionalism: China’ (n. 1).
moment” approach of tackling foundational issues first and fleshing out the details later against an “incrementalist” approach of deferring divisive issues until democratic habits and guardrails have taken hold. The second debate, substantive in nature, is between advocates of “consociationalist” power-sharing arrangements that give competing groups the ability to protect their interests, and those who favor an “integrative” approach of incentivizing coalition-building and cooperation.

These debates are universally relevant because all societies are characterized by some degree of social and political conflict, and the regulation of this conflict is a core function – if not the central function – of constitutions and constitutionalism. What an extreme case like Afghanistan highlights, however, is the possibility that the tools of constitutionalism may be inadequate to the task. Under the wrong conditions, no amount of constitutional ingenuity is guaranteed to hold a society together or ensure the survival of the state.

The difficulty of constitution-making for divided societies is a recurring theme throughout the book. For further coverage, the chapter on Afghanistan could be grouped or assigned together with those on Cyprus, Sudan, Hong Kong, and New Zealand. In the case of Hong Kong, the divisions are political and legal rather than ethnic or religious but nevertheless run deep and permeate the constitutional scheme, while New Zealand’s constitutional framework developed around the accommodation and coexistence of an indigenous Māori community and a British colony within a single state.

Other recurring themes of this unit include the tension between indigenous and external influences on constitution-making and the increasingly complex relationship between constitutional law and international law. Both themes are manifest in the conventional wisdom that constitutions are supposed to be indigenously authored and reflective of local values but must also respect international law. As Mara Malagodi’s chapter on Nepal demonstrates, however, these imperatives can be contradictory, as when traditional local attitudes toward gender and religious equality conflict with international human rights norms.

Markus Böckenförde’s chapter on Sudan is a case study in the growing interaction and interdependence of peacemaking, nation-building, constitution-making, and international law. Fragile and transitional states are ripe for intervention by international actors, which increasingly make constitution-making a focus of their peacemaking and nation-building efforts. In such situations, constitution-making and conflict resolution can become indistinguishable, constitutions tend to express and implement international law, and constitutions, treaties, and peace agreements can blur into each other. Sudan provides a textbook example of these dynamics, but one can also find some version of this blurring in the chapters on Afghanistan, Cyprus, the European Union, Hong Kong, Nepal, and New Zealand.

Yaniv Roznai’s chapter on Hungary provides an accessible introduction to the study of constitutional change. Hungary is a showcase for various forms and modes of constitutional transformation thanks to its repeated and drastic constitutional change over the last thirty years, from communism to liberal democracy to illiberal authoritarianism. Its latest “stealth transformation” is a cautionary lesson in what can happen to a liberal democracy when so-called amendments to the constitution are faithful to the letter but not the spirit of the constitution, and how difficult it can be for either constitutional courts or supranational institutions to halt such change.

12 Mara Malagodi, ‘Constitutional History and Constitutional Migration: Nepal,’ Chapter 6 in this volume.
14 Yaniv Roznai, ‘Constitutional Transformation: Hungary,’ Chapter 7 in this volume.